1966

CANADA
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DU CANADA

Exchequer Court of Canada
Cour de l'Échiquier du Canada

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JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE WILBUR ROY JACKETT
(*Appointed May 4, 1964*)

PUISNE JUDGES:

THE HONOURABLE JOHN DOHERTY KEARNEY
(*Appointed November 1, 1951*)

THE HONOURABLE JACQUES DUMOULIN
(*Appointed December 1, 1955*)

THE HONOURABLE ARTHUR LOUIS THURLOW
(*Appointed August 29, 1956*)

THE HONOURABLE CAMILIEN NOËL
(*Appointed March 12, 1962*)

THE HONOURABLE ANGUS ALEXANDER CATTANACH
(*Appointed March 27, 1962*)

THE HONOURABLE HUGH FRANCIS GIBSON
(*Appointed May 4, 1964*)

THE HONOURABLE ALLISON ARTHUR MARIOTTI WALSH
(*Appointed July 1, 1964*)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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His Honour VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950

The Honourable ARTHUR IVES SMITH, Quebec Admiralty District—appointed June 16, 1950.

The Honourable ROBERT STAFFORD FURLONG, Newfoundland Admiralty District—appointed October 8, 1959.

The Honourable DALTON COURTWRIGHT WELLS, Ontario Admiralty District—appointed January 28, 1960.

The Honourable THOMAS GRANTHAM NORRIS, British Columbia Admiralty District—appointed September 28, 1961.

The Honourable GEORGE ERIC TRITSCHLER, Manitoba Admiralty District—appointed October 19, 1962.

GORDON R. HOLMES, Q.C., Prince Edward Island Admiralty District—appointed May 24, 1963.

The Honourable HAROLD GEORGE PUDDESTER, Newfoundland Admiralty District—appointed June 4, 1963.

The Honourable JAMES DOUGLAS HIGGINS, Newfoundland Admiralty District—appointed May 28, 1964.

DEPUTY JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable GORDON S. COWAN, Nova Scotia Admiralty District—appointed April 6, 1967.

The Honourable CHARLES WILLIAM TYSOE, British Columbia Admiralty District—appointed January 31, 1963.

The Honourable YVES BERNIER, Quebec Admiralty District—appointed November 17, 1965.

The Honourable ANDRÉ DEMERS, Quebec Admiralty District—appointed November 26, 1965.

SURROGATE JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

ALFRED S. MARRIOTT, Q.C., Ontario Admiralty District—appointed February 21, 1957.

ATTORNEY-GENERAL OF CANADA:
The Honourable LUCIEN CARDIN
The Honourable PIERRE ELLIOTT TRUDEAU
SOLICITOR GENERAL OF CANADA:
The Honourable L. T. PENNELL

JUGES
DE LA
COUR DE L'ÉCHIQUIER DU CANADA

en fonction au cours de la période de publication de ces rapports:

PRÉSIDENT:

L'HONORABLE WILBUR ROY JACKETT
(*nommé le 4 mai 1964*)

JUGES PUÎNÉS:

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(*nommé le 1er novembre 1951*)

L'HONORABLE JACQUES DUMOULIN
(*nommé le 1er décembre 1955*)

L'HONORABLE ARTHUR LOUIS THURLOW
(*nommé le 29 août 1956*)

L'HONORABLE CAMILIEN NOËL
(*nommé le 12 mars 1962*)

L'HONORABLE ANGUS ALEXANDER CATTANACH
(*nommé le 27 mars 1962*)

L'HONORABLE HUGH FRANCIS GIBSON
(*nommé le 4 mai 1964*)

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(*nommé le 1er juillet 1964*)

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L'honorable JAMES DOUGLAS HIGGINS, district d'amirauté de Terre-Neuve—nommé le 28 mai 1964.

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L'honorable PIERRE ELLIOTT TRUDEAU

SOLICITEUR GÉNÉRAL DU CANADA:
L'honorable L. T. PENNELL

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CORRIGENDA

On page 86 in the headnote the fifth paragraph of the statement of facts be substituted by the following:

> "This is an appeal from a decision of the Tax Appeal Board of March 11, 1963, which dismissed the appellant's appeal from a reassessment made by the Minister, on April 21, 1961, on the ground that it was income from a business."

On page 86 the fifth paragraph of the holdings be substituted by the following:

> "Appeal allowed but only for the purpose of giving effect to the aforesaid agreement."

On page 307 in the caption "Interpretation Act, c. 58" should read: "Interpretation Act, c. 158".

On page 439 in the caption "Income Tax Act, c. 184" should read "Income Tax Act, c. 148".

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APPELS À LA COUR SUPRÊME DU CANADA

Alpine Drywall & Decorating Ltd. v Minister of National Revenue [1966] Ex.C.R. 1148. Appeal dismissed.

Atlantic Engine Rebuilders Ltd. v. Minister of National Revenue [1965] 1 Ex.C.R. 647. Appeal dismissed.

Belle-Isle v. Ministre du Revenu National [1964] R.C. de l'É 894; [1966] R.C.S. 354 Appel rejeté.

Bert Robbins Excavating Ltd. v. Minister of National Revenue [1966] Ex.C.R. 1160. Appeal discontinued.

Bickle v. Minister of National Revenue [1965] 1 Ex.C.R. 664; [1966] S.C.R. 479. Appeal allowed.

Bomford Timber Ltd. v. V. Jackson [1966] Ex.C.R. 485. Appeal pending.

Breton v. La Reine [1965] 2 R.C. de l'É. 30. Appel accueilli.

Composers, Authors & Publishers Ass'n of Canada Ltd. v. CTV Television Network Ltd et al [1966] Ex.C.R. 872. Appeal pending.

Consolidated Denison Mines Ltd. et al v. Deputy Minister of National Revenue for Customs and Excise [1964] Ex.C.R. 100; [1966] S.C.R. 8. Appeal allowed.

Cree Enterprises Ltd. v. Minister of National Revenue [1966] Ex.C.R. 843. Appeal discontinued.

Curlett v. Minister of National Revenue [1966] Ex.C.R. 955. Appeal allowed.

Curl-Master Manufacturing Co. Ltd. v. Atlas Brush Ltd. [1966] Ex.C.R. 4. Appeal allowed.

Dimensional Investments Ltd. v. The Queen [1966] Ex.C.R. 761. Appeal pending.

Dominion Dairies Ltd. v. Minister of National Revenue [1966] Ex.C.R. 397. Appeal pending.

Dubiner v. Cheerio Toys & Games Ltd. [1966] Ex.C.R. 801. Appeal pending.

Dworkin Furs (Pembroke) Ltd. v. Minister of National Revenue [1966] Ex.C.R. 228. Appeal dismissed.

E. I. Du Pont de Nemours & Co. v. Montecatini-Societa Generale per L'Industria Mineraria E Chimica [1966] Ex.C.R. 959. Appeal pending.

Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning v. Commissioner of Patents [1966] Ex.C.R. 91; [1966] S.C.R. 604. Appeal dismissed.

Farmers Mutual Petroleums Ltd. v. Minister of National Revenue [1966] Ex.C.R. 1126. Appeal pending.

Federal Farms Ltd. v. Minister of National Revenue [1966] Ex.C.R. 410. Appeal pending.

Foreign Power Securities Corp. Ltd. v. Minister of National Revenue [1966] Ex.C.R. 358. Appeal dismissed.

Freeholders Oil Co. Ltd. v. Minister of National Revenue [1966] Ex.C.R. 1144. Appeal pending.

Guaranty Trust Co. of Canada (Towle Estate) v. Minister of National Revenue [1965] 2 Ex.C.R. 69. Appeal allowed.

Harris v. Minister of National Revenue [1965] 2 Ex.C.R. 653; [1966] S.C.R. 489. Appeal dismissed.

Hoffmann-La Roche Ltd. v. Bell-Craig Pharmaceuticals Division of L. D. Craig Ltd. [1965] 2 Ex.C.R. 266; [1966] S.C.R. 313. Appeal dismissed. Cross-appeal allowed.

Jacques-Cartier, Cité de v. La Reine [1966] R.C. de l'É. 1020. Appel interjeté.

Johnson et al v. The Ship Pacific Wind [1966] Ex.C.R. 692. Appeal dismissed.

La Presse Limitée, La Cie de Publication v. Le Procureur-Général du Canada [1964] R.C. de l'É. 627. Appel accueilli.

Lechter v. Minister of National Revenue [1965] 1 Ex.C.R. 413; [1966] S.C.R. 655. Appeal allowed in part.

Leckie v. Minister of National Revenue [1966] Ex.C.R. 1048. Appeal allowed.

Mead Johnson of Canada Ltd. v. The Queen [1966] Ex.C.R. 325; [1966] S.C.R. 457. Appeal allowed.

Minister of National Revenue v. Consolidated Mogul Mines Ltd. [1966] Ex.C.R. 350. Appeal pending.

Minister of National Revenue v. Foot [1965] 1 Ex.C.R. 657. Appeal dismissed.

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Minister of National Revenue v. Highway Sawmills Ltd. [1965] 2 Ex.C.R. 297; [1966] S.C.R. 384. Appeal dismissed.

Minister of National Revenue v. Pevato [1966] Ex.C R. 305. Appeal dismissed.

Minister of National Revenue v. Premium Iron Ores Ltd. [1965] 1 Ex.C.R. 25; [1966] S.C.R. 685. Appeal allowed on first issue. Appeal dismissed on second issue.

National Capital Commission v. Munro [1965] 2 Ex.C.R. 579; [1966] S.C.R. 663. Appeal dismissed.

Perdia v. Kingcome Navigation Co. Ltd. [1966] Ex.C.R. 656; [1966] S.C.R. 51. Appeal dismissed.

Pfizer Corp et al v. The Queen [1966] Ex.C.R. 125; [1966] S.C.R. 449. Appeal dismissed.

The Queen v. Murray et al [1965] 2 Ex.C.R. 663. Appeal dismissed.

Radio Corp of America v. Philco Corp. (Delaware) [1965] 2 Ex.C.R. 197; [1966] S.C.R. 296. Appeal dismissed.

Randall v. Minister of National Revenue [1966] Ex.C.R. 966. Appeal allowed.

Randolph et al v. The Queen [1966] Ex.C.R. 157; [1966] S.C.R. 260. Appeal allowed.

Rodi & Wienenberger Aktiengesellschaft v. Metalliflex Ltd. [1963] Ex.C.R. 232; [1966] S.C.R. 593. Appeal dismissed.

Rowell v. S & S Industries Inc. [1965] 1 Ex.C.R. 118; [1966] S.C.R. 419. Appeal dismissed.

Silhouette Products Ltd. v. Prodon Industries Ltd. [1965] 2 Ex.C.R. 500. Appeal dismissed.

Société des Usines Chimiques Rhone-Poulenc et al v. Jules R. Gilbert Ltd. et al [1966] Ex.C.R. 59. Appeal allowed.

Southam Business Publications v. Minister of National Revenue [1966] Ex. C.R. 1055. Appeal pending.

Steer v. Minister of National Revenue [1965] 2 Ex.C.R. 458. Appeal allowed.

Traver Investments Inc. et al v. Union Carbide & Carbon Corp. et al [1965] 2 Ex.C.R. 126. Appeal dismissed.

Union Carbide Canada Ltd. v. Trans-Canadian Feeds Ltd. et al [1966] Ex.C.R. 884. Appeal pending.

Vincent v. Minister of National Revenue [1965] 2 Ex.C.R. 117; [1966] S.C.R. 374. Appeal dismissed.

Vineland Quarries & Crushed Stone Ltd. v. Minister of National Revenue [1966] Ex.C.R. 417. Appeal pending.

Watson & McLeod Ltd. v. Minister of National Revenue [1966] Ex.C.R. 733. Appeal discontinued.

York Marble, Tile & Terrazzo Ltd. v. The Queen [1966] Ex. C.R. 1039. Appeal pending.

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DETERMINED BY THE

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AT FIRST INSTANCE

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ADJUGÉES PAR

LA COUR DE L'ÉCHIQUIER DU CANADA

EN SA JURIDICTION DE COUR DE PREMIÈRE INSTANCE

ET

EN SA JURIDICTION D'APPEL

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BRITISH COLUMBIA ADMIRALTY DISTRICT

Vancouver 1964

Sept. 14-16 21, 22

Nov. 6

BETWEEN:

GEORGE PERDIA .....PLAINTIFF;

AND

KINGCOME NAVIGATION CO. LTD. ....DEFENDANT.

Shipping—Collision of ships—Apportionment of fault—Offer to admit liability to avoid costs of trial—Apportionment of costs.

Costs—Rejection of offer to admit liability—Costs of trying issue—Discretion of judge.

Following institution of an action for damages resulting from a collision of two ships plaintiff's solicitor offered to admit 50% fault in order to avoid the costs of trying that question. Defendant refused the offer, the action went to trial and defendant was found 85% at fault.

Held, plaintiff was entitled to all costs incurred after the date of his offer. Costs incurred prior thereto should be divided in the same proportions as the apportionment of fault.

Admiralty Rule 131 applied.

APPLICATION to determine apportionment of costs.

John I. Bird, Q.C. for plaintiff.

R. M. Hayman for defendant.

NORRIS, D.J.A.: This is an application to settle the proportion of costs in an action in which blame was assessed 15% against the plaintiff and 85% against the defendant. Admiralty Rule 131 provides:

131. In general costs shall follow the event; but the Judge may in any case make such order as to the costs as to him shall seem fit.

On September 12, 1964, the solicitors for the plaintiff wrote to the solicitors for the defendants as follows:

As a result of instructions received from our clients were (sic) hereby make a firm offer to settle the question of liability for the collision in this case, on the basis that both ships are equally to blame; any question as to the amount of damage suffered by our clients to be referred to the Registrar in Admiralty, if it cannot be agreed.

We make this offer with a denial of liability and in order that the costs of the trial of the issue of liability may be avoided.

We ask that you advise us not later than 10 a.m. Monday, September 14th whether you accept or reject this offer.

In the event that this offer is rejected and the Court fixes your clients with fifty per cent, or more, of the blame for the collision, we shall ask the Court to order that all taxable costs incurred after the time fixed for acceptance of this offer, be paid by your clients.

This offer was refused over the telephone on September 12 and on September 14 the refusal was confirmed by letter.

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Norris D.J.A.

The writ was issued on February 6, 1963, the action tried on September 14, 15, 16, 21 and 22, 1964, and judgment delivered on October 28, 1964.

Counsel for the plaintiff argues that under these circumstances the plaintiff should be awarded costs throughout or at least from September 12. Counsel for the defendant argues that costs should be awarded in the same proportions as each of the parties was found blameworthy, in this case 85% against the defendant and 15% against the plaintiff.

There was cited to the Court by counsel for the plaintiff as authority in favour of the plaintiff's submission the case of *The Hudson's Bay*.[1] I have not been able to find other helpful authority.

In the circumstances of this case I order that all of the costs incurred after September 12th be paid to the plaintiff and all previous costs be paid by the parties in the same proportions as they have respectively been found blameworthy.

BETWEEN:

OTTAWA 1965

May 31-June 4

June 11

CURL-MASTER MFG. CO. LTD. .....PLAINTIFF;

AND

ATLAS BRUSH LIMITED .....DEFENDANT.

Patents—Infringement—Reissue patent—Patent Act, s. 50—Improved curling broom—Essential element of invention not disclosed in original patent—Deficiency not remediable by reissue patent.

One F. M. developed a new type of curling broom with two distinctive features: (1) a short outer skirt of straws surrounding and providing support for the inner and longer sweeping straws, and (2) a binding around the sweeping straws a substantial distance lower than the regular factory binding to which it was attached by loose cords to prevent it from sliding off the broom and which provided flexibility and support. When introduced in 1955 the broom became very popular and in March 1958 a patent was issued to the inventor. The specification described the second of the above features as "a transversal binding hidden by the outside fibers . . . attached by small strings to the top bindings in order that it cannot move".

F. M. applied for a U.S. patent in the same general terms. His application was rejected in 1957 on the ground of anticipation but in May 1961 a U.S. patent was granted following a revised application. F. M. then applied under s. 50 of the *Patent Act* for a "reissue" patent on the ground that the lower binding had been insufficiently described in the original patent because of inadvertence, accident or mistake

[1] [1957] 2 Lloyd's Rep. 506.

resulting from the illness and impaired efficiency of his patent attorney. In January 1963 a reissue patent was issued for a broom "essentially characterized by the provision of a low binding stitched loosely enough to slide on the fibers and spaced a substantial distance downwards towards the outer ends of the fibers from the conventional cord bindings of the broom, said low cord binding preventing the fibers from spreading apart and maintaining the bunch of fibers in flat condition while at the same time allowing the individual fibers to curve freely when the broom is pressed on the ice, due to the fact that the low binding can slide along the fibers".

In an action for infringement by plaintiff company (as assignee of the patent) the Court found that the nub or genius of the invention was described in the above quoted passage but that it was not disclosed in the original patent, which contained no suggestion of the essential elements of looseness and slidability of the lower binding or of its position on the broom substantially lower than the regular binding, and also that the broom described in the original patent was not a new and useful broom and not therefore an invention.

Held, dismissing the action, a reissue patent under s. 50 of the *Patent Act* can replace a defective or inoperative patent with a valid patent by substituting a sufficient description or specification for an insufficient description or specification or by adding or omitting claims but it cannot be for any invention other than an invention disclosed by the original patent. The invention embodied in the brooms F. M. put on the market in 1955 and disclosed in the reissue patent was not disclosed in the original patent and consequently the reissue patent was invalid.

Northern Electric Co. Ltd. v Photo Sound Corpn. [1936] Ex. C.R. 75; [1936] S.C.R. 649 followed.

ACTION for infringement of a patent.

Joan Clark and *Paul Amos* for plaintiff.

Walter C. Newman, Q.C. and *E. Foster* for defendant.

JACKETT P.:—This is an action for infringement of a patent for an invention relating to an improved curling broom granted under the *Patent Act* on March 25, 1958 (No. 554,826) and of a "reissue" patent granted under section 50 of the *Patent Act* upon the surrender of that patent. The reissue patent was issued on January 29, 1963 (No. 656,934). The plaintiff alleges that the defendant "has infringed" both patents by manufacturing, using, advertising, offering for sale and selling in Canada, curling brooms in infringement of Claims 1, 2, 3 and 4 of Patent No. 656,934 and in infringement of Claims 2, 3 and 4 of Patent No. 554,826. (The claims in respect of Claims 2 and 3 of the latter patent were dropped during argument.) The defendant, by way of defence to the action, denies that it has infringed any rights of the plaintiff under either patent and claims

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that both patents are, and have always been, invalid. The defendant further counterclaims for a judgment that the patents are invalid.

Prior to 1955, the brooms employed in Canada by participants in the game of curling, particularly in Western Canada were normally like ordinary kitchen brooms except that the straws were substantially longer. Such a broom consisted of a cylindrical wooden stick or handle to one end of which was attached a bundle of straws of some suitable kind, the bundle of straws being pressed into a roughly flat broad shape and held in that shape by a number of tight bindings (three or four) near the handle. The opposite sides of these bindings were so stitched together through the straws that they held the bundle of straws in the flat broad shape. These bindings were attached by a machine process and are hereafter referred to as the factory bindings. Such brooms were employed in the game of curling to sweep the ice on which the game is played, more or less vigorously according to the style of the player using the particular broom. Among others, such brooms had the following characteristics:

(*a*) as the straws were all of approximately the same length, the outside straws tended, under the influence of vigorous sweeping, to break off at the lowest factory binding,

(*b*) as there was a relatively long distance between the lowest factory binding and the part of the broom that came in contact with the ice, the straws tended to spread out on coming in contact with the ice thus diminishing the force which would otherwise be applied to the ice at the particular place that the player intended to sweep.

About the end of 1953, Fernand Marchessault, who is the president of the plaintiff company, became interested in breaking into the business of making and selling curling brooms in Canada. In the course of attempting to do so, he developed a new type of curling broom which differs from the type of curling broom that I have just described in that

(*a*) it has a "short outer skirt" of straws surrounding the straws that come in contact with the ice (which I will call the "sweeping straws")—the outer straws, not being as long as the sweeping straws, are not

subject to pressure from the ice and are not as likely to break against the factory binding; they also supply support for the sweeping straws and they supply protection to the loose lower binding hereinafter referred to; and

(*b*) it has a binding around the sweeping straws about half-way between the lower factory binding and the sweeping end of the broom; such binding is applied by hand and not by machine and is loose enough so that the straws can move in relation to it but it is tight enough and it has its opposite sides so stitched together that the sweeping straws are held together and cannot spread appreciably in any direction. (This loose lower binding is attached by cords to the lowest factory binding so that it will not slide off the sweeping end of the broom.)

This new style broom is narrower and thicker than the old style broom.

In the fall of 1955, Marchessault introduced brooms of the kind that I have just discussed to curlers in various parts of Canada and that kind of broom, almost immediately, became very popular. Curlers in substantial numbers preferred them to the old style broom because the short outer skirt solved to a considerable extent the very troublesome problem of broken straws and, apparently, because the loose lower binding kept the sweeping straws together in such a way that much greater force was applied to the part of the ice that it was desired to sweep, thus giving the curler the feeling that his sweeping was more efficient. This feeling was undoubtedly aided by the backing given to the sweeping straws by the short outer skirt. In addition, the concentration of straws enabled certain curlers to develop a rhythmic noise or beat while sweeping that contributed to their satisfaction with their sweeping efforts.

Commercial success therefore followed the introduction of this broom both for Marchessault (or the plaintiff company, all the shares of which belong to him and his family) and for his various competitors who imitated his new style broom.

On March 1, 1956, Marchessault filed an application for a Canadian patent and, on March 25, 1958, Patent No. 554,826 was issued to him pursuant to that application. The specification reads as follows:

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La présente invention se rapporte à un nouveau balai destiné particulièrement pour le jeu de curling.

Le but principal de l'invention est d'obtenir un balai de grande élasticité et de grande souplesse.

Un autre but de l'invention est d'obtenir un balai dont les fibres le composant sont de grande longueur sans risque de se disloquer ni de se briser.

Encore un but de l'invention est d'obtenir un balai qui est souple et bien monté.

Encore un but de l'invention est d'obtenir un balai homogène dont la qualité des fibres ne varie pas.

Encore un but de l'invention est d'obtenir un balai qui est très fort c'est-à-dire en rapport avec le volume de fibres qui le compose de sorte qu'il peut durer longtemps, les bouts ne se fendant pas et ne produisant pas de fentes.

Enfin, encore un but de l'invention est d'obtenir un balai du but et caractère décrits qui est de construction rationnelle et constitue une innovation très prisée dans le monde du curling.

Dans les buts précités, l'invention consiste en un faisceau plat de longues fibres végétales fixées sur un bout d'un manche. Le faisceau est à deux étages c'est-à-dire que les fibres extérieures ne se rendent pas à l'extrémité. Comme tous les balais, à courte distance de la fixation au manche, le faisceau de fibres comporte plusieurs ligatures transversales qui sont cachées par une gaine de toile. Les fibres se rendant à l'extrémité du balai comportent en outre une ligature transversale cachée par les fibres extérieures. Cette dernière ligature est reliée par des cordelettes aux ligatures supérieures afin qu'elle ne puisse se déplacer.

J'obtiens les buts précités au moyen de l'invention illustrée dans les dessins ci-joints et dans lesquels:

La figure 1 est une vue en élévation d'un balai construit selon l'invention;

La figure 2 est une vue semblable à celle de la figure précédente, sauf qu'elle est partiellement en coupe;

La figure 3 est une vue de côté; et

La figure 4 est une autre vue de côté et illustrant l'emploi de l'invention.

Dans la description qui suit et les dessins qui l'accompagnent les chiffres semblables renvoient à des parties identiques dans les diverses figures.

Comme tous les balais, le balai constituant la présente invention comporte un manche 1 à un bout duquel est fixé un faisceau de fibres végétales 2. Ces fibres sont de préférence des fibres simples et résistant à l'eau. Elles peuvent toutefois être de tampico tiré de feuilles d'un agrave du Mexique, de coco provenant de fibres entourant la noix de coco, de paille de sorgho, ou de piassava provenant de palmiers de l'Amérique du Sud. L'invention ne réside cependant pas dans le choix de fibres mais plutôt dans la construction du balai. Celui-ci est relié au manche 1 par une forte ligature de broche 3 et le joint caché par une bague métallique tronconique 4 elle-même fixée par une autre ligature de fil métallique 5.

A courte distance de la fixation au manche, le faisceau 2 comporte plusieurs ligatures transversales et parallèles 6 à l'aide de cordelettes. Dans les dessins, ces ligatures sont au nombre de quatre. Une cinquième ligature 7 est formée un peu plus bas dans un but qui sera expliqué plus loin. Ces

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ligatures sont cachées par une gaine de toile 8 dont la surface peut recevoir un texte publicitaire ou un écusson d'un club de curling.

Le faisceau 2 est obtenu de fibres végétales très longues qui forment deux groupes d'inégales longueurs. Les fibres intérieures 9 sont les plus longues et les autres 10 formant le tour des premières sont les plus courtes. Au point de vue apparence le bout du faisceau est à deux étages. Les fibres les plus longues 9 comportent une ligature transversale 11 sous les fibres 10 de sorte qu'elle est invisible à l'œil. Pour que cette ligature ne puisse se déplacer elle est reliée à la ligature 7 ou à tout autre partie fixe du balai par des cordelettes 12 ou tout autre lien.

Dans l'emploi de l'invention, particulièrement pour le jeu de curling où le palet lancé par le joueur doit glisser sur la glace, le balayage facilitant le parcours doit s'effectuer rapidement et couvrir beaucoup de surface. Le balai constituant la présente invention permet un emploi rapide sans risque de briser les fibres. Ces dernières qui sont longues conservent leur homogénéité tel que la figure 4 des dessins l'illustre. Les fibres 9 se courbent sous la poussée et ne se mélangent pas avec les fibres 10. Les fibres 10 constituent un arc-boutant pour les fibres et ces dernières conservent cette homogénéité grâce à la ligature 11. En même temps les fibres 10 protègent la ligature 11 intérieure contre l'usure et servent de garde aux fibres longues pour les empêcher de briser. Le balai peut donc être ployé dans les deux sens sans qu'il ne puisse se briser.

Quoiqu'une seule forme spécifique de l'invention ait été illustrée et décrite, il est bien entendu que divers changements à la construction de l'invention peuvent être effectués pourvu que l'on ne se départe pas de son esprit tel que réclamé dans les revendications qui suivent.

Les réalisations de l'invention au sujet desquelles un droit exclusif de propriété ou de privilège est revendiqué, sont définies comme suit:

1. Un balai formé d'un faisceau de fibres fixées à un bout d'un manche, lesdites fibres étant à deux étages c'est-à-dire que les fibres sont en deux groupes d'inégales longueurs, ledit groupe de fibres plus longues que celles de l'autre groupe formant le centre du faisceau tandis que ledit autre groupe l'entoure.

2. Un balai tel que réclamé dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure.

3. Un balai tel que réclamé dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure et suspendues auxdites ligatures dudit autre groupe.

4. Un balai tel que réclamé dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure et suspendues par cordelettes auxdites ligatures dudit autre groupe.

An English translation of this specification was subsequently filed in the Patent Office by the plaintiff. That translation reads as follows:

This invention deals with a new broom particularly designed for playing curling.

The main purpose of the invention is to obtain a broom with great elasticity and great suppleness.

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Another aim of the invention is to obtain a broom made up of long fibers without risking that they dislocate or break.

Another aim of this invention is to obtain a supple and well mounted broom.

Still another purpose of the invention is to obtain a homogeneous broom in which the quality of the fibers does not vary.

Another aim of the invention is to obtain a very strong broom that is, in relation with the volume of fibers with which it is made so that it may last a long time without the ends splitting or producing splits.

Finally one more aim of the invention is to obtain a broom for the purpose and type described of a rational construction, and constituting a much appreciated innovation among curling fans.

For the above-mentioned aims, the invention consists of a flat bunch of long vegetable fibers tied to one end of the handle. The bunch is in two layers, that is, the exterior fibers do not reach the extremity. Like all brooms, at a short distance from where it is secured to the handle, the fiber bunch includes several transversal bindings hidden under a linen sheath. The fibers reaching the extremity of the broom also include a transversal binding hidden by the outside fibers. This last binding is attached by small strings to the top bindings in order that it cannot move.

I attained the above-mentioned aims by means of the invention illustrated in the attached drawings and in which:—

Figure 1 is an elevation view of the broom built according to the invention;

Figure 2 is a view similar to the one on the previous figure except that it is partially cut;

Figure 3 is a side view; and

Figure 4 is another side view illustrating the use of the invention.

In the description which follows and the accompanying drawings, similar figures refer to identical parts in the different figures.

Like all brooms, the broom being the object of this invention includes a handle 1 at one end of which is attached a bunch of vegetable fibers 2. These fibers are preferably simple, waterproof fibers. They may however be made of tampico from the leaves of Mexican aloes, coir derived from fibers surrounding coconuts, sorghum straw, or piassaba from South American palm trees. The invention does not consist however in the choice of fibers but rather in the construction of the broom. This broom is attached to handle 1 by a strong wire binding 3 and the joint hidden by a metal ring in the shape of a truncated cone 4, itself attached by another metallic wire binding 5.

At a short distance from where it is attached to the handle, bunch 2 includes several transversal and parallel bindings 6 with small strings. In the drawings, there are four such bindings. A fifth binding 7 is made a little lower for a purpose explained below. These bindings are hidden by a linen sheath 8 on which can be applied some slogans or curling club emblems.

Bunch 2 is obtained from very long vegetable fibers which form two groups of different length. Inside fibers 9 are the longest and the others 10 surrounding the first ones are the shortest. From a point of view of appearance, the end of the bunch is in two layers. The longest fibers 9 include transversal binding 11 under fibers 10 in order that it is invisible. In order that this binding does not move, it is attached to binding 7 or to any stationary part of the broom by small strings 12 or any other tie.

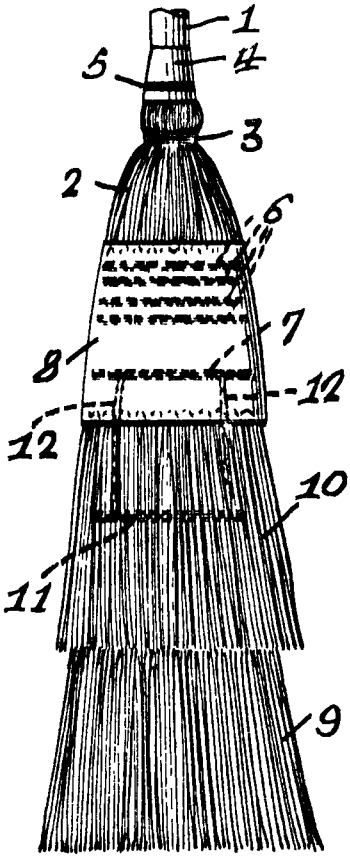

Fig. 1

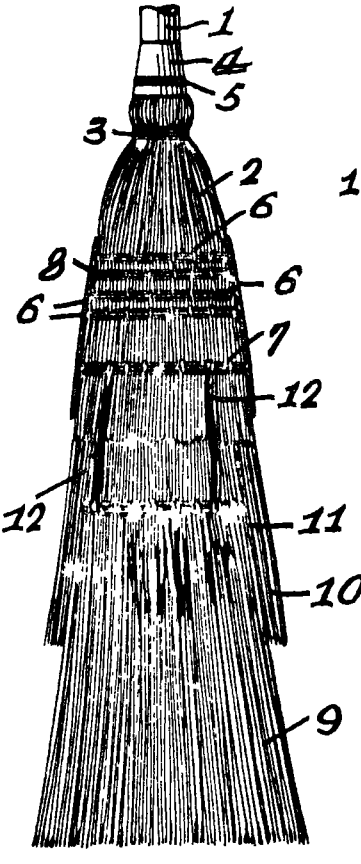

Fig. 2

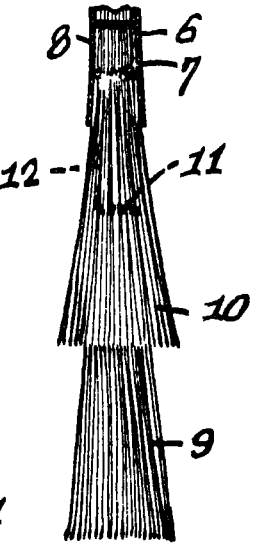

Fig. 3

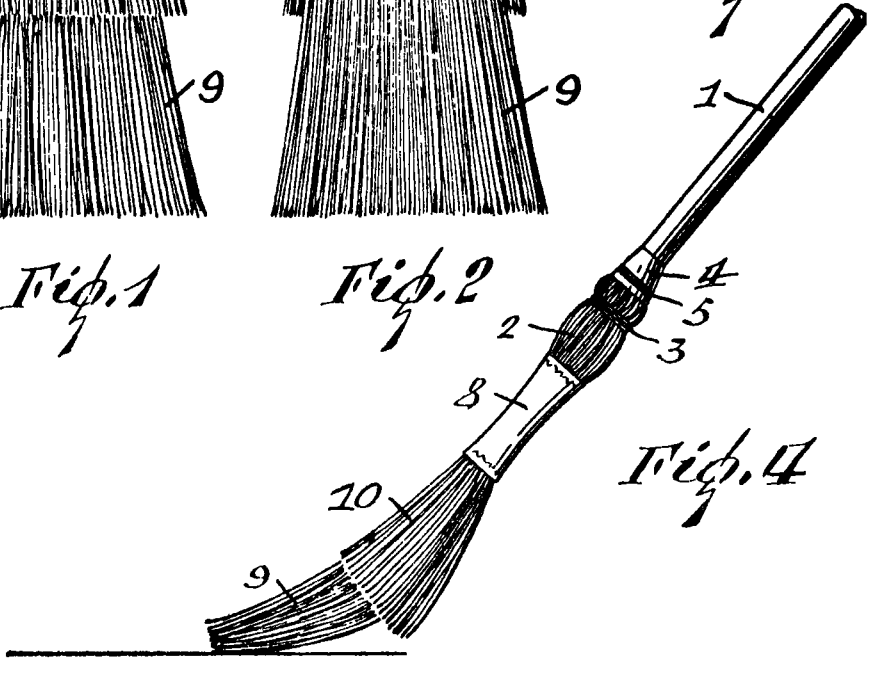

Fig. 4

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In using the invention, particularly for the game of curling where the stone pushed by the player must slide on the ice, the sweeping facilitating the run must be made rapidly and cover a large area. The broom being the object of the present invention permits rapid use without risking to break the fibers. Those fibers which are long keep their homogeneity as illustrated on figure 4 in the drawings. Fibers 9 bend under pressure and do not mix with fibers 10. Fibers 10 constitute a buttress for the fibers which keep this homogeneity thanks to binding 11. At the same time, fibers 10 protect inside binding 11 against wear and act as a guard to prevent long fibers from breaking. The broom may therefore be bent in both directions without breaking.

Even though only one specific form of the invention has been illustrated and described, it is well understood that various changes in the construction of the invention may be made as long as its idea is not departed from as claimed in the following claims.

The embodiments of the invention in which an exclusive property or privilege is claimed are defined as follows:

1. A broom made up of one bunch of fibers attached to one end of a handle, said fibers being in two layers, that is, that the fibers are in two groups of different length, the said group of fibers longer than the ones from the other group forming the center of the bunch while said other group surrounds it.

2. A broom as claimed in claim 1, in which said fibres of said two groups include transversal bindings, the bindings of said center of bunch being underneath said other group surrounding it.

3. A broom as claimed in claim 1, in which said fibers of two said groups include transversal bindings, the bindings of said center of bunch being underneath said other group surrounding it and suspended to said bindings of said other group.

4. A broom such as claimed in claim 1, in which said fibres of said two groups include transversal bindings, the bindings of said center of bunch being underneath said other group which surrounds it and suspended by small strings to said bindings of said other group.

On January 28, 1959, Marchessault assigned this patent to the plaintiff.

In connection with the application for Patent No. 554,826, Marchessault was represented by a patent attorney whose name was Albert Fournier. Fournier, in February, 1957, also made an application on behalf of Marchessault for an invention concerning curling brooms under the United States patent legislation.

The claims put forward in the original United States application were not in the same terms as the claims subsequently allowed in the Canadian patent, but they followed the same general lines. They were all rejected by the United States Patent Office on the ground that they were anticipated by prior patents. In May, 1959, Fournier was replaced by Pierre Lesperance as Marchessault's attorney in connection with his United States application. After

some negotiation, a United States patent issued, on May 16, 1961, containing a number of claims, of which the first, second and fifth read as follows:

1. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of long fibers, closely spaced bindings extending around said fibers, an additional flexible binding loosely surrounding and loosely stitched through said fibers and slidable relative to said fibers and spaced from said first named bindings a distance about half way between the sweeping end of the broom and said closely spaced bindings, and flexible ties having one end connected to said additional binding and having their other end fixed with respect to said first named bindings in order to prevent slipping of said additional binding off said fibers.

2. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch, and an outer bunch of fibers, substantially closely spaced bindings extending around the two bunches of fibers, and an additional binding surrounding only the central bunch of fibers and covered by the fibers of the outer bunch, said additional binding being spaced from said first named bindings a distance about half way between said first named bindings and the sweeping ends of said fibers.

. . . .

5. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch of relatively long fibers and an outer bunch of shorter fibers forming a skirt surrounding the upper part of the central bunch, closely spaced cord bindings extending around the two bunches of fibers, and an additional cord binding surrounding only said central bunch of fibers and covered by the free end portions of the fibers of the outer bunch, said additional cord binding being spaced from said first named cord bindings a distance about half way between said first named cord bindings and the sweeping ends of said fibers.

On March 21, 1962, the plaintiff filed a "Petition for Reissue" in the Canadian Patent Office pursuant to section 50 of the *Patent Act*, which reads as follows:

50. (1) Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more or less than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent within four years from its date and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the same invention for the then unexpired term for which the original patent was granted.

(2) Such surrender takes effect only upon the issue of the new patent, and such new patent and the amended description and specification have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if such amended description and specification had been originally filed in their corrected form before the issue of the original patent, but in so far as the claims of the original and reissued patents are identical such surrender does not affect any action pending at the time of reissue nor abate any cause of action then existing,

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and the reissued patent to the extent that its claims are identical with the original patent constitutes a continuation thereof and has effect continuously from the date of the original patent.

(3) The Commissioner may entertain separate applications and cause patents to be issued for distinct and separate parts of the invention patented, upon payment of the fee for a reissue for each of such reissued patents.

The Petition for Reissue reads as follows:

The Petition of Curl-Master Mfg. Co. Ltd., whose full post office address is 1575 Craig Street, East, Montreal, Province of Quebec, Canada, SHEWETH:

(1) That Your Petitioner is the patentee of Patent No. 554,826 granted on the twenty-fifth day of March, 1958, for an invention entitled:

"BROOM"

(2) That the said Patent is deemed defective by reason of insufficient description or specification and by reason of the patentee having claimed more in certain respects and less in other respects than that he had the right to claim as new.

(3) That the respects in which the patent is deemed defective are as follows: In the description of the Patent there is insufficient description as to the purpose of the low binding 11 and of the ties 12.

The low binding 11 actually prevents spreading apart of the long fibers during sweeping. In the description of the original Patent this is only mentioned in an inferential way on page 6, line 11, wherein it is stated "et ces dernières conservent cette homogénéité grâce à la ligature 11." (translation, page 3, line 27, "which keep this homogeneity thanks to binding 11").

Furthermore, the description of the original Patent only mentions in an inferential way that the low binding surrounds and is loosely stitched through the fibers as follows: Page 4, lines 6, 7 and 8: "Cette dernière ligature est reliée par des cordelettes aux ligatures supérieures afin qu'elle ne puisse se déplacer." (translation, page 1, lines 28, 29 and 30: "This last binding is attached by small strings to the top bindings in order that it cannot move.") Page 5, line 25, "pour que cette ligature ne puisse se déplacer elle est reliée à la ligature 7 ou à tout autre partie fixe du balai par des cordellettes 12 ou tout autre lien." (translation, page 3, lines 15, 16, 17: "In order that this binding does not move, it is attached to binding 7 or to any stationary part of the broom by small strings 12 or any other tie.")

In accordance with the invention it is important that said low binding 11 be stitched loosely enough in order to slide on the fibers so as to allow flexibility in the bending of the fibers during sweeping.

Claim 1 of the Patent, which claims the broad idea of having a broom head of stepped formation with a central group of long fibers and an outer group of shorter fibers forming a skirt surrounding the central group, is probably somewhat too broad in view of U.S. Patent: Struve–1,115,255–October 27, 1914.

Claim 2 of the Patent which mentions the bindings surrounding the center bunch of fibers and surrounded by the outer bunch of fibers depends on claim 1 and is deemed too restricted because the Patentee's broom could very well be made without the skirt or outer bunch of shorter fibers. Such a broom is certainly operative as a curling broom and the low binding 11 would continue to exert its essential function although it will last a shorter

time because of the absence of the protection afforded by the skirt of outer fibers.

Claims 3 and 4 of the Patent are also defective for the reasons given in connection with claim 2.

(4) That the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention in the following manner:

That the patent application which resulted in the above noted Patent was prepared by Albert Fournier in the month of February 1956 at which time Mr. Fournier was suffering from a heart condition which somewhat impaired his work efficiency; Mr. Fournier died in fact in August 1958. Therefore, he did not fully comprehend the purpose of and working of the low binding 11 and of the importance of ties 12 of the inventor's broom. On the other hand, the inventor himself was not fully conversant with the requirements of a patent application to wit the fact that he delegated to Mr. Fournier the task of preparing a patent application and obtaining a patent for his invention. Moreover, the Canadian Examiner only cited against the original patent application. U.S. Patent 2,043,758–Lay–June 9, 1936. Therefore the Patent issued without knowledge either by the Patentee, his Patent Agent, or the Canadian Office, of a prior Patent teaching that it was known to have a broom with a stepped construction which might render claim 1 of the Patent invalid.

(5) That knowledge of the new facts stated in the amended disclosure and in the light of which the new claims have been framed was obtained by Your Petitioner on or about the last days of December 1958, in the following manner: At that time an official action had been received from the U.S. Examiner citing the Struve U.S. Patent mentioned above against the Patentee's corresponding U S. patent application Serial No. 640,676 dated February 18, 1957. Copy of this Patent was ordered from the Patent Office and it was then discovered that it showed the stepped construction of Applicant's U S. claim 1 which at that time somewhat corresponded to claim 1 of the Canadian Patent. In December 1958, the Canadian Patent was already issued. In view of the situation of the U.S. patent application at that time, it was decided to await the issue of the U.S. Patent before initiating re-issue procedure in the Canadian Patent. The eventual U.S. Patent claiming the Patentee's invention finally issued on May 16, 1961, under U.S. Patent 2,983,939.

(7) That Your Petitioner hereby appoints PIERRE LESPERANCE, whose full post office address is 934 St. Catherine Street, East, Montreal, Province of Quebec, Canada, as his agent, with full power of revocation and substitution, to sign the petition and drawings, to amend the specification and drawings, to prosecute the application, and to receive the patent granted on the said application; and ratifies any act done by the said appointee in respect of the said application.

(8) Your Petitioner therefore surrenders the said original patent and prays that a new patent may be issued to him in accordance with the amended specification herewith, for the unexpired term for which the original patent was granted.

Signed at Montreal, P.Q., this 21st day of March 1962.

CURL-MASTER MFG. CO. LTD.

F. Marchessault (signed)

president

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On January 29, 1963, Patent No. 656,934 was issued as a "reissue" patent pursuant to section 50 of the *Patent Act*. The specification reads in part as follows:

The present invention relates to a new broom specifically adapted for the game of curling.

In the game of curling, brooms are used for sweeping the ice ahead of the stone sliding on the ice. This has the effect of removing dirt or ice particles and temporarily melting the sandy like frost which covers the ice surface thus making it more slippery so that the stone will travel farther.

Prior to the present invention, brooms identical in construction to household brooms were used for curling, except that they had longer fibers than household brooms. Conventional household brooms comprise a wooden handle or staff to the lower end of which a head is attached, said head consisting of fibers usually secured to the staff and held together as a bunch by means of a wire binding and also by several cord bindings spaced from each other, surrounding the fibers and stitched through the fibers in a tight manner. Because these cord bindings are located in the upper part of the broom head and that the fibers of the broom head are long, the fibers had a tendency to spread excessively when the broom was used for sweeping the ice, and to break, especially at the lowermost cord binding, rendering the old time broom ackward (sic) to use.

It is the general object of the present invention to provide a curling broom which obviates the above disadvantages and which more particularly prevents spreading apart of the fibers of the conventional curling brooms when the broom head is pressed on the ice.

Other objects of the present invention reside in the provision of a curling broom which is of light weight construction and is easy to manipulate and efficient for ice sweeping in the game of curling, and which has a long life because the fibers do not break easily.

The broom in accordance with the present invention is essentially characterised by the provision of low binding stitched loosely enough to slide on the fibres and spaced a substantial distance downward towards the outer ends of the fibers from the conventional cord bindings of the broom, said low cord binding preventing the fibers from spreading apart and maintaining the bunch of fibers in flat condition while at the same time allowing the individual fibers to curve freely when the broom is pressed on the ice, due to the fact that the low binding can slide along the fibers. Thus, the flexibility of the fibers is not impaired.

In accordance with the invention, the low binding is prevented from sliding off the outer end of the fibers by being attached by flexible ties.

In accordance with another characteristic of the invention, the main bunch of fibers is surrounded by an outer bunch of shorter fibers defining a skirt and overlying the low cord binding so as to protect the same against wear as it is known that when the broom is manipulated, the low cord binding due to its very low level position strikes the ice during sweeping motions.

(At this point there is a description of how to make an embodiment of the invention.)...

While a preferred embodiment in accordance with the present invention has been illustrated and described, it is understood that various modifications may be resorted to without departing from the spirit and scope of the appended claims.

The Embodiments of the invention in which an exclusive property or privilege is claimed are defined as follows:

1. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of fibers and including fiber binding means in the zone of said head attached to said staff, a low flexible binding surrounding and stitched loosely enough through said fibers to be slidable relative to said fibers, and spaced a substantial distance from said fiber binding means and flexible ties connecting said low binding to said head in order to prevent slipping of said low binding off said fibers.

2. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch and an outer bunch of fibers and including bindings extending around the two bunches of fibers, a low binding surrounding and loosely stitched through the central bunch of fibers only, slidable with respect to said central bunch of fibers and covered by the fibers of the outer bunch, said low binding being spaced a substantial distance from said first named bindings, and flexible ties connecting said low binding to said head in order to prevent slipping of said low binding off said fibers.

3. A broom as claimed in claim 2, wherein said outer bunch is constituted by fibers shorter than the fibers of the central bunch, whereby said outer bunch forms a skirt surrounding the upper part of the central bunch, said low binding being disposed underneath and covered by the free end portion of the fibers of the outer bunch.

4. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch of long fibers and an outer bunch of shorter fibers forming a skirt surrounding the upper part of the central bunch, said head including bindings extending around the two bunches of fibers, and a low flexible binding surrounding and loosely stitched through said central bunch of fibers only and slidable relative to the fibers of said central bunch and covered by the free end portions of the fibers of the outer bunch, said low binding being spaced about half way between said first named bindings and the sweeping ends of said long fibers, and flexible ties attached to the low binding at one end and having their other end connected to said head in order to prevent slipping of said low binding off the fibers of said central bunch.

It is common ground that the defendant did manufacture some brooms, both in the period between the issue of Patent No. 554,826 and the issue of Patent No. 656,934 and in the period since the issue of Patent No. 656,934, which, in my view, fall clearly within Claim 3 of Patent No. 656,934. The plaintiff contends that Claim 3 of Patent No. 656,934 is substantially identical to Claim 4 of Patent No. 554,826. The plaintiff's case was closed on an understanding between the parties and the Court that, if the plaintiff had made out a case for one act of infringement of either patent, there would be

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(a) a reference as to what acts of infringement had been committed, and

(b) a reference as to the damages flowing from such acts of infringement, or a reference for an accounting of profits depending upon what relief the Court determines that the plaintiff is entitled to.

It is therefore unnecessary for me to make any further finding of fact concerning such matters.

I find as a fact that the broom that Marchessault put on the market in the fall of 1955 was the embodiment of an invention of which Marchessault was the inventor. Leaving aside the element of the short outer skirt as a protection against the breaking of the sweeping straws at the bottom factory binding and as a support for the sweeping straws, in my opinion, the loose lower cord around the sweeping straws a substantial distance down the broom from the factory bindings (which I have already described), by virtue of its effect of keeping the sweeping straws in a compact bundle without interfering with their flexibility, created a curling broom that was substantially different from the brooms previously used by curlers and definitely more satisfactory to them. It was not anticipated in my view by any of the earlier patents or by Ken Watson's personal practice of putting a loose string an inch or so below the factory binding (Ken Watson himself admitted that Marchessault deserved the credit for getting the loose string "down there" although he thought that his loose string involved the same principle). The new element was relatively simple, it is true. It resulted, however, in a radically different broom that was so much more useful (judged by the assessment of those who used curling brooms) that it immediately came into great demand. There is no doubt in my mind that it was an "invention" within the meaning of the *Patent Act* in the sense that it was "new" and "useful". It was an inventive step forward. I also find that the combination of the element of the loose lower binding and the element of the short outer skirt as a means of protecting the loose lower binding from wear also constituted an invention for the same reasons.

Unfortunately, I have come to the conclusion that neither of those two inventions are either disclosed or claimed by Patent No. 554,826 and that section 50 of the *Patent Act* does not authorize the grant of a reissue patent for an

invention that has not been disclosed or claimed by the original patent.

Section 50 authorizes the Commissioner to cause a new patent to be issued "for the same invention . . . for which the original patent was granted". See *Northern Electric Co. Ltd. v. Photo Sound Corpn.*[1] where Maclean J. (as he then was) at page 89 summarized the effect of the reissue provision as follows:

> . . .the purpose of a re-issue is to amend an imperfect patent, defects of statement or drawings, and not subject-matter, so that it may disclose and protect the patentable subject-matter which it was the purpose of that patent to secure to its inventor. Therefore the re-issue patent must be confined to the invention which the patentee attempted to describe and claim in his original specification, but which owing to "inadvertence, error or mistake," he failed to do perfectly; he is not to be granted a new patent but an amended patent. An intolerable situation would be created if anything else were permissible. It logically follows of course, that no patent is "defective or inoperative" within the meaning of the Act, by reason of its failure to describe and claim subject-matter outside the limits of that invention, as conceived or perceived by the inventor, at the time of his invention.

See also the same case on appeal to the Supreme Court of Canada[2] where Duff C.J., delivering the judgment of the Court said at page 651:

> First of all, the invention described in the amended description or specification and protected by the new patent must be the same invention as that to which the original patent related.

and at page 652:

> The statute does not contemplate a case in which an inventor has failed to claim protection in respect of something he has invented but failed to describe or specify adequately because he did not know or believe that what he had done constituted invention in the sense of the patent law and, consequently, had no intention of describing or specifying or claiming it in his original patent. The tenor of the section decisively negatives any intention to make provision for relief in such a case[3].

Patent No. 656,934 was issued for a broom "essentially characterized by the provision of low binding stitched loosely enough to slide on the fibers and spaced a substantial distance downwards towards the outer ends of the fibers from the conventional cord bindings of the broom, said low cord binding preventing the fibers from spreading apart and maintaining the bunch of fibers in flat condition while at the

[1] [1936] Ex. C.R. 75. [2] [1936] S.C.R. 649.

[3] I have in mind that Duff C J., in the following paragraph, comments, "In this connection," on an aspect of the section that he was discussing that was the subject of an amendment before the legislation was reproduced in the present section 50. I do not understand the passage quoted to be dependent on that comment.

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same time allowing the individual fibers to curve freely when the broom is pressed on the ice, due to the fact that the low binding can slide along the fibers." That, in my opinion, is the nub or the genius of the invention. It is not, in my opinion, to be found disclosed, either expressly or by reasonable inference (I should have thought there is some doubt as to whether a specification can disclose an invention by inference), in Patent No. 554,826, which contains a general description of the patent for which it is issued in the following paragraph:

> Dans les buts précités, l'invention consiste en un faisceau plat de longues fibres végétales fixées sur un bout d'un manche. Le faisceau est à deux étages c'est-à-dire que les fibres extérieures ne se rendent pas à l'extrémité. Comme tous les balais, à courte distance de la fixation au manche, le faisceau de fibres comporte plusieurs ligatures transversales qui sont cachées par une gaine de toile. Les fibres se rendant a l'extrémité du balai comportent en outre une ligature transversale cachée par les fibres extérieures. Cette dernière ligature est reliée par des cordelettes aux ligatures supérieures afin qu'elle ne puisse se déplacer.

The essential elements of the loose lower cord are neither expressed nor suggested either in this paragraph or elsewhere in the original patent. I cannot accept the suggestion that the elements of looseness and slideability is in any way indicated by the words "reliée par des cordelettes aux ligatures supérieures afin qu'elle ne puisse se déplacer" or by the expression "suspendues par cordelettes" in Claim 4. Nowhere is there any indication of the equally important element of the position of the loose lower cord substantially down the straws from the factory bindings toward the sweeping end of the broom.

In my view, a reissue patent under section 50 of the *Patent Act* can replace a defective or inoperative patent with a valid patent by substituting a sufficient description or specification for an insufficient description or specification or by adding or omitting claims but it cannot be for any invention other than an invention disclosed by the original patent. The invention that is embodied in the brooms that Marchessault put on the market in 1955, prior to applying for either patent, and that is disclosed in Patent No. 656,934, the reissue patent, is not disclosed in Patent No. 554,826, and Patent No. 656,934 is therefore invalid.

Patent No. 554,826 is invalid because the class of broom described in it is not a new and useful broom and is not therefore an invention. Claim 4, the only claim that the

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plaintiff endeavoured to support, is, among other things, for an unspecified number of bindings around the sweeping straws, whether tightly or loosely bound and in any position between the factory bindings and the end of the outer skirt.[1] It would extend to what Ken Watson did and to many embodiments which would obviously not be good curling brooms as well as to the broom made by Marchessault in 1955. Patent No. 554,876 claims too much and is invalid.

I do not therefore need to come to any conclusion with reference to the several other submissions made for the defence.

The action is dismissed and the prayer in the counterclaim for a declaration that both patents are invalid is granted. Costs follow the event.

Action dismissed; counterclaim allowed.

[1] I cannot accept the submission that a wide claim may be restricted by reference to an illustration used in describing a particular embodiment. See *Northern Electric Co. Ltd. v. Photo Sound Corpn., supra.* See also *United Merchants and Manufacturers, Inc. v. A. J. Freiman Limited, et al.* [1965] 2 Ex. C.R. 690. Cases such as *George Hattersley & Sons Ltd. v. George Hodgson Ltd.,* [1906] 23 R.P.C. 192, upon which counsel for the plaintiff relied, are distinguishable. In that case, the claims were expressly framed by reference to the illustration and description and there was no statement such as there is in Patent No. 554,826, viz., «Quoiqu'une seule forme spécifique de l'invention ait été illustrée et décrite, il est bien entendu que divers changements à la construction de l'invention peuvent être effectués pourvu que l'on ne se départe pas de son esprit tel que réclamé dans les revendications qui suivent.»

Toronto 1964 / Jan. 27, 28 / 1965 / Sept. 8

ONTARIO ADMIRALTY DISTRICT

BETWEEN:

CARGILL GRAIN COMPANY LIMITED and SCREATON GRAIN LIMITED ..... PLAINTIFFS;

AND

N. M. PATERSON & SONS LIMITED ..... DEFENDANT.

AND BETWEEN

SMITH VINCENT & CO. LIMITED ..... PLAINTIFF;

AND

N. M. PATERSON & SONS LIMITED ..... DEFENDANT.

Shipping—Damage to cargo from wetting—Special winter storage contract—Damage ascertained after vessel tied up for winter—Proof of negligence—Damage prima facie proof—Onus—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Schedule, Article IV(2).

In early December 1960 the ship *Ontadoc* carried a cargo of grain from Fort William to Goderich, Ontario. The grain remained aboard the vessel in Goderich under a special winter storage contract. At the end of December it was discovered that snow on No. 7 hatch cover was melting and investigation disclosed that the grain in No. 7 hatch had suffered damage from wetting. The owners of the grain sued the shipowner for the damage to the grain. Article IV(2) of the Schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291 (which governed the bills of lading) relieves a shipowner of liability for loss or damage resulting, *inter alia*, from the conduct of the master in the operation of the ship and from perils of the sea. The special winter storage contract also relieved the shipowner of liability for damage resulting from perils of the sea and for damage resulting from circumstances other than negligence, and placed the burden of establishing negligence on the person asserting it. At the trial evidence was given that in the course of the voyage from Fort William to Goderich the vessel encountered heavy weather and that waves broke over the ship at approximately the position of No. 7 hatch. Defendant contended that the damage was caused by a peril of the sea and from the master's failure to alter the course of the voyage to prevent the incursion of water.

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Held, plaintiffs were entitled to succeed. The fact of the damage to the grain satisfied the onus on plaintiffs by raising a *prima facie* case of negligence against the defendant which could only be met by proving what actually occurred. This the defendant had failed to do, as it was uncertain from the evidence whether the grain was damaged during the voyage or after the ship arrived at Goderich.

Gosse Millerd v. Can. Gov't Merchant Marine Ltd. [1927] 2 K. B. 432, per Wright J. at p. 434 *et seq.; Canada Rice Mills Ltd. v. Union Marine and Gen. Ins. Co.* [1941] A.C. 55, applied.

ACTIONS for damages.

A. S. Hyndman for plaintiffs.

J. J. Mahoney and *C. Mason* for defendant.

WELLS D.J.A.:—These are two actions tried together. Both concern the damaging of grain carried by the ship *Ontadoc* from Fort William to the port of Goderich. The bills of lading in each case are dated December, 1960 and as appears from the certificates filed at the time of shipment, the goods which consisted of barley and two grades of Northern Manitoba wheat, were all in apparent good order and condition on loading.

The voyage took place and the steamship duly reached the port of Goderich on December 5, 1960. This grain, in each case, was subject to a special contract for private storage aboard the *Ontadoc* and the grain was to be kept in winter storage until April 15 in the succeeding year.

Somewhere towards the end of the month, in the vicinity of December 27, it was discovered that snow on hatch cover at No. 7 hatch was melting and on investigation it was discovered that some of the grain had been wetted and as a result it had heated. It was an area under what had been the cover of hatch No. 7, which has been variously described by the witnesses. Mr. Stoddard described the situation from the melting of the snow on the hatch cover at about an area of 4 feet. Mr. Meno, for the Salvage Association of London, who did not see it until about January 6, 10 days after the situation was first discovered, said that the section of grain affected was on the starboard side of No. 7 hatch. He described it as a distinctly localized area about 4×5 feet in diameter. All those who examined it complained of the pungent and acid odour. The condition of the grain in the other holds was perfect, except for the odour which had penetrated and affected the rating of some of the other grain.

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The grain itself was apparently wet and damp on top and the charring process which turned it black from its heating, was at the bottom of the heap, not at the top. One of the witnesses called by the defendants said that they were able to contain the damaged grain by a sort of coffer dam or metal sheet which they sank around it to the bottom of the hold.

Stoddard who was the ship keeper for the winter storage said that when he noticed it he called Mr. Robinson who looked after the ship owner's interest in Goderich. He saw the grain subsequently discharged from the ship and described how some of the grain was black, not on the top, nor in his opinion, all the way down.

Captain Robinson had been a Master Mariner for 33 years and he also testified. He was acting as Harbour Captain at Goderich that winter and he saw the damaged grain about December 27 when Stoddard called him. He said that when he took the leaf from the hold cover the grain was steaming, warm and damp and coamings were wet from condensation. The grain was not removed until nearly a week later and it was he who described making a coffer dam 3 feet deep around the grain.

He said the damaged grain had a spread of 10 feet at the bottom and in his opinion the charred grain, which looked like charcoal, had spread from near the top to the bottom. On cross examination he described seeing steam, but no flame or smoke. He also mentioned the strong odour. He did not recall saying that there was any oakum missing, he said both pads were on the hatch cover. There was no caking of the grain on top, but there could have been little chunks of it. He said that Mr. Meno and Mr. Loeser were both present at the time of the unloading. He said that at that time the pad on top of the hatch cover had been removed.

Johnston, who was the Assistant Superintendent of the Goderich Elevator and Transport Company also testified that the grain was wet and had quite an odour to it. He thought the area affected was the width of the hatch, 10 or 12 feet and he said that at a depth of about 6 or 7 feet it was burnt. There was no burning on top, but it was quite wet. The damaged grain he saw was barley. He had never seen

grain burned like this before, although he had been with the elevator company some 36 years.

As a result the Cargill Grain Company Limited and Screaton Grain Limited claim damages in the sum of $15,-037.41. Smith Vincent & Co. Limited the other plaintiff in the second action claim damages in the sum of $28,408.02.

Paragraph 6 of the bills of lading appears to be the same in all the bills and is as follows:

> All the terms, provisions and conditions of the *Canadian Water Carriage of Goods Act 1936*, and of the rules comprising the Schedule thereto are, so far as applicable, to govern the contract contained in this Bill of Lading and this Bill of Lading is to have effect subject to the provisions of the Rules as applied by the said Act. If anything herein contained be inconsistent with the said provisions, it shall to the extent of such inconsistency and no further be null and void.

On the back of each bill of lading there is endorsed a special contract for storage aboard the *S. S. Ontadoc* from December 2, 1960 until April 15, 1961.

It would appear to me that paragraphs 1 to 5 are the conditions that are applicable to the facts of this case and they are as follows:

1. It is understood and agreed that the vessel is to be considered as a vessel and not a warehouse throughout the storage period. It is further understood and agreed that the shipowner is not engaged in the business of warehousing grain or any other commodity and does not hold itself out generally as engaged in the business of storing grain for profit, and hereby assumes no obligation in respect to inspecting, ventilating, or conditioning cargo during the storage period referred to in this contract. If the shipowner receives any information indicating that the grain is, or is likely to be damaged, it shall be its obligation to report this information promptly to the shipper.
2. The shipowner does not warrant the fitness of the vessel or its appliances for the storage of grain, but does warrant to use due diligence to furnish a seaworthy vessel as a bulk carrier of grain for the storage period. The shipowner shall not be liable for loss or damage due to any defect, latent or otherwise, in the vessel or its appliances if at the time of loading the grain it shall have exercised due diligence to furnish a seaworthy vessel as a bulk carrier of grain.
3. The shipowner shall not be liable for loss or damage to the grain whensoever and howsoever occurring, not due to its negligence or the negligence of its servants and employees.
4. Notwithstanding the provisions of the foregoing paragraph, the shipowner in any event shall not be liable for any loss or damage to the grain by collisions, perils of the sea, or fault or error in navigation of the vessel; or by fire unless the fire is caused by the neglect or design of the shipowner.
5. The burden of establishing negligence will be on the person asserting it.

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The defence consists of a general denial and an assertion that the loss or damage arise from perils, danger and accidents of the sea for which the defendant was not responsible and paragraphs 9, 10 and 11 of the statement of defence in the Cargill action and in the Smith Vincent & Co. Limited action are as follows:

9. On passage across Lake Superior the said S.S. *Ontadoc* steering 120 degrees on the downbound course encountered strong winds from the South South West causing waves to break over the ship on the starboard side at approximately the position of number seven hatch.
10. At 1305 hours on the 3rd day of December 1960 with the weather continuing to deteriorate and seas continuing to break over the vessel the ship's course was altered to 130 degrees.
11. With the alteration of course no further water was shipped on deck. The vessel arrived at the Port of Goderich on December 5, 1960, without further incident.

In consequence of this alteration of course no further water was shipped on deck. The defendant's explanation is that during this period water entered the hold by way of the hatch cover supporting bar aperture at the forward end of hatch No. 7 on the starboard side and that as a result the grain in No. 3 hold, directly beneath the named hatch cover became wetted and subsequently fired. They submit that this was a peril of the sea for which they were not liable.

In addition it is also pleaded by the defendant that such loss or damage resulted from the act of those controlling the ship, in failing to alter the course of the vessel in time to prevent the incursion of water into No. 3 hold.

These defences are obviously directed to the rules under the *Water Carriage of Goods Act,* 1936, c. 419, s. 1, which is now found in c. 291, R.S.C. 1952. By that statute every bill of lading is directed to contain an express statement that it is to have effect subject to the provisions of the rules as applied by the Act. Article 4 of the rules, paragraph 2 sets out a number of circumstances under which neither the carrier nor the ship be responsible for loss or damage. It is sufficient to quote Article 4, par. 2, sub-items (*a*) to (*c*) as follows:

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
   (*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
   (*b*) fire, unless caused by the actual fault or privity of the carrier;
   (*c*) perils, danger, and accidents of the sea or other navigable waters;

The defendant in opening its case called a meteorologist with the Department of Transport stationed at the weather office at Malton Airport, by name Wyllie. He produced a copy of a letter from the Department of Transport Air Services Office at 315 Bloor Street W., Toronto. This letter was from the Director Mr. McTaggart-Cowan and from it the witness read paragraphs 2 and 3, which are as follows:

> Included are (1) copies of the Lake Forecasts issued on December 3, 1960 together with a copy of the decoding tables and (2) reports from three ships which were in the area on the date in question.
>
> An examination of the weather maps for this date indicates that southwesterly winds in the range of 10-15 m.p.h. were reported from land stations and it would be reasonable to expect that speeds of 20-25 knots would be attained over open water. No precipitation was reported in this area on December 3.

Mr. Wyllie said that these winds were not unusual, which would seem a reasonable view to take of the whole circumstances.

The Captain of the *Ontadoc* was then called and he described the loading of the ship. The wind was first a light wind from the South West and as he proceeded it freshened around 1:00 p.m. He put it somewhere between 20 and 25 miles an hour. The ship's scrap log was produced and marked as Exhibit 10. He stated the entries were made by the mate between noon and 1:00 p.m. on December 3. He then described how the ship started to take a little water over the starboard side a little abaft the beam. The wind was on the starboard side. He said there was no water coming over forward of Number 7 hatch but at times there was a foot of water coming over No. 7. It kept up for around three hours when he changed course and no further water came aboard. The ship apparently had a draft of about 19.16 aft and 18 feet 2 or 3 inches at the bow. He placed the freeboard of the ship at nearly 8 feet. He stated that it was customary to hawl off but he was not in a hurry and it was a good thing to keep closer to the land under the circumstances. He had no reason to fear for the safety of the cargo or the ship.

McDonald, the first mate, also testified that when they left the weather was good and he described the battening down of the hatches, particularly when the loading finished at 2250 hours. The hatches were battened down at night, and he said that the deck was illuminated. Later on he said that the ship left the dock at around 11:30 p.m. at which

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time the battening down process had been completed. He was on watch when the ship cleared and continued until 4:00 a.m., coming back on duty at about noon on December 3. He placed the freeboard of the ship at around 9 feet and according to his recollection the wind became stronger at around 12:30 p.m. and the ship's course was changed at 1305 hours. He said after the course was altered the water continued "a little slop". There was no rain or snow and he described their arrival at Goderich on December 5 at which time he said that he had no reason to think that the cargo was damaged. He inspected the tarpaulins on the hatch covers generally at Goderich but found no damage to them.

Looking at the scrap log, Exhibit 10, the ship was apparently steering a course of 120 degrees at 1044 on December 3. The wind was described as coming from the South South West and moderate and the weather was described as clear. The next entry is at 1305 hours when the course was altered to 130 degrees and the entry as to wind is a ditto mark under the letters S.S.W. and then the word "strong" is written in and on looking at it, it would appear to be in a different handwriting than other entries around about it. I am not able to say this with any certainty whatsoever as no one was examined in respect to these entries in regard to the handwriting. I simply mention the word "strong" as having a somewhat unusual appearance when one looks at the log book.

After the damaged grain was discovered Captain Chapman was ordered by the owners to execute an instrument of protest, which he did as Master of the *Ontadoc* and this was done on December 30 some 27 days after the events to which it related. Captain Chapman's statement of what occurred at that time is as follows:

> At One O'Clock in the afternoon of December 3rd, 1960 a strong southerly wind was encountered with heavy seas over the deck of the said ship. The ship hauled up for three hours and at Four O'Clock in the afternoon of December 3rd, 1960 the wind and sea diminished and the ship proceeded to the Port of Goderich arriving Monday, December 5th, 1960 at Five O'Clock A.M.

In connection with this evidence I have to reach conclusions on two points. Whether I can accept this evidence, which is not contradicted, and if I do accept it whether it is a peril of the seas, which would excuse the defendant from liability, pursuant to the terms of the Bills of Lading.

Quite frankly I have considerable doubt whether the weather was as heavy as the Master's protest would indicate. Looking at the log book I have some suspicion and it is only a suspicion, as to when the word "strong" was inserted, nor it does not seem to me that the evidence of Captain Chapman, the mate McDonald, the pleadings and the protest are entirely consistent.

In my opinion there is a certain element of exaggeration in describing what occurred when the wind strengthened around 1:00 o'clock p.m. on December 3. The evidence of the ship officers does not convince me of its accuracy.

A great deal of the defendants' evidence was devoted to showing the care that had been taken by the defendants in loading the ship. There is no doubt however, that the water at some stage got into the grain under hatch cover No. 7. My difficulty is that I am not certain when it got in or how it got in. I do not place very much credit in the statement that water was washing over the part of the deck where the hold in question was situated. After the loading inspection was made late at night at Fort William under somewhat uncertain light and everything was certified as being in good condition. A further inspection was made without removing any of the tarpaulins on or about December 12 at Goderich. It is quite clear that during the month of December, before the heating of the grain was discovered, there was snow on the decks. I am not even sure that the water in question got in on the voyage, it may have, in some fashion, penetrated after the ship got to Goderich.

The Judicial Committee of the Privy Council dealt with a problem of what is a peril of the sea in the case of *Canada Rice Mills Ltd. v. Union Marine and General Insurance Co.*[1] This was an action on an insurance policy, covering among other things, perils of the sea. The opinion of the Judicial Committee was delivered by Lord Wright. The cargo was rice which was damaged by wetting. A variety of occurrences were shown from which it could be inferred that the damage had been caused by a peril of the sea. The case was originally heard by a Jury who came to that conclusion. At page 67 beginning at the third paragraph Lord Wright reviewed many of the cases dealing with this problem and at page 68 he summed the matter up in the following words:

[1] [1941] A.C. 55.

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Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the seawater which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury. There are many deck openings in a vessel through which the seawater is not expected or intended to enter, and, if it enters, only enters by accident or casualty. The cowl ventilators are such openings. If they were not closed at the proper time to prevent seawater coming into the hold, and seawater does accidentally come in and do damage, that is just as much an accident of navigation (even though due to negligence, which is immaterial in a contract of insurance) as the improper opening of a valve or other sea connection. The rush of sea water which, but for the covering of the ventilators, would have come into them and down to the cargo was in this case due to a storm which was sufficiently out of the ordinary to send seas or spray over the orifices of the ventilators. The jury may have pictured the tramp motor vessel heavily laden with 5000 tons of rice driving into the heavy head seas, pitching and rolling tremendously and swept by seas or spray. The Lordships do not think that it can properly be said that there was no evidence to justify their finding. On any voyage a ship may, though she need not necessarily, encounter a storm, and a storm is a normal incident on such a passage as the Segundo was making, but if in consequence of the storm cargo is damaged by the incursion of the sea, it would be for the jury to say whether the damage was or was not due to a peril of the sea. They are entitled to take a broad commonsense view of the whole position.

In the case before me no circumstances have been disclosed which would explain when the water penetrated to the grain. In the case of *Gosse Millerd v. Canadian Government Merchant Marine Limited* and the case of *American Can Company v.* the same defendants[1], the two actions were tried together and Lord Wright, who was then Mr. Justice Wright, heard them. It was necessary for him to consider the *Carriage of Goods By Sea Act* 1924, they are in similar form to those attached to our *Water Carriage Goods Act,* R.S.C. 1952, c. 291, and in doing so he discussed the rules scheduled in that Act, and at page 434 there is a very illuminating discussion of the rules as follows:

[1] [1927] 2 K. B. 432.

These Rules, which now have statutory force, have radically changed the legal status of sea carriers under bills of lading. According to the previous law, shipowners were generally common carriers, or were liable to the obligations of common carriers, but they were entitled to the utmost freedom to restrict and limit their liabilities, which they did by elaborate and mostly illegible exceptions and conditions. Under the Act and the Rules, which cannot be varied in favour of the carrier by any bill of lading, their liabilities are precisely determined, and so also are their rights and immunities. In particular, Art. III., r.2, of the Rules is in the following terms: "Subject to the provisions of Article IV., the carrier" (which means the carrier and any person employed by him to do the work) "shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." The word "discharge" is used, I think, in place of the word "deliver", because the period of responsibility to which the Act and Rules apply (Art. I. (*e*)) ends when they are discharged from the ship. Art. III., r 3, requires the bill of lading to state (inter alia) "the apparent order and condition of the goods," that is, on shipment.

The words "properly discharge" in Art. III., r.2, mean I think, "deliver from the ship's tackle in the same apparent order and condition as on shipment," unless the carrier can excuse himself under Art. IV. Hence the carrier's failure so to deliver must constitute a prima facie breach of his obligations, casting on him the onus to excuse that breach. That this is so, I think, is confirmed by the language of Art. IV., r.1, which deals with unseaworthiness and provides that, in a case of loss or damage resulting from unseaworthiness, the carrier must prove the exercise of due diligence to make the ship seaworthy. Art. IV., r.2, contains a long list of matters in respect of loss or damage arising or resulting from which the carrier is not to be liable. The excepted causes specified in paras. (*c*) to (*p*) inclusive, except (*l*), are all matters beyond the control of the carrier or his servants, such as sea perils, acts of God, restraint of princes, riots, inherent vice of the goods, etc. (*l*) relates to deviation to save life and property. (*a*) deals with neglect in the navigation or management of the ship, which falls, I think, under a category different from the care of the cargo. (*b*) relates to fire and, following previous statutory protection, gives a wide exemption. Finally (*q*) is in these terms: "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." I read the second "or" in the above paragraph as meaning "and." In this I agree with the decision of MacKinnon J. in *Brown & Co. v. T. & J. Harrison*, (1927) 27 Ll.L. Rep. 415.

The words of para. (*q*) expressly refer to the carrier as claiming the benefit of the exception, and I think that, by implication, as regards each of the other exceptions, the same onus is on the carrier. He must claim the benefit of the exception, and that is because he has to relieve himself of the prima facie breach of contract in not delivering from the ship the goods in condition as received. I do not think the terms of Art. III. put the preliminary onus on the owner of the goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves either that the goods have not been delivered, or have been delivered damaged. The carrier is a bailee and it is for him to show that he has taken reasonable care of the goods while they have been in his custody (which includes the custody of his servants or agents on his behalf) and to

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bring himself, if there be loss or damage, within the specified immunities. It is, I think, the general rule applicable in English law to the position of bailees that the bailee is bound to restore the subject of the bailment in the same condition as that in which he received it, and it is for him to explain or to offer valid excuse if he has not done so. It is for him to prove that reasonable care had been exercised. This was the language of Erle C J. in delivering the judgment of the Exchequer Chamber in *Scott v. London and St. Katherine Docks Co.* (1865) 3 H. & C. 596, adopted by the House of Lords in *Dollar v. Greenfield,* (1905) The Times, May 19. In *Joseph Travers & Sons v. Cooper* [1915] 1 K.B. 73, 88. Buckley L.J. said:

> "The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and that the loss would still have resulted. He has not discharged himself of that onus."

Buckley L.J. also quotes from *Morison Pollexfen & Blair v. Walton,* Unreported the words of Lord Halsbury:

> "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him."

The principle is also discussed by Atkin L. J. in The Ruapehu, (1925) 21 Ll L. Rep. 310, 315, where he points out that it is wrong to say that the onus on the bailee to prove absence of negligence does not arise until the bailor has first shown some negligence on the part of the bailee. I think that this principle of onus of proof is applicable to the carrier under the Act. Indeed in the general exception of Art. IV., r. 2 (*q*), it is expressly laid down. In the facts of this case, if the shipowners claim (as they do in their pleading) the benefit of that exception, in that damage was due to wet or damp, they can only succeed by negativing fault or privity.

This judgment was reversed in the Court of Appeal but restored by the House of Lords. There are two very illuminating judgments in that decision which is found in [1929] Appeal Cases, 223. There is a judgment by the then Lord Chancellor Hailsham with whom Lord Atkin agreed and a further judgment by Lord Sumner. For the purposes of this case I think the matter may be summed up by quoting part of the headnote, which is found at page 223, as follows:

> Held, that the shipowners having failed properly and carefully to carry, keep and care for the tinplates, as required by Art. III., r. 2 of the Schedule to the Carriage of Goods by Sea Act, 1924, the onus was on them to prove that they were protected from liability by Art. IV., r. 2(*a*) and that the negligence in the management of the hatches was not negligence "in the management of the ship" within the meaning of that rule.

In my view the principles enunciated in this case also apply to a claim to the benefit of Rule IV, Article 2(*c*), that is perils of the sea. The goods having been damaged by a state of affairs, which was discovered slightly over three

weeks after the conclusion of the voyage on December 5; the defendants have not in my opinion proved that the damage to the grain occurred by the incursion of water on the voyage down. The ship remained at storage for three weeks and a day after that before the real state of affairs was apparent. The water may have gotten in while the ship was in Goderich, it is in my opinion on the evidence impossible to say. It may have been from a peril of the sea, it may have been from some fault in the covering of the hatches during or after the voyage. I do not know. Water however, unquestionably did get in at some time. As I understand the principles behind the decision of Mr. Justice Wright, as he then was, the fact that the goods were damaged raises a *prima facie* case of negligence, which can only be met by showing what actually occurred. This the defendant has not shown and the *prima facie* case raised by the plaintiff by showing the damages which had occurred in the absence of any explanation which might relieve the ship or its owners answers the burden placed on the plaintiff by Paragraph 5 of the Special Contract for Private Storage of grain and/or seed on the *Ontadoc,* which provided that the burden of establishing negligence will be on the person asserting it. The *prima facie* case of negligence raised by the plaintiff in this case has not been answered. In the result therefore, there will be judgment for the plaintiff in each case. The actual loss or damage suffered was not gone into in any great detail. Unless the parties can agree these can be most conveniently determined by a reference to the Surrogate Judge. The plaintiffs should have their costs of the action in each case. The cost of the reference should be left to the discretion of the Surrogate Judge.

Judgment for plaintiffs.

Vancouver 1964 Oct. 6, 7 1965 Jan. 22

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

BURRARD TERMINALS LIMITED .....PLAINTIFF;

AND

STRAITS TOWING LIMITED .....DEFENDANT.

Shipping—Barge breaking loose from mooring in windstorm—Damage to neighbouring dock—Liability of barge owner—Negligence—Onus of proof—Nuisance.

Defendant moored three barges to an insubstantial mooring in busy Vancouver harbour in close proximity to plaintiff's dock. During a severe windstorm, of which defendant had warning, one of the barges broke loose and damaged plaintiff's dock.

Held, defendant was liable for the damage. The owner of a vessel which goes out of control must prove that it did so without his fault. The evidence here did not establish that the defendant took reasonable care to ensure that the barge was securely moored.

Held also, from the time the barge broke adrift it constituted a nuisance.

Newby v. General Lighterage Co. Ltd. [1955] 1 Lloyd's Rep. 273; *Scott v. London & St. Katherine Docks Co.* (1865) 3 H. & C. 596; *Le-Lievre v. Gould* (1893) 1 Q.B 491; *The Velox* [1955] 1 Lloyd's Rep. 376, applied.

ACTION for damages.

T. P. Cameron for plaintiff.

Robert J. Harvey for defendant.

NORRIS D.J.A.:—This is an action by the plaintiff, the owner of a dock situate on the north shore of Burrard Inlet in North Vancouver, B.C., against the defendant, being the owner and operator of barges and towboats and in particular being at all material times the owner and operator of a barge, *Straits No. 7.*

The facts with reference to the plaintiff's claim are as follows:

On the night of October 12, 1962, the barge, *Straits No. 7,* broke loose from its moorings at Moodyville Scow Grounds, which are situate a short distance to the east of the plaintiff's dock in Vancouver Harbour, during a severe wind storm, and the barge being unattended was driven by the wind and sea against the plaintiff's dock and damaged it.

The plaintiff claims that the damage to the dock was due to the negligence of the defendant as follows:

(*a*) Despite having received ample warning of the wind storm referred to in Paragraph 3 hereof, the Defendant did not so secure the *Straits No. 7* as to preclude the possibility of the said Barge breaking adrift from its moorings.

(*b*) Once the said Barge had broken adrift the Defendant failed to recapture it before it had done the damage complained of.

The plaintiff claims in the alternative that:

. . . the Defendant's Barge *Straits No. 7* constituted a nuisance in that having broken adrift from its moorings as aforesaid the Defendant, knowing that the said Scow was adrift in Vancouver Harbour, allowed it to drift unattended so that it struck the Plaintiff's dock and caused damage thereto and despite the fact that the Defendant knew that the said Scow was ranging against the Plaintiff's dock, held by wind and tide, the Defendant allowed it to continue to do so whereby the Plaintiff's dock was further damaged and whereby the Plaintiff suffered loss and was put to expense.

The plaintiff claims damages for the cost of repairing the dock and the rental of a tug "assisting thereat".

In the Statement of Defence the defendant, after general denials, alleges that the defendant did not cause or permit the *Straits No. 7* to break adrift from its moorings, that the mooring facilities at the Moodyville Scow Grounds gave way under the stress of winds allowing the *Straits No. 7* to come clear of her moorings, that the defendant caused the *Straits No. 7* to be recovered as soon as possible under the circumstances, and that any damage to the plaintiff's dock was caused solely by reason of the dilapidated condition thereof.

The defendant further alleges that at all material times the *Straits No. 7* was secured to its moorings at Moodyville Scow Grounds in a proper and seamanlike manner but that on or about midnight of October 12-13, severe and unanticipated gale force winds caused the *Straits No. 7* to come clear of her moorings and to drift down to the Burrard Terminals Docks and that the severe unanticipated gale force winds were of such a nature as to constitute an Act of God for which the defendant is not responsible. Alternatively, the defendant says that neither it nor its servants or agents were guilty of negligence causing or contributing to any loss or damage.

At the trial the Court raised a question as to its jurisdiction to try this action on the footing of the judgment in *The Robert Pow*.[1] Counsel for both parties argued that the Court did have jurisdiction, and the Court decided that the

[1] (1863) Br. & L. 99.

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Court's jurisdiction had in effect been settled as a result of the judgment in *The Zeta*.[1] The grounds on which the Court arrived at this decision are in general those set out in *Anglo-Canadian Timber Products Limited v. Gulf of Georgia Towing Company Limited, et al.*[2]

The facts relating to the damage to the dock by the barge were not disputed on trial nor was there any effort to prove that the dock was in a dilapidated condition.

Counsel for the plaintiff put forward his argument under four headings:

(1) that to escape liability the defendant must prove inevitable accident;

(2) that alternatively the defendant was negligent and is therefore liable;

(3) that the defendant created a nuisance or adopted it, due to which the plaintiff suffered damage and for which the defendant is liable;

(4) that even if the defendant is not liable in tort in the ordinary sense, the judgment in *Rylands v. Fletcher*[3] applies, and that the strict rule in that case is imposed on the defendant under the circumstances.

The argument of counsel for the defendant was based on the broad ground that there was no proof of negligence on the part of the defendant, its servants or agents. He divided his argument into three parts:

(1) that the rule in *Rylands v. Fletcher* does not apply because facts which might support the application of that rule were not pleaded; that it was not in issue on the pleadings that the barge was dangerous, and that in order to succeed on the basis of the rule in *Rylands v. Fletcher* there must be a "dangerous item" which escaped from land.

(2) that the plaintiff had not led any evidence from which the Court could infer that the defendant was negligent. His submission is in short form contained in the following extract from the transcript:

> The plaintiff has proven the incident and the burden is now on the defendant to establish some cause how that could have happened without negligence and if that explanation is given and if from that evidence an inference can be drawn that the defendant was not negligent, then ... the case has to be dismissed because the plaintiff having the burden of proof has not discharged it.

[1] [1893] A.C. 463. [2] (1964) 50 W.W.R. 122. [3] (1868) 3 H.L. 330.

He further submitted that the defendant was not liable for the condition of the mooring because the Scow Grounds were not owned by the defendant but by a towboatmen's association and that there was no evidence to show that the defendant ought to have known that the Scow Grounds were inadequate; that there was no evidence to show that there was any apparent defect in the mooring grounds or that the defendant therefore either knew or should have known that they were inadequate and that such matter was not pleaded.

(3) that the plaintiff was not entitled to rely on nuisance which arose from the very beginning because the pleadings alleged only that the nuisance was constituted by the drifting scow after it had broken adrift; that as to the nuisance created by the scow after it was adrift, the defendant had one of its tugs go to the location of the scow but by reason of the heavy winds was not able to remove it from the dockside.

As to the defence of Act of God or inevitable accident, it is important to bear in mind the following extracts from the transcript:

THE COURT: . . . Now, Mr. Harvey, substantially your defence is that this was an act of God?

MR. HARVEY: No, my lord, substantially my defence, that I will argue, at least, is that we were not negligent. I have little confidence in the defence of a pleading of an act of God. This type of storm has taken place on several occasions previously and I will not be arguing that that is the defence.

THE COURT: What do you argue?

MR. HARVEY: It is in three branches, my lord.

THE COURT: I am not anticipating your argument; you argue just as you see fit.

MR. HARVEY: Yes.

THE COURT: I was just curious because I just wanted to get the act of God—

MR. HARVEY: My lord, it may be of some assistance if I refer you to that point, I refer you to SALMOND on TORTS, the 12th Edition at Page 572, and there is a quotation from Baron Bramwell in a case in 1858 speaking of an extraordinary storm.

THE COURT: What was the case?

MR. HARVEY: *Ruck v. Williams*, my lord, 1858, Volume 157 of the English Reports, at Page 488.

THE COURT: All right.

MR. HARVEY: The learned Baron said:

"We call it extraordinary, but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years; on the contrary, it would be extraordinary if it did not happen. There is a

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French saying that 'there is nothing so certain as that which is unexpected'."

THE COURT: That is right, that is not what I wanted to get clear, I wanted to know whether that was the basis of your argument.

MR. HARVEY: No, my lord, it is not.

THE COURT: Because it seems to me that was the trend of your evidence Anyway, you say you don't argue that?

MR HARVEY: No, I won't argue that, my lord, although I certainly will argue that the winds here had a causative effect on the loss, but that will arise in my argument on negligence, rather than any argument in support of a plea of act of God.

THE COURT: You say substantially that you are not negligent, anyway?

MR HARVEY: That is right, my lord.

THE COURT: Contributing to the accident, now, just so that I may get that clear, you are not arguing inevitable accident or act of God?

MR. HARVEY: No, my lord.

THE COURT: Because there is some distinction?

MR. HARVEY: Although it could be said that inevitable accident is part of my defence, in that I will be arguing that the breaking away was not as the result of any negligence on our part; ergo, this was inevitable accident, so I shouldn't really say with such assurance that inevitable accident is not part of my case

THE COURT: I just want to get this, well, as I understand it, inevitable accident includes the term, it is the broader term, includes the term "Act of God", and it is one of those branches, you see.

MR. HARVEY: In my argument, I will be using inevitable accident in the sense that there was no negligence on our part that contributed to the loss, and perhaps it is unnecessary to plead inevitable accident, as I understand it, if in fact you establish that you were not negligent, but perhaps I am just making my argument confusing if I talk about inevitable accident at this point.

THE COURT: I saw Mr. Cameron shaking his head at something I said; I don't know why, because I think the authorities make it quite clear.

MR. CAMERON: I wouldn't presume to shake my head at what your lordship says.

THE COURT: When you were enunciating the proposition of inevitable accident, you may include in the class that which is an Act of God.

MR. CAMERON: Yes, I am quite sure your lordship is right. Actually, I was really thinking to myself when my friend said he was going to argue no negligence but not inevitable accident, that this is impossible, because in a case like this, if there is no negligence, ergo, it must be inevitable accident.

MR. HARVEY: That is exactly what—

MR. CAMERON: That is why I was shaking my head, my lord, and the term "inevitable accident" is almost unnecessary, it means no negligence.

THE COURT: He doesn't have to show how the accident was caused, he has to show that it was not caused by any negligence which contributed to the casualty. That, I think, is the proper way to put it.

MR. CAMERON: Yes, my lord.

THE COURT: All right.

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MR. HARVEY: My lord, the one real issue that I see in this case is whether or not we were negligent, the Straits Towing Limited was negligent, because if we were, we are liable; if we were not, we are not liable. The answer to that issue will determine the case, I suggest.

THE COURT: The only reason I raised the question was because it is pleaded, you see.

After referring to *The Saint Angus*[1] and *The Merchant Prince*[2] in order to distinguish them, and quoting from *United Motors Service v. Hutson*[3], he then went on:

So, my lord, I say that this case decides that the line of cases as shown by the *Merchant Prince* only applies to a certain type of case, and the *Merchant Prince* rule only applies to the type of case where a ship underway runs into a ship at anchor, and there is an implication of law there from that act that the defendant is liable unless he can prove inevitable accident. Now, this is not the case here in this case at bar, because the rule I see here, the Plaintiff has proven the incident, and the burden is now on the defendant to establish some cause how that could have happened without negligence, and if that explanation is given and if from that evidence an inference can be drawn that the defendant was not negligent, then, my lord, I submit the case has to be dismissed, because the Plaintiff having the burden of proof, has not discharged it; . . .

In my opinion, although the statements may appear to be somewhat contradictory, they constitute a complete abandonment of "Act of God" and "inevitable accident" as positive defences.

He thereafter went on to cite several authorities, relying strongly on the judgment of Coady J. in *McDonald Aviation v. Queen Charlotte Air Lines*[4], affirmed by the Court of Appeal[5]. The decision of the Court of Appeal really turned on the applicability of the doctrine of frustration and Coady J. held that "the circumstances surrounding the occurrence do not disclose facts from which a reasonable inference as to the actual cause can be drawn". This statement is sufficient to distinguish that case from the case at bar as the facts in the two cases are widely different.

In my respectful opinion the law applicable is stated clearly in *Newby v. General Lighterage Company, Ltd.*[6]:

It was conceded in the Court below, and I think rightly conceded, that the burden was on the owners of the barge to prove that it was there without their fault. It needs no words to emphasize that a vehicle or a vessel which is out of control in a public highway is a great danger to other persons using the highway. So great is it that the law holds the owner of it responsible for all damage which it may do unless he can prove that it was quite without his fault that it came to be out of control. The burden on him is not merely a provisional burden of explanation such as arises in

[1] [1938] P. 225. [2] [1892] P. 179. [3] [1937] S.C.R. 294.
[4] [1951] 1 D.L.R. 195. [5] [1952] 2 D.L.R. 291.
[6] [1955] 1 Lloyd's Rep. 273 at 277.

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cases of *res ipsa loquitur*. It is a legal burden to prove that he was not at fault, as in *The Merchant Prince*, [1892] P. 179, and *Southport Corporation v. Esso Petroleum Company, Ltd.*, [1954] 2 Q.B. 182; [1954] 1 Lloyd's Rep. 446. In the recent case of *Smith v. W. G. Marriott & Son, Ltd.*, [1954] 2 Lloyd's Rep. 358, Mr. Justice Ormerod had the case of a drifting barge before him. He said (at p. 360):

> ". . . the burden of proof is on the defendants to satisfy me that they did take reasonable care to ensure that this barge was properly moored and properly secured when it was left by them and that they had taken reasonable precautions to maintain it in that secure position."

I agree with that statement of the law. The legal burden is on the defendants to prove that this barge was adrift without any fault on their part.

In considering the duty to take care, the requirements of that duty must be determined in accordance with the circumstances of each particular case.

In the case at Bar there is no doubt that the barge caused the damage to the wharf and was under the management of the defendant and its servants, being unattended at the time the damage was done. There is no doubt that the accident was such as in the ordinary course of things does not happen if those who have the management use proper care. In the absence of explanation by acceptable evidence on behalf of the defendant this is reasonable evidence of negligence on the part of the defendant sufficient to place a burden on it of showing an absence of negligence on its part: *Scott v. The London and St. Katherine Docks Company*[1]:

> But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

See also *The Telesfora DeLarrinaga*[2], Bucknill, J. at p. 96.

The proximity of the mooring to the plaintiff's dock is of importance when considering the duty of care resting upon the defendant and the extent thereof, as the defendant must be taken to have known that an inadequate mooring at the Moodyville Scow Grounds would always constitute a threat to the safety of the Plaintiff's dock. In *LeLievre v. Gould*[3], Lord Esher, M.R. in paraphrasing the decision in *Heaven v. Pender*[4], in my opinion, with respect, put the matter very well indeed when he said:

[1] (1865) 3 H. & C. 596 at 601.
[2] (1939) 65 D.L.R. 95.
[3] [1893] 1 Q.B. 491 at 497.
[4] (1883) 11 Q.B.D. 503.

That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property. For instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage. In the same way it is the duty of a man not to do that which will injure the house of another to which he is near. If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But, if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood.

The severity of the storm as an extraordinary event is not available to the defendant in the circumstances of this case to meet the *prima facie* case of negligence:

(*a*) because of the terms of the abandonment by counsel, already quoted, of the defence of Act of God or inevitable accident; considered together with the following matters:

(*b*) the evidence of Captain Sundstrom, the Master of the *Arctic Straits* who had been engaged on the British Columbia coast for nineteen years on tug boats and as a master for twelve years. It was the *Arctic Straits* which took the *Straits No. 7* to the mooring grounds, and his evidence is as follows:

Q. During the time that you had operated tug boats in the general Vancouver area—well, let's say, in the B.C. area—had you experienced winds as strong as this in the Vancouver Harbour?

A. Yes.

(*c*) because in a maritime operation in Vancouver Harbour such storms may be expected and it is part of the duty of persons mooring barges to moor them in anticipation of such weather.

(*d*) the weather forecast issued at Vancouver on Friday, October 12, 1962.

At 5:00 A.M. Synopsis:

The intense storm centred just west of Vancouver Island is now weakening slowly. Gales buffeted the south coast throughout the night and peak gusts exceeding 70 mph were experienced at Victoria, Comox and Tofino. Winds will slacken slowly this morning and should drop to below gale force by this afternoon. However, another disturbance now intensifying off the California coast is expected to bring rain and gales to the south coast again tonight.

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At 11:00 A.M. Synopsis:

The storm that has lashed the coast for the last twenty-four hours is weakening over northern Vancouver Island. The lull will be very brief however for there is a new storm approaching which promises to be just as vigorous as the last. Gales and rain overnight with a slow decrease in wind on Saturday as the center becomes weaker along the north coast.

At 3:00 P.M. Synopsis:

A new storm is battering the California coast and will move northward to the lower B.C. coast tonight. Strong southeast winds and rain are forecast for coastal waters as the storm approaches. The rain will change to showers and the winds subside slowly on Saturday.

At 7:00 P.M. Synopsis:

An intense storm centre now off the south of the Columbia River is expected to move steadily northward to reach northern Vancouver Island by Saturday afternoon. Strong east to southeast winds will develop over most waters adjacent to Vancouver Island tonight and subside slowly on Saturday. Rain which accompanies the storm will change to showers tomorrow.

At 9:00 P.M. Synopsis:

Rain is spreading over the south half of the province as a new storm moves steadily northward along the Oregon coast. Strong southeast winds can be expected over the lower coast through the night. The centre of the storm is forecast to move to northern Vancouver Island by noon on Saturday. It will likely weaken rapidly thereafter leaving unsettled showery weather over most regions of the province for the weekend.

Gale warnings for Georgia Strait were given throughout the period referred to. In considering this matter the words of Willmer J. in *The Velox*[1] are in point:

I have already stressed that this collision occurred during a period of weather which was wholly exceptional. I have been reminded, and quite properly reminded, that no seaman can be called upon to exercise more than ordinary care; but I think it is necessary to observe that when a seaman is called upon to face wholly exceptional conditions, ordinary care of itself necessarily demands that exceptional precautions may have to be taken.

and at p. 382:

In those circumstances, it seems to me that, although the measures demanded by the situation may be regarded as exceptional, nevertheless they were no more than those required of a seaman of ordinary care and skill, having regard to the exceptional weather conditions prevailing.

and Baron Bramwell's proposition in *Ruck v. Williams*[2] speaking of an "extraordinary storm":

We call it extraordinary, but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years; on the contrary, it would be extraordinary if it did not happen. There is a French

[1] (1955) 1 LL.L.R. 376 at 380. [2] (1958) 3 H. & N. 308 at 318.

saying "that there is nothing so certain as that which is unexpected." In like manner, there is nothing so certain as that something extraordinary will happen now and then.

These words are particularly applicable to people engaged in maritime affairs who, because of their very occupation, should be apprehensive of weather conditions.

The burden on the defendant in this case is infinitely heavier than in the ordinary case because, as Lord Denning said in *Newby v. General Lighterage Company, Ltd., supra:*

> It needs no words to emphasize that a vehicle or a vessel which is out of control in a public highway is a great danger to other persons using the highway. So great is it that the law holds the owner of it responsible for all damage which it may do unless he can prove that it was quite without his fault that it came to be out of control. The burden on him is not merely a provisional burden of explanation such as arises in cases of *res ipsa loquitur*. It is a legal burden to prove that he was not at fault, ...

It is true that the defendant is not an insurer as was indicated by Bucknill, J. in *The Telesfora DeLarrinaga* case, but is "a person who must take ordinary steps to meet the conditions to be anticipated by prudent seamen". For the reasons already stated, the conditions on the night in question were to be anticipated. Considering what was reasonably prudent in the circumstances, it is borne in mind that Exhibit 1 shows that the mooring was in close proximity to the dock of the defendant's and to a succession of docks in the area, that the harbour is restricted in size, that the traffic in the harbour is heavy, that the evidence, including that of Captain Williams, shows that the mooring was insubstantial, being merely a mooring to wooden dolphins and boomsticks. The mooring which Captain Williams gave evidence that he used was of a very different and very much more substantial and permanent kind, consisting of inside and outside buoys connected with logs which were in turn chained to concrete blocks by $2\frac{1}{2}''$ chains, the concrete blocks being approximately twelve tons in weight. It does not avail the defendant to argue that even these blocks were dragged into the centre of the harbour by the force of the storm. The actual mooring to the blocks held, whereas Captain Sundstrom, whose evidence I accept, testified that the barge broke adrift because the boomsticks broke, and at least one dolphin pulled out and a wire or wires to the boomsticks or dolphins broke.

The three barges of the defendant were the only barges on the mooring ground. From the evidence it would appear

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that there were some thirty-odd scows moored in the same grounds but these were lighter vessels. The two other barges were secured to the *Straits No. 7* and were not moored independently. The three barges were not manned and there was no means of controlling them if they broke adrift. From the evidence it would appear that the defendant's barges were the only vessels which broke adrift. It would have been a matter of prudent operation when the defendant was using such heavy and cumbersome barges as the three in question, moored as they were moored, to have had available for immediate use a tug or similar vessel to move the barges in case of emergency. Due apparently to the lack of tugs, the defendant did nothing immediately to recover and secure the barges when it had knowledge that they were adrift.

The Moodyville Scow Grounds were checked at 11:40 P.M. at which time it was blowing very hard. No further precautions were taken then or later with regard to the *Straits No. 7* or the other barges. The *Straits No. 7*, adrift and uncontrolled, remained at the plaintiff's dock for some three hours before it was taken away. The evidence is that during those three hours, damage would be done to the dock. The evidence is that the *Straits No. 7* was not removed because of the gale that was blowing.

The barges were moored side by side and I find on the evidence that had they been moored on line ahead, and independently secured, there would have been less likelihood of their breaking adrift. It is not sufficient for the defendant to say, as counsel said, that the barges were tied as barges or scows were customarily secured. It has not been shown that under the circumstances then existing this was the proper and seamanlike thing to do.

Counsel for the defendant argued that the defendant is not liable for the insufficiency or inadequacy of the boomsticks "and so on", or for the condition of the mooring because the mooring ground was owned by another company with which the defendant had an arrangement to moor the barges. I reject this proposition. Under the circumstances it was for the defendant to make sure that the

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mooring was in all respects secure. The evidence is that on a strong gust of wind one of the barges moved, a line broke, a dolphin pulled out and the east end of the barge swung out, as a result of which other lines broke and the three barges swung out. There is no evidence that there was proper or adequate examination of the moorings.

Counsel for the defendant argued that paragraph 4 (*a*) of the Statement of Claim, reading:

> (*a*) Despite having received ample warning of the wind storm referred to in Paragraph 3 hereof, the Defendant did not so secure the *Straits No. 7* as to preclude the possibility of the said Barge breaking adrift from its moorings.

was not a sufficient plea that the defendant knew or should have known that the mooring ground was inadequate. This argument is without foundation and I find that the plea referred to is sufficient.

The defendant has not met the burden of proof to satisfy me that it did take reasonable care to ensure that the barge was properly moored and properly secured and that it had taken reasonable precautions to maintain it in a secure position.

I think that the pleadings are sufficient to allege a claim of nuisance (as alleged in paragraph 5 of the Statement of Claim) and as I read the paragraph it is broad enough to allege liability from the time that the barge broke adrift. It is true that the inception of the nuisance relates back to the way in which the vessel was moored but that does not alter the liability of the defendant in this regard. In this connection I refer to the judgment of Locke J. in *Goodwin Johnson Ltd. v. AT & B No. 28*[1], and in particular what was said by Lord Wright in the *Sedleigh Denfield* case quoted by Locke J. at p. 517.

It is not a defence for the defendant to say that the place from which the nuisance proceeded was a suitable one for the purpose of carrying on the operation and that no other place was available.

I find that the claim of nuisance has been established. In view of my findings that the defendant has not satisfied me in accordance with the principles laid down in *Scott v. The*

[1] [1954] S.C.R. 513 at 516-7.

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Norris D.J.A.

London and St. Katherine Docks Company, supra, that it has not been guilty of negligence, and that the nuisance has been established, it is not necessary for me to deal with the argument by counsel for the plaintiff on the principles laid down in *Rylands v. Fletcher, supra,* and I do not do so.

There will be judgment for the plaintiff and a reference to the Registrar to ascertain damages.

Judgment for plaintiff.

Ottawa 1965

Apr. 5, 6

Apr. 23

BETWEEN:

THE CONSUMERS' GAS COMPANY. ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Computation of income—Deductions—Stock issue—Underwriting expenses—Income Tax Act, R.S.C. 1952, s. 11(1)(cb).

In computing its income for 1960 and 1961 Consumers' Gas Co. claimed a deduction of certain sums paid to underwriting firms in connection with a stock issue. Under the underwriting agreement the underwriting firms were paid the following sums:

(*a*) $24,150 in 1960 and $121,980 in 1961 for managing an underwriting group;

(*b*) $108,315 in 1960 and $136,653 in 1961, commission as dealers in securities;

(*c*) $46,739.89 in 1960 and $121,980 in 1961 for administrative and clerical work in processing the stock issue.

The company sought to deduct one-half of the amounts described in (*a*) and all of the amounts described in (*c*), but conceded that the amounts described in (*b*) were not deductible.

Section 11(1)(*cb*) of the *Income Tax Act* permits deduction of:

an expense incurred in the year,

(i) in the course of issuing or selling shares of the capital stock of the taxpayer. . .

but not including any amount in respect of

(iii) a commission or bonus paid or payable to a person to whom the shares were issued or sold or from whom the money was borrowed, or for or on account of services rendered by a person as a salesman, agent or dealer in securities in the

course of issuing or selling the shares or borrowing the money. . .

The underwriting agreement did not disclose the basis for calculating the amounts described in (*a*), but the amounts described in (*c*) were calculated at a bonus or commission rate of 17½ cents per share.

Held, all of the expenses claimed were barred from deduction by s. 11(1) (*cb*) (iii) of the *Income Tax Act,* R.S.C. 1952, c. 148, (am. 1955, c. 54, s. 1(1)).

APPEAL from income tax assessments for 1960 and 1961.

John G. McDonald, Q.C., W. H. Zimmerman, Q.C. and *M. L. O'Brien* for appellant.

M. A. Mogan and *M. Barkin* for respondent.

DUMOULIN J.:—The instant appeal is directed against the re-assessment dated May 1, 1963, and assessment dated May 6, 1963, in respect of income for taxation years 1960 and 1961.

Appellant company filed Notice of Objection to the re-assessment for 1960 and the assessment for 1961 on July 25, 1963, and such re-assessment and assessment were confirmed by respondent by a Notification of July 29, 1964.

Consumers' Gas is a company "incorporated by Special Act of the former Province of Canada and continued under the Corporations Act, 1953, of Ontario, and is engaged in the business of distributing natural gas to consumers in the Provinces of Ontario and Quebec, and in the State of New York".

As related at trial by the appellant's Vice-President, Treasurer and Assistant Secretary, Mr. Warren Hurst, this company has maintained an oft-repeated policy of soliciting additional working capital from the investing public at large. Since 1954, recourse was had to 17 such financings, an 8 months' periodicity, in the form of bonds, debentures, preferred and common shares. Two of the latest issues were those of December 3, 1959, and June 8, 1961.

Paragraph 3 of the Notice of Appeal sets forth that:

Pursuant to terms of a Prospectus filed on December 3, 1959, (ex. A-3) the Appellant issued and sold 309,472 of its common shares without par value upon the exercise by holders of the Appellant's common shares of subscription warrants evidencing the right to subscribe for one additional common share without par value of the capital stock of the Appellant for each six common shares without par value then issued and outstanding. In the course of issuing and selling such shares the Appellant incurred, inter alia, the expenses described in paragraph 5 of this Notice of Appeal

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It could go without saying that the sole and only moot question is that of the deductibility of those disbursements, re-occurring also, for different amounts, in connection with the 1961 issue of 1,093,230 common shares, evidenced by the June 8, 1961, prospectus (ex. A-6).

Each prospectus resulted from agreements dated, respectively, November 23, 1959 (ex. A-4) and June 7, 1961 (ex. A-7), between Consumers' Gas and Dominion Securities Corporation, Ltd., and A. E. Ames and Co. Ltd., hereinafter called the "Underwriters".

Paragraph 5 and its subparagraphs (*a*), (*b*) and (*c*), next quoted, would sum up the purport of these agreements so far as they may interest this suit:

> 5. Pursuant to the terms of an agreement evidenced by letter dated November 23, 1959, the Appellant agreed to pay to Dominion Securities Corpn. Limited and A. E. Ames & Co. Limited (hereinafter called the "Underwriters") the following amounts in consideration of the services rendered by the Underwriters as hereinafter described:
>
> (*a*) $24,150 for services rendered by the Underwriters in forming and managing an Underwriting Group and Soliciting Dealers Group to facilitate subscriptions for the new common shares of the Appellant, and in consideration of the agreement by the Underwriters to use their best efforts to maintain an orderly market in the rights evidenced by the subscription warrants;
>
> (*b*) $108,315 representing commission payable to the Underwriters in consideration for their services as dealers in securities; and
>
> (*c*) $46,738.89 in consideration for the services of the Underwriters for the performance of all administrative and clerical work involved in processing warrants tendered by shareholders in the course of exercising their right to subscribe for and purchase the new common shares of the Appellant. Such charges were required by the Underwriters in accordance with the provisions of Regulations issued by the Investment Dealers Association of Canada, the Toronto Stock Exchange and the Montreal Stock Exchange to reimburse the Underwriting Group for the cost of such administrative and clerical work.
>
> Such particular services rendered by the Underwriters were not rendered by them as agents or dealers in securities in the course of issuing and selling the Appellant's new common shares.
>
> All of the expenses described in this paragraph 5 were incurred by the Appellant during the 1960 taxation year.

Paragraph 6 is identically worded, save that it concerns the 1961 taxation year and the amounts in its subparagraphs are: (*a*) $121,654; (*b*) $136,653; (*c*) $121,980, and substitutes "Facilitating Group" for "Soliciting Dealers Group" in (*a*) of paragraph 5.

The Notice of Appeal next proceeds to explain, in paragraphs 7 and 9, that for the 1960 and 1961 taxation years, appellant deducted, in computing its income returns according to s. 11 (1) (*cb*) of the *Income Tax Act*:

7. . . . $12,075 (representing one-half of the expenses described in paragraph 5(*a*) of this Notice of Appeal) and the whole sum of $46,738.89 described in paragraph 5(*c*) . . . The Appellant did not deduct the sum of $108,315 described in paragraph 5(*b*) . . ., such sum being regarded by the Appellant as a non-deductible commission payable to the Underwriters in consideration for their services as dealers in securities.

Similar averments for larger figures appear for 1961 in paragraph 8 of the Notice of Appeal, which urges the following reasons and statutory provisions in paragraph 10, Part B:

10. The Appellant submits that none of the expenses described in paragraphs 5(*a*) and (*c*) and 6(*a*) and (*c*) . . . constituted "commission or bonus paid or payable . . . for or on account of services rendered by a person *as* (emphasis in text) a salesman, agent or dealer in securities in the course of issuing or selling the shares" of the Appellant, within the meaning of section 11(1) (*cb*) (iii) of the *Income Tax Act*. The Appellant says that such expenses were on account of services rendered by the Underwriters acting in a clerical capacity and not as dealers in securities. . . .

The company therefore submits that the expenses above mentioned, for the material taxation years 1960 and 1961, are deductible in accordance with the provisions of section 11(1)(*cb*)(i) enacting as follows:

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1), of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year

(*cb*) an expense incurred in the year

(i) in the course of issuing or selling shares of the capital stock of the taxpayer.

The Minister replies negatively on the assumption that all sums referred to in subparagraphs (*a*) and (*c*) of paragraphs 5 and 6 of the Notice of Appeal "were payments on account of capital and properly disallowed as deductions . . . under the provisions of paragraph (*b*) of subsection (1) of section 12" . . . and/or "were commissions paid to persons on account of services rendered as salesmen, agents or dealers in securities in the course of issuing or selling the Appellant's shares within the meaning of subparagraph (iii) of paragraph (*cb*) of subsection (1) of section 11 of the *Income Tax Act*".

These two sections read thus:

12. (1) In computing income, no deduction shall be made in respect of

(*b*) an outlay, loss or replacement of capital, a payment on account of capital . . .

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11. (1) (*supra*)

(*cb*) (*supra*) Deductions allowed are exclusive of

(iii) a commission or bonus paid or payable to a person to whom the shares were issued or sold or from whom the money was borrowed, or for or on account of services rendered by a person as a salesman, agent or dealer in securities in the course of issuing or selling the shares or borrowing the money.

As the hearing of the case began, the appellant's counsel reminded the Court, as said in paragraphs 7 and 8, that the amounts of $24,150 in paragraph 5(*a*) and $121,654 in 6(*a*) were reduced by one-half each, and those of $108,315 in 5(*b*) and of $136,653 in 6(*b*) were completely withdrawn, these latter disbursements "being regarded by the Appellant as a non-deductible commission payable to the Underwriters in consideration of services as dealers in securities". The explanation offered for the 50% reduction of the claims in subparagraphs (*a*) of paragraphs 5 and 6 was their similarity with those of subsections (*c*) in paragraphs 5 and 6 of the Notice of Appeal, respectively.

These preliminary informations disposed of, there now remains for the Court's decision the real subject matter consisting in:

1. The legal connotation of the disbursements sought in subparagraphs 5(*a*) and 6(*a*): "for services rendered by the Underwriters in forming and managing an Underwriting Group and Soliciting Dealers Group" (5*a*); and/or "a Facilitating Group to facilitate subscriptions for the new common shares of the Appellant" (6*a*); and
2. Are the payments "in consideration for the services of the Underwriters for the performance of all administrative and clerical work involved in processing warrants tendered by shareholders" . . . alleged in subparagraphs 5(*c*) and 6(*c*) of the Appeal governed by the provisions of s. 11(1) (*cb*) (i) of the Act or, rather, of 11 (1)(*cb*)(iii)?, deductible in the former hypotheses, excluded in the latter.

I will attempt to answer these questions in their numerical sequence.

1. The duties and obligations assumed by the Underwriters, Dominion Securities Corp. Ltd., and A. E. Ames &

Co. are minutely detailed in the Letters of Agreement, exhibits A-4 and A-7, relating to the 1959 and 1961 issues of shares. Their wording is, substantially, along comparable lines except, *inter alia*, that in A-7, the noun "fee" has ousted that of "commission" used in the initial, 1959, covenant, ex. A-4, from which the texts hereunder are excerpted.

The two underwriters' opening offer is (ex. A-4, first page):

(*a*) to form a Soliciting Dealer Group (A Facilitating Group in ex. A-7) to facilitate subscriptions for the New Stock and to use our best efforts to maintain an orderly market in the rights evidenced by the Warrants;

(*b*) to form an Underwriting Group to be composed of substantially the same investment dealers and brokers who have recently participated in the primary distribution of other securities of the Company and such Underwriting Group will include and be managed by us;

(*c*) to invite all members of the Underwriting Group, The Investment Dealers' Association of Canada, The Toronto Stock Exchange, Montreal Stock Exchange and Canadian Stock Exchange to become members of a Soliciting Dealer Group.

If, peradventure, there could remain any stock dealers unreached by this global "call to action", it would require even better than the eagle's keen glance to ferret them out.

Adverting to ex. A-3, the company's prospectus dated December 3, 1959, conveying information about the new issue of 309,472 common shares, we see, on page 30, that:

The Company has entered into a letter agreement with Dominion and Ames dated November 23, 1959 (ex. A-4) whereby:

(i) Dominion and Ames agreed to form a Soliciting Dealer Group (changed into a Facilitating Group in ex. A-6, the 1961 prospectus) to facilitate subscriptions for the common shares currently being offered and an Underwriting Group and to use their best efforts to maintain an orderly market in the rights evidenced by the subscription warrants and the Company agreed to pay Dominion and Ames, for such services, an aggregate *commission* (italics throughout these notes added) of $24,150.

(ii) . . .

(iii) . . .

(iv) Dominion and Ames agreed: to purchase from the Company at the price of $32 50 per share all of the shares currently being offered and not subscribed for pursuant to the subscription warrants at the expiry of the subscription period . . .

The 1961 prospectus (A-6) does not materially differ, except, as already noted, that the expression "aggregate

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commission" of $24,150 in the 1959 one now becomes an aggregate "fee" of $121,654.

I do not attach paramount importance to this varied expression, holding "commission" to be much truer to the facts and quite in accordance with the definition of the word found in Black's Law Dictionary 1951, Fourth ed., V° Commission, p. 339:

> The recompense or reward of an agent, factor, broker or bailee, when the same is calculated as a percentage on the amount of his transactions or on the profit to the principal.

Though the percentage ratio or margin of profit remained undivulged, the two sums of $24,150 and $121,654 not in round figures suggest clearly enough a basis of computation. A stronger reason derives from the services attributed to the Underwriters by subsections 5(*a*) and 6(*a*) of the plea "in forming and managing an Underwriting Group and Soliciting Dealers Group (or Facilitating Group in 6(*a*)) to facilitate subscriptions for the new common shares . . . and in consideration of the agreement by the Underwriters to use their best efforts to maintain an orderly market in the rights evidenced by the subscription warrants".

All similar assistance and endeavours on the Underwriters' part are nothing but services rendered in the actual sale and disposal of the shares for which they were paid by the taxpayer "an aggregate commission" or "aggregate fee" as dealers in securities. Since these disbursements fall within the exclusion written in s. 11(1)(*cb*)(iii), the appellant cannot succeed on this point.

2. Amounts of $46,738.89 and $121,980 are claimed as deductible in sections 5(*c*) and 6(*c*) of the Notice of Appeal "in consideration for the services of the Underwriters for the performance of all administrative and clerical work involved in processing warrants tendered by shareholders in the course of exercising their rights to subscribe for and purchase the new common shares of the Appellant . . ."

Both parties agreed that this related to clauses 12 of exhibits A-4 and A-7, the "Agreement Letters" of November 23, 1959 (first issue of shares) and June 7, 1961 (second issue). I am quoting from ex. A-4:

12. The Company as soon as practicable after the expiration of the Subscription Offer, shall pay a *commission of 17½c* (12½c in A-7) to each member of the Soliciting Dealer Group for each common share for which such member procures a subscription, provided such procurement is evidenced by the appearance of the name of the firm in the blank space provided in the subscription form on the face of the warrant. Payment will be made to the head office of such firm.

Mr. Warren Hurst himself, in cross-examination, had to admit the wide discrepancy between the motivations advanced in the written plea and the text just recited; adding that the Company paid these commissions to various brokerage firms by means of 260 cheques in 1960 and 92 for the 1961 issue of stock.

In this second instance, namely, the issue raised in paragraphs 5(*c*) and 6(*c*) of the appeal, the entitlement to a monetary reward on a percentage ratio uniquely depends on a perfected sale, bearing no relation whatever to the amount of pain or trouble if unsuccessfully exerted, and in this connection "commission" or "fee" are absolute synonyms. Here again it is beyond doubt that such commissions were earned by individual members of the Soliciting Dealer Group or Facilitating Group "on account of services rendered . . . as salesman . . . or a dealer in securities in the course of . . . selling the shares" of the appellant, and are, therefore, assessable to income tax according to s. 11(1)(*cb*)(iii).

The appellant frequently invoked ruling No. 18 of the Toronto Stock Exchange, under date of April 28, 1959, filed as ex. A-11, specifically alluded to in paragraph 5(*c*) of the Notice of Appeal. It indeed appears that the "service charges on exercising rights" therein foreseen only apply as between a salesman or dealer and his personal client, a buyer of shares. I am unable to find in the agreements or prospectuses any stipulation linking ruling 18 to the Company. If, perchance, it did, then, its provisions would conflict nevertheless with the relevant statutory enactments and, inasmuch, be of no avail.

For the reasons above, this appeal should be dismissed with all taxable costs against the appellant company.

Appeal dismissed.

Montreal 1965 May 17 Ottawa June 10

BETWEEN:

GÉRALD MOLLEUR ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Superannuation or pension fund or plan—Sickness benefit plan—Single payment in satisfaction of rights under—Whether entitled to lower rate—Income Tax Act, R.S.C. 1952, s. 36(1)(a)(i)(C).

In 1962, consequent on an amendment to the Quebec Hydro-Electric Commission's Sickness Benefit Plan, appellant, a long standing employee of the Commission, received a single payment of $10,740 in full settlement of his accumulated credit days or sickness pay allowances under the Plan. Appellant contended that the single payment was, within the language of s. 36(1) of the *Income Tax Act*,

(a) a single payment

(i) . . . out of or pursuant to a superannuation or pension fund or plan

(C) to which the payee is entitled by virtue of an amendment to the plan . . .,

and subject to a lower rate of tax under the provisions of s. 36.

Under the Plan, employees received so-called "credit days" for a specified number of days for each working year subject to reduction for absences with pay for sickness and other specified reasons. The Plan provided that an employee on reaching pension age would continue to receive full salary for a number of days equal to his accumulated reserve of unused credit days before his pension began. It also provided that on the death or retirement of an employee his accumulated sick leave credit could be applied in payment of any arrears of the Commission's Pension Plan.

Held, the Commission's Sickness Benefit Plan was not a superannuation or pension fund or plan within the meaning of s. 36(1)(a)(i)(C) of the *Income Tax Act,* predicated "on a single payment out of or pursuant to *a superannuation or pension fund or plan*".

APPEAL from decision of the Tax Appeal Board.

P. N. Thorsteinsson for appellant.

Paul Boivin, Q.C. and *Paul Ollivier, Q.C.* for defendant.

DUMOULIN J.:—On April 17, 1963, a tax in the sum of $5,958.18 was levied in respect of the appellant's income for taxation year 1962. The Tax Appeal Board, on September 25, 1964, affirmed this levy[1]; hence the instant appeal.

[1] 37 Can. Tax A.B.C. 78.

Gérald Molleur was, in 1962—and still is—a highly remunerated employee of the Quebec Hydro-Electric Commission, being, as such, a member of an "Employees' Sickness Benefit Plan", in force since December 31, 1944. (cf. exhibit A-1)

Under the signature of Mr. L. E. Potvin, then President of the Quebec Hydro-Electric Commission, the main objectives of this Sickness Benefit Plan were outlined in an official communication published in the February 1945 issue of "Entre-Nous", the employees' magazine, (cf. ex. A-1) from which are excerpted, in part, these five paragraphs:

. . . I am pleased, on behalf of the Commission, to outline some details of the sickness benefit plan announced at Christmas, a plan which will apply to all permanent employees and will afford substantial relief in the event of illness or other specifically authorized absence.

. . .

Every permanent employee is eligible to benefit under the plan, and the length of his leave-of-absence—with pay—will be in proportion to his years of service at the rate of seven working days for each year prior to December 31, 1944, and of 14 working days for 1945 and for each subsequent year.

The cumulative total of *Credit Days* (all *italics* in these notes are added) will be subject to deductions for absences with pay—after January 1, 1945—due to:

(*a*) sickness of the employee,

(*b*) death of an immediate relative,

(*c*) weddings in the immediate family, and

(*d*) other leaves, specifically authorized by the Commission.

On reaching pension age, an employee will benefit from any unused *Credit Days* to the extent that *his full salary* will continue to be paid to him during a number of calendar days equivalent to the *accumulated reserve* he may have built up, *after which he will start drawing his pension* . . .

. . .

The goal of the Commission in adopting this new plan of *sickness pay allowance,* is to provide a greater measure of security. . .

I would, at once, draw attention to the expressions used by the originators of this benevolent initiative to qualify and describe it: "Sickness Benefit Plan; Credit Days; *accumulated reserve* . . . after which he (the employee) will start drawing *his pension*; sickness pay allowance", so many nouns without analogy to the accepted notion of a real pension. Moreover, this relief fund, referred to as an "accumulated reserve", is sharply contrasted with the

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Commission's regular pension scheme, of which the periodical instalments fall due only after the aforegoing "reserve" is exhausted.

In paragraph 3 of the Notice of Appeal, it is stated that:

> 3. The said plan in 1962 provided for dollar amounts accumulated as sick leave credits by a member to be applied on the death or retirement of the member first to payment of any arrears of pension contribution of such member *to the registered pension plan* of the Quebec Hydro-Electric Commission or to any other debt due by the member to the Quebec Hydro-Electric Commission . . .

Here again may be detected a clear enough indication of a specific difference between these "sick leave credits" and the Employees' registered pension plan, any arrears of which must be made good out of such sickness pay allowance. Otherwise, we would have a rather unfrequent instance of a supplementary pension serving, occasionally, to bolster up the principal one, something more akin to a form of insurance than to a true pension.

This Sickness Benefit plan was amended in 1962 and, as a result Molleur received, that year, a single payment of $10,740.13, in full settlement of his accumulated Credit Days or sickness pay allowances. At a credit rate of 7 working days prior to December 31, 1944, and 14 for subsequent years, so considerable a sum is a sure proof of the appellant's continued streak of unimpaired health over a lengthy span of years, and, also, of the important nature of his functions.

However, the receipt of so enviable an amount could be an unmitigated blessing only if the appellant's election "to have the said sum of $10,740.13 taxed, pursuant to the provision of section 36 (1)(*a*)(i)(C)," were not interfered with, an unfortunate contingency taking form and shape in the Minister's refusal to agree with Molleur's contention that the Sickness Benefit plan constituted "a supplementary non-contributory pension plan".

The appellant, in his written plea and oral argument, attached great significance to the fact that this sickness benefit plan, being amended on February 14, 1962, (cf. ex. 21), not to mention 22 other amendments (cf. exhibits 1 to 23), thereby entitled him to the option extended by s. 36(1)(*a*)(i)(C), an advantage available in the case, only, of a superannuation or pension fund.

The pertinent provisions of s. 36 enact that:

36. (1) In the case of

(*a*) a single payment

(i) out of or pursuant to a *Superannuation* or pension fund or plan

(A) . . .

(B) . . .

(C) to which the payee is entitled by virtue of an amendment to the plan although he continues to be an employee to whom the plan is applicable

. . .

(*c*) . . . the payment or payments made in a taxation year may, at the option of the taxpayer by whom it is or they are received, be deemed not to be income of the taxpayer for the purpose of this Part, in which case the taxpayer shall pay, in addition to any other tax payable for the year, a tax on the payment or aggregate of the payments equal to the proportion thereof that

(i) the aggregate of the taxes otherwise payable by the employee under this Part for the 3 years immediately preceding the taxation year (before making any deduction under section 33, 38 or 41) is of

(ii) the aggregate of the employee's income for those three years.

Obviously, an appreciable degree of fiscal alleviation would enure to the appellant, were he permitted to spread over the aggregate total income of the past 3 years this lump payment, in 1962, of his unused sickness credit days; but, as aforesaid, to this the Minister strongly objected.

This "superannuation or pension fund or plan" foreseen by the statutory text, just related in part, does exist since March 28, 1946, "to assure pensions to the Employees of Hydro-Quebec" (cf. ex. A-3). It was enacted by c. 27, 10 Geo. VI (1946), and amended in 1961 by c. 49, 9-10 Elizabeth II, of the Quebec Provincial Statutes.

The Hydro-Quebec Employees' Pension Plan, duly registered, is similar in all essential respects to the present day style of superannuation funds, providing for:

(*a*) A contribution of three per cent of his remuneration or salary to be paid by each employee benefiting from the by-law;

(*b*) A contribution by the commission of twice that of its employees (ex. A-3, s. 5). Compulsory contribution to the Pension fund for all employees is decreed by s. 5 of By-Law No. 12 (Revised); s. 25 renders all pensions and one-half pensions non-transferable and exempt from seizure. For all purposes and intents this remains

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the only pension scheme affecting the appellant of which proof was adduced before the Court.

A sickness benefit plan, such as the instant one, differs completely from a superannuation fund. To the differences previously mentioned, could be added several others: its applicability exists long before the beneficiary attains retirement age, to wit: ex. 21, "an Extract of Minutes of the Meeting of the Quebec Hydro-Electric Commission, held at Montreal, Que., on Wednesday, February 14, 1962..." decreeing that (s. 3): "The value of the days exceeding the maximum (130 days) shall be paid to an employee on the anniversary date of his permanency, at the salary rate in effect on the day preceding such date". Furthermore one may permissibly presume that a large number of employees availing themselves of these 14 days sickness leave of absence with pay, each year or practically so, use up, "as they go", any claim to those "credit days". Again, the non-contributory nature of the measure rules out the very fanciful hypothesis of an insurance device, essentially a bilateral contract depending upon payment of a premium by the insured.

Pension allowances or stipends presuppose the retirement or cessation of the pensioner's services, as no one draws from the same employer both a salary and superannuation instalments.

The Shorter Oxford Dictionary (third edition) defines the word thus:

Pension (4): An annuity or other periodical payment made, esp., by a government, a company, or an employer of labour, in consideration of past services or of the relinquishment of rights, claims, or emoluments.

The connotation in Words and Phrases[1] is to the same effect:

Pensions are universally construed as a reward for long-continued service paid upon retirement from service, and all pensions of public employees are paid upon their retirement

P. 552. "A Pension" is a stated allowance or stipend made in consideration of past services or of surrender of rights or emoluments to one retired from service, and is not wages as that word is used in Unemployment Compensation Act provision, wherein wages are defined as remuneration for employment.

Another analysis of the term in Quillet, Dictionnaire de la Langue Française[2] suggests identical conditions; I cite:

[1] Vol. 31A, at pp. 551-552.

[2] The 3-volume edition.

Pension de retraite, revenu annuel attribué sous certaines conditions d'âge et de services rendus, à un militaire, à un fonctionnaire, etc., qui a cessé son service.

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In brief, I readily agree with this finding of the learned Tax Appeal Board member, Mr. Maurice Boisvert, Q.C., that "At the very most it sets up a sickness benefit fund (designated in French under the expression of "caisse-maladie"), supplied by an accumulation of salaries withheld from the employees by the employer..." (*supra,* at p. 85).

Since, therefore, s. 36 of the *Income Tax Act* is predicated "on a single payment out of or *pursuant to a superannuation or pension fund or plan*" and, as the sickness pay allowance or Credit Days at issue herein is something quite different, the statutory enactment aforesaid has no application in the matter.

For the reasons above, the appeal is dismissed with taxable costs in favour of the respondent.

Appeal dismissed.

BETWEEN:

SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC and CIBA, S.A. — PLAINTIFFS;

AND

JULES R. GILBERT LIMITED, *et al.* .... DEFENDANTS.

Ottawa 1961 June 26-30, July 4-6 1965 May 3-7, 10-14 June 16

Patents—Infringement—New substance—Presumption of production by patented process—Patent containing three process claims—Infringement of one process only—Patent Act, s. 41(2)—"Invention", meaning of—Patent Act s. 2(d).

Plaintiffs' patent described and claimed three processes for producing a class of chemical substances. Defendants imported and sold in Canada tablets said to contain one of these substances. Plaintiffs sued for infringement of one of the processes claimed in their patent.

Section 41(2) of the *Patent Act* provides:

> "In an action for infringement of a patent where the invention relates to the production of a new substance, any substance of the same chemical composition and constitution shall, in the absence of proof to the contrary, be deemed to have been produced by the patented process."

Section 2(*d*) of the Act defines "invention" as meaning:

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"any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter;"

Neither plaintiffs nor defendants had any knowledge of how the tablets complained of were prepared or produced.

Held, the action must be dismissed. While the presumption might arise under s. 41(2) that the defendants' tablets were produced by one or other of the three processes described and claimed in plaintiffs' patent no presumption arose that the tablets were made by any particular one of them.

The word "invention" in s. 41(2) could not be restricted to the invention described in a particular process claim relied on by a plaintiff in an infringement action but meant the invention for which the patent was granted. The invention disclosed by the patent in suit was not merely the process described in the claim relied on but consisted both of new and useful substances and of the processes for their production. The various subject-matters of invention described in s. 2(*d*) could be read collectively where a particular invention consisted of both a new product and a process for producing it.

Re May & Baker Ltd. (1948) 65 R.P.C. 255 at 281; *Ciba v. Comm'r of Patents* [1959] S.C.R. 378; *Auer Incandescent Light Mfg. Co. v. O'Brien* (1897) 5 Ex. C.R. 243 at 286-288, referred to.

Patent Act, R.S.C. 1952, c. 203, s. 2(*d*) and s. 41(2)

ACTION for infringement of a patent.

Christopher Robinson, Q.C. and *R. S. Smart* for plaintiffs.

I. Goldsmith and *R. S. Caswell* for defendants.

THURLOW, J.:—In this action the plaintiffs claim an injunction and other relief in respect of alleged infringement by the defendants of claim 18 of Canadian patent number 474,637 which was granted to the first named plaintiff on June 19, 1951. The second named plaintiff sues as the exclusive licensee of the first named plaintiff under the patent.

The invention of the patent is entitled "Improvements in or relating to substituted diamines" and claim 18 thereof is a claim for a process for the production of a class of substituted diamines and their salts by reacting a particular secondary-tertiary diamine with any one of the compounds of a class numbering at least twelve known as pyridyl halides. The products of the process and their salts would thus number, theoretically, at least twelve multiplied by the number of known acids. One substance the production of which by this process, (whether with or without additional steps) would be within the claim is the

monohydrochloride salt of tripelennamine. Tripelennamine is the generic name of a particular substituted diamine having a complex molecular structure and a considerable number of lengthy but equally accurate chemical names.

The plaintiffs' complaint is that the defendant Jules R. Gilbert Limited by importing into and selling tripelennamine hydrochloride in Canada, and the other defendants by selling tripelennamine hydrochloride in Canada have infringed the claim in suit. By paragraph 6 of their defence the defendants admit the supplying by Gilbert Surgical Company Limited, which carries on business also under the firm name of Gilbert Surgical Supply Company, to the Department of Defence Production of tablets designated as tripelennamine hydrochloride and the supplying by the defendant Jules R. Gilbert Limited to the other defendant of tablets designated as tripelennamine hydrochloride but they deny that they have infringed the claim sued on and in particular they deny that any substance contained in the said tablets was produced by any one or more of the processes claimed in claim 18 of the patent in suit. In another paragraph they also plead that claim 18 is invalid for a number of reasons.

For the purposes of this action the parties have agreed:

1. That the process claimed in claim 18 of Canadian patent No. 474,637 consists in the application of methods which were known on June 22nd, 1943, to substances which were also known on the said date, though the said methods had never at the said date been applied to the said substances except by the inventor named in the said patent.
2. That the substance referred to in paragraphs 6 and 7 of the reamended Statement of Defence was not manufactured in Canada and was imported from outside Canada.
3. That none of the defendants has any knowledge as to the process by which the said substance was prepared or produced.

I should add that counsel for the plaintiffs stated at an early stage of the trial that the plaintiffs as well had no knowledge of the process by which the tablets complained of were prepared or produced and no evidence was led on the point, the plaintiffs' case being based entirely on the application of s. 41(2) of the *Patent Act*[1]. That subsection provides that:

41. (2) In an action for infringement of a patent where the invention relates to the production of a new substance, any substance of the same chemical composition and constitution shall, in the absence of proof to the contrary, be deemed to have been produced by the patented process.

[1] R.S.C. 1952, c. 203.

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It follows from paragraph 1 of the agreed statement of facts that there can be no patentable invention involved in or corresponding to the process claimed in claim 18 unless the process results in the production of substances which are both new and useful in the patent sense and that the essence of the invention of the process is the unexpected utility of its products. Re *May & Baker Limited*[1] and *Ciba v. Commissioner of Patents*[2]. There thus can be no invention of such a process without or apart from the invention of the substances as well. For the purpose of considering the question of infringement, I shall assume, as I think it is necessary to do for this purpose, that such novelty and utility of the products of the process of claim 18 exist and that the claim is valid.

But the question arises as to what is to be taken as the "invention" referred to in s. 41(2) of the *Patent Act*. Mr. Smart, in his able argument on behalf of the plaintiffs urged that the term refers only to the invention of the particular process claim or claims on which the plaintiff in an infringement action chooses to rely but I am unable to see the justification for so strained an interpretation of the words of the subsection. The subsection itself does not appear to me to refer to the particular claim relied on by a patentee but to the invention for which the patent has been granted. While it may be arguable that the scope of the subsection is now somewhat broader than it was when the enactment first appeared in the statute as a proviso[3] to what is now s-s. (1) of s. 41 the provision is still tied to situations in which a new substance has been invented and its object still is to afford to a patentee a means of discharging the onus of proof of the use of his patented process only where the invention relates to the production of a new substance. Its prime application originally was and still is to aid the proof of infringement of a claim for a production which is limited to that product when produced by a particular process or by particular processes.

By s. 2(*d*) of the Act the term "invention" is defined as meaning:

[1] (1948) 65 R P C 255 at 281. [2] [1959] S C.R. 378.
[3] S. of C. 1923, c. 23, s. 17.

any new and useful art, process[1], machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter;

but while these expressions may I think be read distributively I see no reason why they cannot or should not also be read collectively where a particular invention consists of both a new product and a process for producing it. No doubt a process claim such as the one here in suit may by itself be taken as defining an invention of the process, but the expression "the invention" in s. 41(2) in my opinion refers not to what may be embraced in any particular claim but to the "invention" of the patent for the infringement of which the action is brought.

The inventive act which the patent in suit purports to disclose with respect to the substituted diamines which may be produced by the process of claim 18 is not confined to the process of claim 18. It consists in the devising of the new substances and of methods for producing them and of the discovery of their useful properties but it is the discovery of their useful properties which turns what would otherwise be a fruitless laboratory exercise into an invention. This discovery may be viewed and described as a discovery of the useful properties which the new substances produced by the processes possess or it may be viewed and described as a discovery that the processes produce new substances which have useful properties but whichever way it is viewed and described, the discovery is the same and the inventive act resulted in a single invention consisting of both the new and useful substances and of the processes for their production.[2] For the sake of simplicity in this discussion the invention here in question may I think be treated as being concerned only with tripelennamine but for the purpose of s. 41(2) that "invention" must in my opinion be taken as consisting both of that substance and of the methods for producing it which the inventor has disclosed and patented.

[1] The word "process" was added to the definition at the same time as the enactment of what is now s. 41(2). *Vide* S. of C. 1923, c. 23. Prior to that the definition of invention had remained in the form in which it appears in R S.C. 1886, c. 61.

[2] *Vide: The Auer Incandescent Light Manufacturing Co. v. O'Brien* (1897) 5 Ex. C R. 243 at pp. 286-288.

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When s. 41(2) is so read it is clear that the plaintiffs' action must fail for the patent itself discloses and claims not one but three processes for producing tripelennamine of which claim 18 embraces only one and while s. 41(2) might conceivably apply to raise the presumption that the tablets in question were produced by some one or another of these three processes (if the fact of their containing tripelennamine hydrochloride should be regarded as established, as to which I have some doubt) I am unable to read the subsection as raising a presumption that the tablets were made by any particular one of them and there is thus no case for holding that the tablets were made by the process of claim 18.

In the course of the argument counsel for the defendants also raised a number of other contentions on the issue of infringement and made a strong attack on the validity of the claim in suit but in view of the conclusion which I have expressed it does not appear to me to be necessary to deal with the matters so raised.

The action will be dismissed with costs.

Action dismissed.

Charlottetown 1965

May 31, June 1

Ottawa June 16

BETWEEN:

ETHEL BLANCH CONWAY, KATHLEEN CONWAY, HENRY JOSEPH CONWAY and EASTERN & CHARTERED TRUST COMPANY, Executors of the Last Will and Testament of MICHAEL J. CONWAY, Deceased ... } APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Estate tax—Appeal from assessment—Joint bank account set up by husband for wife's future benefit—Account used solely by husband for business—Death of husband—Whether widow had beneficial interest in account—Onus of proof—Estate Tax Act, ss. 3(1)(a), (c), (f), 3(2)(a).

Evidence—Appeal from tax assessment—Onus on appellant to rebut assumption underlying assessment—Onus where new basis for tax asserted after assessment appealed.

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M.C. set up a joint bank account in 1944 or earlier in the names of himself and his wife and told her that he did so to ensure that she would get the moneys therein on his death. M.C. used the account for purposes of his business and no deposits or withdrawals were made by his wife. He had other bank accounts for other purposes in his own name. When M.C. died on 7 June 1961 the account contained $26,705, and sums of that amount had been deposited in the account in 1960 and 1961. The Minister assessed the estate in respect of the whole $26,705 on the ground that M.C. was competent to dispose of the property immediately prior to his death (*Estate Tax Act*, s. 3(1)(*a*)), and that the widow had no beneficial interest in the account prior to M.C.'s death (s. 3(1)(*e*)). After the assessment had been appealed the Minister contended alternatively that if the widow did have a one-half undivided interest in the account prior to M.C.'s death it arose from deposits made by M.C. within three years of his death and was therefore chargeable under s. 3(1)(*c*).

Held, the assessment could not stand.

1. Where a husband transfers property to his wife, whether jointly with himself or otherwise, a gift of the property from the time of the transfer is presumed, subject to rebuttal [*In re Mailman* [1941] S.C.R. 368, per Crocket J. at p. 375; *Niles v. Lake* [1947] S.C.R. 291, per Kellock J. at p. 311]. Such presumption is not to be taken lightly [*Shephard v. Cartwright* [1954] 3 All E.R. 649, per Lord Simonds at p. 652]. The presumption was not rebutted in this case by evidence as to the use of the account by M.C. for purposes of his business: that evidence did not warrant the inference that his object in establishing the account was to provide a convenient means of transacting his business [*Marshall v. Crutwell* (1875) L.R. 20 Eq. 328; *Southby v. Southby* (1917) 40 O.L.R. 429; *Maclean v. Vessey* [1935] 4 D.L.R. 170 distinguished on the facts], or that his object in establishing the account was to benefit his wife only after his death but not during his life [*Laurendeau v. Laurendeau* [1954] O.W.N. 722, *Hill v. Hill* (1904) 8 O.L.R. 710, distinguished].

2. *Semble*, the presumption in favour of a gift by a husband to his wife applies to the income from joint property as well as to the capital thereof [*Re Hood* [1923] 1 Ir. R. 109; *Dummer v. Pitcher* (1833) 2 My. & K. 262, per Brougham L.C. at p. 273; *Fowkes v. Pascoe* (1875) L.R. 10 Ch. App. 343 explained], but even if the presumption with respect to the income were otherwise such presumption was rebutted by the fact that interest credited to the joint account was not withdrawn but left there as part of the whole.

3. The onus of supporting the assessment under the Minister's alternative plea, *viz* that the wife's undivided interest in the account resulted from gifts made by the deceased within three years of his death, was not on appellants but on the Minister and had not been met. There was no proof that the deposits made by the deceased in 1960 and 1961 represented gifts rather than replacements of jointly owned moneys withdrawn by the deceased [*Johnson v. M.N.R.* [1948] S.C.R. 486, distinguished].

4. The fact that the deceased could have withdrawn the whole balance in the account whenever he wished did not render the whole balance in the account property of which he was competent to dispose within the meaning of s. 3(1)(*a*) and s. 3(2)(*a*). If withdrawn by him the property would still have remained joint property in his hands and he

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would have been accountable to his wife for her interest therein [*Re Daly; Daly v. Brown* (1907) 39 S.C.R. 122, per MacLennan J. at p. 148 applied].

APPEAL from judgment of Income Tax Appeal Board dismissing an appeal from an estate tax assessment.

K. M. Martin, Q.C. and *A. K. Scales* for appellants.

G. W. Ainslie and L. M. Little for respondent.

THURLOW J.:—This is an appeal by the executors of the Estate of Michael J. Conway, deceased, from a judgment of the Tax Appeal Board[1] dismissing their appeal from an assessment of estate tax. On June 7, 1961 when Michael J. Conway died there was a balance of $26,705.84 in an account at The Royal Bank of Canada in Charlottetown in the joint names of the deceased and his wife, Helen Conway and the matter in issue is whether estate tax is payable in respect of the whole or of only one half of such balance.

The deceased, who died at an advanced age, left an estate valued in excess of $100,000. He had been engaged for many years in a sand and gravel business carried on at Charlottetown at first on his own and from January 1, 1946 to the time of his death in partnership with one of his sons. Among other assets standing in his name when he died were savings accounts at The Bank of Nova Scotia and at The Provincial Bank with balances of $17,597.24 and $11,-449.48 respectively and a personal chequing account at The Royal Bank of Canada showing a balance of $204.36. The account at The Bank of Nova Scotia had been used mainly, if not entirely, to deposit receipts and pay expenses of an apartment building which he had acquired and the account at The Provincial Bank had been similarly used in connection with a dwelling house which he had let to a tenant.

The account in question in the appeal was also a savings account. It is admitted that it had been in existence for upwards of thirty years and it seems not unlikely that it may have been carried on for more than forty years. The Minister does not admit, however, that the account was a joint account for the whole period. There is in evidence a bank joint deposit form of the kind considered in *Niles v. Lake*[2] which bears the signatures of the deceased and Helen Conway and is dated March 15, 1944 but there is no

[1] 34 Tax A.B.C. 390. [2] [1947] S.C.R. 291.

document showing what the arrangement with the bank was prior to that. From the fact that the pass book (Exhibit 4, No. 5) shows no alteration in the account at that time and in particular no change in the numbering of it it seems to me to be more probable that this was a joint account even before the signing of the particular bank form in evidence than that it was in the name of the deceased alone prior to that time.

On May 2, 1929, the earliest date shown in the pass books in evidence, the balance in this account stood at $7,901.87. Thereafter in general it increased from year to year and on March 15, 1944 it stood at $22,564.85. On June 7, 1958, that is to say, three years before the deceased died, the balance was $28,228.62. Between 1930 and 1936 there were substantial deposits and minor withdrawals each year. From 1936 onward the number of entries increased and it is common ground that about that time the deceased began depositing receipts from his sand and gravel business in the account and paying therefrom expenses of the business. This practice continued even after the commencement of the partnership and up to the time of his death. It is in evidence, however, that the deceased was wont to do business in cash and it seems unlikely that all of the transactions of the business are reflected in the entries in the account.

Helen Conway made neither deposits in nor withdrawals from this account. In a statutory declaration dated March 29, 1962, which was admitted in evidence by consent, she stated *inter alia* that her husband "explained to [her] that his purpose [in establishing the account] was to make certain that whatever happened at his death [she] would get whatever moneys he had, and over the subsequent years he frequently reminded [her] that whatever was there when he was gone would be [hers]".

The deceased left a will dated April 15, 1959 in which he appointed as his executors three of his children and The Eastern Trust Company and these are the appellants in the present appeal. The will contains provisions for his widow, children and grandchildren but does not specifically mention any of the bank accounts. In an Estate Tax return completed by the corporate appellant the account in question was disclosed as a joint account and half of its balance

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was included in the executors' computation of the value of the deceased's estate. The Minister, however, in making the assessment added the other half of the balance as well and following a notice of objection confirmed the assessment as having been made in accordance with the provisions of the Act and "in particular on the ground that the bank account No. 339 at The Royal Bank of Canada was not a true joint account; that the beneficial interest arising by survivorship on the death of the taxpayer was for the entire amount on deposit and therefore upon application of paragraph (*f*) of subsection (1) of section 3 of the *Estate Tax Act* the entire amount on deposit in said bank account is to be included in computing the aggregate net value of the estate of the taxpayer".

In his reply to the appellant's notice of appeal to this Court the Minister expanded the grounds so relied on. He pleaded that on assessing he assumed that:

(*a*) the deceased, immediately prior to his death was the beneficial owner of the savings account with The Royal Bank of Canada at Charlottetown, which, on his death, had a balance of $26,705.84;

(*b*) Mrs. Helen Conway, immediately prior to the death of the deceased, had no beneficial interest in the said account; and

(*c*) on the death of the deceased, the beneficial interest in the debt of $26,705.84, owing by The Royal Bank of Canada to the deceased, as evidenced by the said savings account, arose or accrued by survivorship to Mrs. Helen Conway.

and he went on to submit that the whole of the $26,705.84 representing the balance in the account was property

(*a*) which passed on the death of the deceased within the meaning of s.s. (1) of sec. 3 of the Estate Tax Act, 7 Eliz. II, c. 29;

(*b*) which the deceased was, immediately prior to his death, competent to dispose of within the meaning of para. (*a*) of s.s.(1) of sec. 3 of the Estate Tax Act;

(*c*) in respect of which the deceased had such an estate or interest therein, or such general power as would have enabled him to dispose of it within the meaning of para. (*a*) of s.s.(2) of sec. 3 of the Estate Tax Act; and

(*d*) which was held jointly and in respect of which the whole beneficial interest therein arose or accrued on the death of the deceased within the meaning of para. (*f*) of s.s.(1) of sec. 3 of the Estate Tax Act.

As an alternative the Minister also pleaded that if immediately prior to the death of the deceased Mrs. Helen Conway had a one-half undivided interest in the debt of $26,705.84 owing by the bank, the interest of Mrs. Conway arose in respect of deposits made by the deceased within three years

immediately prior to his death and that the said deposits were dispositions operating as immediate gifts *inter vivos* and he sought to support the assessments under ss. 3(1)(*a*), 3(2)(*a*) and 3(1)(*c*) of the Act.

I have set out this summary of the Minister's various pleas because it appears to me that the onus of proof is not the same for all of them. The effect of the judgment of the Supreme Court in *Johnson v. M.N.R.*[1] is that in order to succeed in their appeal the appellants had the onus of demolishing the basic facts assumed by the Minister in making the assessment. There is, however, nothing in the judgment in that case which suggests that the onus is upon a taxpayer to disprove every other basis upon which an assessment could conceivably be justified, and I do not think any such onus rested on the appellants in the present case. In particular I do not think it was for the appellants to disprove the facts alleged in the Minister's alternative plea. If the assumptions upon which the assessment was based have been demolished it appears to me that the appellants are entitled to succeed unless the facts necessary to justify the taxation under the alternative plea have also been established by the evidence. The onus of supporting the assessment under the alternative plea was accordingly not on the appellants but on the Minister. *Vide Pillsbury Holdings Ltd. v. M.N.R.*[2]

On the hearing of the appeal the main submission put forward on behalf of the Minister was that Mrs. Conway, though a joint holder with her husband of the legal title to the debt owing by the bank in respect of the balance from time to time of the account, had no beneficial interest in the property during her husband's lifetime and that on his death Mrs. Conway either

(*a*) acquired no beneficial interest therein by survivorship, in which event the amount on deposit fell to be included in the aggregate net value of his estate for estate tax purposes simply as part of his estate; or

(*b*) alternatively, became entitled to the whole beneficial interest by survivorship in which event the whole balance on deposit fell to be included in the aggregate net value of his estate for tax purposes under s. 3(1)(*f*) of the Act.

[1] [1948] S.C.R. 486. [2] [1964] C.T.C. 294 at 302.

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In support of his contention that Mrs. Conway had no beneficial interest in the money in the account during the life of the deceased counsel first submitted that while a presumption of advancement arises where property belonging to a husband is transferred by him into the joint names of himself and his wife, in the case of pure personalty, as opposed to realty, there arises a rebuttable presumption that the husband intended to enjoy the whole income therefrom during their joint lives and that the extent of the benefit conferred on the wife is only a contingent right to the capital should she survive. For this proposition he cited a statement to that effect in Dymond's Death Duties, 12th Edition at page 196 which in turn cites *Fowkes v. Pascoe*[1], *Standing v. Bowring*[2], *In re Eykyn's Trusts*[3] *and Re Hood*[4].

As I understand it the principle upon which the beneficial ownership of property held jointly by two or more persons is determined, where the property has been contributed by one of them alone, is that while at law the title is vested in the joint holders, if valuable consideration has not been given therefor by the other or others, they, in equity, hold on a resulting trust for the contributor of the property, except in cases in which the contributor intended to make a gift of some interest in the property to the other joint holder or holders. Where a gift is intended (or perhaps as some cases indicate, to the extent to which a gift is intended) such other joint holders are not trustees and the equitable title follows the legal title. The intention to make such a gift may appear either from express declaration by the contributor to that effect or from circumstances but where a transfer is made by a husband to his wife or by a father to his child whether jointly with himself or otherwise a gift is presumed until the contrary is shown. Thus in *In re Estate of Hannah Mailman*[4], Crocket, J. speaking for the majority of the Supreme Court said at page 374:

> That both law and equity interpose such a presumption against an intention to create a joint tenancy, except where a father makes an investment or bank deposit in the names of himself and a natural or adopted child or a husband does so in the names of himself and his wife, is now too firmly settled to admit of any controversy. This presumption, of course, is a rebuttable presumption, which may always be overborne by the

[1] (1875) 10 Ch. App. 343.
[2] (1885) 31 Ch. D. 282.
[3] (1877) 6 Ch. D. 115.
[4] [1923] 1 Ir. R. 109.
[5] [1941] S.C.R. 368.

owners previous or contemporaneous oral statements or any other relevant facts or circumstances from which his or her real purpose in making the investment or opening the account in that form may reasonably be inferred to have been otherwise. In the absence, however, of any such evidence to the contrary the presumption of law must prevail. That is the clear result of such leading English cases as *Dyer v. Dyer* (1785) 2 W. & T.'s Leading Cases, 8th ed. 820; *Fowkes v. Pascoe* (1875) 10 Ch. App. 343; *Marshall v. Crutwell* (1875) L.R. 20 Eq 328; *In re Eykyn's Trusts* (1877) 6 Ch.D. 115; *Bennet v. Bennet* (1879) 10 Ch.D. 474, and *Standing v. Bowring* (1885) 31 Ch.D. 282. This principle has been uniformly recognized in Canada wherever the courts have been required to adjudicate upon claims depending upon the creation of a joint tenancy or gift of a joint interest when the owner of the money involved has made investments or bank deposits in his own and another's names.

It will be observed that in this passage Crocket, J. also referred to *Fowkes v. Pascoe, In re Eykyn's Trusts* and *Standing v. Bowring* and in my opinion these cases are not inconsistent with the view that when the transfer is a gift a joint ownership by the husband and the wife of the capital at least, even if not, in all cases, of the income as well, exists during the joint lives. That such a joint ownership exists from the time of the transfer is I think implicit in the following statement of Crocket J. which follows at page 375 the passage already quoted:

> There have been many such cases, particularly in Ontario and New Brunswick. Some of these involved disputes between the executor or administrator of a deceased father and a surviving son or daughter, and others disputes between the executor or administrator of a deceased husband and his surviving widow, where the presumption is in favour of a joint tenancy or a gift of a joint interest for the benefit of the child or of the wife, as the case may be.

The same appears from the statement of Kellock J. in *Niles v. Lake*[1] at page 311:

> The mere transfer into the joint names or purchase in joint names is sufficient to constitute joint ownership with its attendant right of survivorship. As put in Williams on Personal Property, 18th Ed., p. 518:
>
> > "If personal property, whether in possession or in action, be given to A and B simply, they will be joint owners ***. As a further consequence of the unity of joint ownership, the important right of survivorship, which distinguishes a joint tenancy of real estate, belongs also to a joint ownership of personal property."

So far as the capital is concerned, I therefore reject the submission that in a case of this kind the wife is presumed to have no interest in the joint property during the joint lives.

Moreover, while the basis for the decision in *Re Hood*[2] that the husband was entitled to the income of the joint

[1] [1947] S.C.R. 291.

[2] [1923] 1 Ir. R. 109.

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property during the joint lives does not appear from the judgment, a possible explanation, which would not I think apply today, is suggested in the judgment of the Lord Chancellor Brougham in *Dummer v. Pitcher*[1] where at page 273 he said:

> It was further contended that the circumstance of the testator's power over this *chose in action* continuing after the transfer and up to his death differs this from the case of advancement to a child. But there is a great fallacy here, as it seems to me. The testator's power may have continued, but in what capacity? As husband, and in the exercise of his marital right.

On the other hand in decisions on gifts of joint interests other than by a husband to his wife the right of the donor to the income during the joint lives appears to have rested on what was presumed in the circumstances to be the intention of the donor at the time of the making of the gift (*vide Fowkes v. Pascoe*[2] at page 351). No doubt circumstances may be conceived in which such an inference might also be drawn in the case of a gift of a joint interest by a husband to his wife. Under present day law relating to the legal capacities and rights of married women in the absence of either direct or circumstantial evidence of what the intention was I can see no sufficient reason for raising with respect to income any different presumption from that applicable in respect to the capital but whether there is a different presumption or not it is clear that it is rebuttable and must yield to the proper inference to be drawn from the circumstances of the particular case. As will appear the intention in the present case in my opinion appears from the facts in evidence.

The respondent's second submission was that even if it is to be presumed that Mrs. Conway had a beneficial interest in the property during the lifetime of her husband, the proper inference from the facts in evidence is that it was not intended that she should have such an interest while her husband lived. Two arguments to this effect were put forward. It was said first that the deceased's intention in establishing the joint account was merely to provide a convenient means of transacting his business and in this connection reference was made to *Marshall v. Crutwell*[3], *Southby v. Southby*[4] and *Maclean v. Vessey*[5] in each of which it appeared from the evidence that the object of the

[1] (1833) 2 My. & K. 262; 39 E.R. 944. [2] (1875) L.R. 10 Ch. App. 343.
[3] (1875) L.R. 20 Eq. 328. [4] (1917) 40 O.L.R. 429.
[5] [1935] 4 D.L.R. 170.

husband in establishing the joint bank account was to provide a convenient way of handling his own affairs. In my view there is no similarity on this point between these cases and the present case and such an inference as to the deceased's intention is not in my opinion warranted on the facts in evidence. There is nothing to suggest any need for any such arrangement at the time of the establishment of the joint account, whether that event occurred in 1944 or earlier, either on the ground of absence or illness of the deceased or inability to attend to his own affairs and Mrs. Conway apparently never did transact her husband's business for him. In addition there is evidence that his purpose was to confer a benefit on her and there is also the fact that in connection with his apartment building and rented house he kept the bank accounts in his own name. What convenience in carrying on his affairs was served by having this account in the joint names of himself and his wife I am unable to see. This contention accordingly fails.

Secondly, it was said that even if the deceased, when establishing the account intended to benefit his wife the evidence showed that he did not intend her to benefit during his life and that such an intention was either ineffective because it was an attempt to make a testamentary disposition otherwise than by a properly executed will with the result that the property passed on the death of her husband, or, if effective, such benefit arose or accrued to her by survivorship on his death. In support of this contention counsel referred to a number of features of the case appearing from the evidence, most of which in my view indicate nothing one way or the other as to the deceased's intention when the joint account was established, and he relied particularly on the statement, to which I have already referred, in the statutory declaration of Mrs. Conway coupled with the conduct of the deceased in using the account to deposit receipts from and pay the expenses of his business and in keeping the pass book with his personal belongings in his dwelling rather than in that portion of the dwelling used for the purposes of his business.

The question is whether these and the other facts referred to in the light of such other circumstances as have been established rebut the presumption that an immediate gift of an undivided interest in the balance in the account was

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intended. That the presumption is not to be taken lightly appears from *Shephard v. Cartwright*[1] where Lord Simonds said at page 652:

> Equally it is clear that the presumption may be rebutted, but should not, as Lord Eldon said, give way to slight circumstances.

Here the facts urged are I think equivocal at best and in my view they do not lead to the conclusion that Mrs. Conway was to have no interest during the joint lives. As I read it the statement in the statutory declaration of Mrs. Conway as to the deceased's purpose in establishing the account does not indicate an attempt on his part to confer a benefit on his wife to take effect only upon his death but on the contrary shows an intention to make certain that she would have the money in this account if she survived him by making a present gift to her of a joint interest in it so that her right to it would be unaffected "whatever happened at his death" with respect to the remainder of his property. It does not seem unlikely to me that when establishing the account as a joint account the deceased may have intended to deposit in it from time to time for their joint benefit moneys which he had been able to save, whether from his business or from other sources and the payment into the account of receipts from his business and the payment out of it of business expenses whether adopted as a practice before or after the account was established in their joint names may have been his way of carrying that intention into effect. It is not to be forgotten that the relationship was that of husband and wife and that the deceased was apparently the spouse who transacted the family's business and it does not seem improbable to me that Mrs. Conway should have left the management of her interest in the account to him in view of the fact that the balance in the account tended to grow rather than decrease as time went by. On the whole I can see nothing in the facts before me which is inconsistent with an intention on the part of the deceased at any material time to confer on his wife a joint interest in the moneys in the account. Moreover there is in this case no proof that Mrs. Conway was prohibited from exercising rights in respect of the account during the deceased's lifetime, as was the case in *Laurendeau v. Laurendeau*[2] or that

[1] [1954] 3 All E.R. 649.

[2] [1954] O.W.N. 722.

there was an understanding between Mrs. Conway and the deceased that the deceased alone should have the right to control and dispose of the property so long as he lived as was the case in *Hill v. Hill*[1]. And whle it was said that the deceased kept the pass books with his personal belongings in the home rather than in the part of the house used for the purposes of his business, it is not shown that they were kept in a place to which Mrs. Conway did not have free access or that she was ever denied access to them. The case is thus in my opinion not one of an intended testamentary disposition which is ineffective because of failure to comply with the formalities involved in making such a disposition and I am further of the opinion that there is nothing in the material before me which rebuts the presumption insofar as the capital is concerned. Moreover as any interest income on the account appears to have been added to the balance when credited and not to have been withdrawn but to have been left there and subsequently treated as part of the whole I am of the opinion that the result is the same with respect to the ownership during the joint lives of such interest as well. It follows in my opinion that Mrs. Conway was entitled to an undivided half interest in the balance standing in account at the time of the death of the deceased and that the extent of any beneficial interest in the account which arose or accrued to her by survivorship or otherwise on the death of the deceased amounted to no more than the other undivided half of the said balance that is to say the undivided half thereof held by the deceased at the time of his death.

I turn now to the further ground upon which it was sought to support the assessment, that is to say, that the undivided interest of Mrs. Conway in the joint account immediately prior to the death of the deceased was property disposed of by the deceased under dispositions operating as immediate gifts *inter vivos* made within three years prior to his death. The facts upon which this ground was urged were that the withdrawals from the account after June 7, 1958 had exhausted the $28,288.62 which was in the account at that date and that the balance of $26,705.84 in the account on June 7, 1961, when the deceased died, was made up entirely of sums which he had deposited in the

[1] (1904) 8 O.L.R. 710.

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account in 1960 and 1961. These deposits, it was urged, represented gifts *inter vivos* by the deceased to his wife within three years prior to his death of an undivided half interest in the amounts deposited and fell to be included under s. 3(1)(*c*) of the Act. The short answer to this is that there is no proof that such deposits represented gifts rather than replacements of jointly owned moneys withdrawn by the deceased from the joint account whether pursuant to some arrangement between himself and his wife or otherwise. The onus of proving that these deposits were gifts, in my opinion, rested on the respondent if the assessment was to be sustained on this ground and in my view the necessary facts have not been established.

The remaining argument put forward in support of the assessment was that since the deceased could have withdrawn the whole balance of the account whenever he saw fit the whole balance was property of which he was competent to dispose and fell to be included under ss. 3(1)(*a*) and 3(2)(*a*) of the Act. Granting that he could have withdrawn the money from the bank that alone would not in my opinion have changed the ownership of the amount. Having been joint property of him and his wife while on deposit, when withdrawn it would have been nonetheless joint property in his hands, (*vide* MacLennan J. in *Re Daly; Daly v. Brown*[1] at page 148) and he would have been accountable to his wife for her interest therein. On the facts before me the deceased had no right on withdrawing the balance either to make it his own or to dispose of it without his wife's consent and in my opinion her interest in the money in the account was accordingly not property of which he was competent to dispose within the meaning of the statutory provisions.

The appeal accordingly succeeds and it will be allowed with costs and the assessment will be referred back to the Minister to be varied by decreasing the aggregate net value of the estate by $13,352.92 and by reducing the tax and interest, as assessed, accordingly.

Appeal allowed.

[1] (1907) 39 S.C.R. 122.

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

ARTHUR MIDDLEBROOK and JOSEPH MUZYKA.....DEFENDANTS.

New Westminster 1965
June 21-25
June 25

Expropriation—Unregistered lease of land in British Columbia for more than three years—Land Registry Act, R.S.B.C. 1960, c. 208, s. 35—Right to compensation.

While s 35 of the *Land Registry Act*, R S.B C. 1960, c. 208 renders null an unregistered lease of land in British Columbia for a term exceeding three years as against a *bona fide* purchaser for value without notice, the lessee has an enforceable interest in the land against the lessor and is entitled to be compensated therefor if the land is expropriated.

ACTION to determine compensation payable upon expropriation of property.

Watson T. Hunter and *Harvey A. Newman* for plaintiff.

Lloyd H. Wilson for defendants.

JACKETT P.:—(Delivered orally at the conclusion of the trial) This is an action under section 27 of the *Expropriation Act*, R.S.C. 1952, chapter 106, to determine the compensation payable to the named defendants in respect of the expropriation on December 12, 1962, of property in the Municipality of Matsqui, British Columbia, for a drug addict institution.

For many years before the expropriation, the defendant Arthur Middlebrook was the owner of approximately 91.84 acres of land with a frontage of 1,287.45 feet on the Huntingdon Road, and a depth for the most part of 2,496 feet. At the time of the expropriation, Middlebrook was operating a beef and pig farm business upon the property—that is, he acquired cattle and pigs, and after getting them in shape for market, resold them. He had on the premises, at the time of the expropriation, a new house not quite finished, an old house that was not at that time being used, a very large barn that was adaptable for dairy farming, although it was being used for beef farming and to some extent for pigs, special buildings for pigs, a machine shed, a good well and pump, and other improvements.

Many years before the expropriation, Middlebrook had permitted one Smith to erect a slaughter-house building on

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his farm some 537 feet from the Huntingdon Road and to construct a road giving the slaughter-house access to the Huntingdon Road. At the end of 1958, Smith sold to the defendant Muzyka the chattels and equipment that he had been using in the slaughter-house business, his firm name "The Abbotsford Slaughter-house" and the goodwill of his business, for the sum of $1,850. Muzyka, in the first instance, used the premises on Middlebrook's farm under an understanding that, in consideration therefor, he would do Middlebrook's slaughtering—both any that Middlebrook required personally and any required for Middlebrook's customers—without charge, and would permit Middlebrook to have the waste from the slaughter-house as fertilizer for his farm. After this arrangement had been in force for some time, Middlebrook and Muzyka made an oral agreement for a 99-year lease of a defined area of land for his slaughter-house business and of the access road. In October, 1962, a lease was executed by the two defendants for a 99-year term commencing June 15, 1960. That lease expressly provided that the buildings, fixtures, and equipment on the premises are the property absolutely of Muzyka, and removable by him during the term of the lease. Muzyka was to pay a lump sum consideration for this lease, and Middlebrook was thereafter to pay for his business slaughtering, but was still to have the waste from the slaughter-house for fertilizer.

Middlebrook's title to his farm property was subject to a right of way across one corner of the property in favour of British Columbia Electric Company Limited. The property was expropriated subject to the same right of way, although the Information indicates that the property was expropriated outright. (*See* paragraphs 2 and 3 of the Information). It is, therefore, unnecessary to take any account of this right of way in these proceedings, except to consider whether it reduces the market value of the expropriated property, which I have done in the findings that I am about to state, although I shall not refer to the right of way again.

The Information alleges that the property described therein was taken "except mines and minerals". That exception does not appear in the description of the property expropriated. However, it is conceded by counsel that

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Middlebrook did not own the mines and minerals so that the property with which we are concerned in these proceedings is the property as described in the expropriation documents, and in the Information, "except mines and minerals".

The amended Information filed by the Deputy Attorney General of Canada shows that the defendant Muzyka claimed an interest in the expropriated property by virtue of the 99-year lease to which I have already referred, and states that the Crown does not admit that Muzyka had any interest in the expropriated property. A single statement of defence was filed on behalf of both defendants. As amended, that statement of defence alleges that Muzyka did have the 99-year leasehold interest in the expropriated property, and did, at the time of the expropriation, own the buildings, fixtures and equipment on the leasehold property.

There were other encumbrances on the expropriated property at the time of the expropriation, but it is common ground that, under the usual form of judgment, the compensation awarded to Middlebrook will be payable to him subject to his supplying releases in respect of such encumbrances.

It is also common ground that the plaintiff paid Middlebrook $56,000 on account of the compensation to which he is entitled on September 13, 1963, and that the plaintiff paid Muzyka $5,000 on account of the compensation, if any, to which he may be entitled on February 21, 1964. It is also agreed that Middlebrook gave up possession of all the property taken, except the residence and some 18 acres, on February 1, 1963, and of the 18 acres on June 1, 1964. He still has possession of the residence. Muzyka vacated the slaughter-house property on March 4, 1964.

By the Information as amended at the trial, it is stated that the Crown is willing to pay to Middlebrook $84,400 by way of compensation for his interest or the interest of any other person in the expropriated land, and for all loss or damage occasioned by the expropriation to Middlebrook or any other person. The Information, as amended at trial, also states that, if Muzyka had a leasehold interest, the Crown is willing to pay to him $8,250 for his interest, and for any loss or damage sustained by him or any other person by reason of the expropriation. While these portions of the

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Information as amended are not as clear as they might be, counsel agreed that these two amounts are cumulative, and that the Information is to be read as stating that the Crown is willing to pay

(*a*) $8,250 for a release of all claims in respect of the expropriation of Muzyka's 99-year lease, if it was a valid interest in the expropriated property, plus

(*b*) $84,400 for a release of all other claims arising out of the expropriation except any possible claim in respect of mines and minerals.

The amended statement of defence claims not less than $15,000 in respect of the expropriation of Muzyka's interest in the expropriated property and not less than $100,000 in respect of the expropriation of Middlebrook's interest, or a total amount in respect of the expropriation of not less than $115,000.

The defendants have the onus of establishing the compensation to which they are respectively entitled. They were represented at the trial by the same counsel, and the same evidence was introduced on behalf of both of them.

Before dealing with the evidence as to the amount of compensation, I must first dispose of the question as to the validity of Muzyka's interest in the land at the time of expropriation. The doubt as to the validity of his 99-year lease is, in effect, based on section 35 of the *Land Registry Act*, chapter 208 of the Revised Statutes of British Columbia of 1960, which reads in part as follows:

> . . . no instrument executed and taking effect after the thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein, shall become operative to pass any estate or interest, either at law or in equity, in the land (except a leasehold interest in possession for a term not exceeding three years) until the instrument is registered in compliance with the provisions of this Act;

Muzyka's lease was not registered, and section 35 undoubtedly makes it a nullity in so far as a *bona fide* purchaser for value without notice is concerned. Muzyka had no legal title. As between the parties, however, Muzyka had, at the time of the expropriation, in my view, an enforceable interest in the land in the same way that a purchaser under an agreement for sale has an interest. It has long since been settled that the holder of such an interest is entitled to compensation under the *Expropriation Act*. I, therefore, reject the attack on Muzyka's right to claim compensation.

With reference to the compensation to which Muzyka is entitled, the evidence led on behalf of the defendants puts his claim at a total amount of $12,500 broken down as follows:

Buildings	$ 4,500	
Land	4,000	
Disturbance	4,000	(being one year's profits)
	$ 12,500	

It is difficult to reach any conclusion as to the market value of Muzyka's leasehold interest in the property at the time of the expropriation. There is no evidence upon which I can make any finding that a reasonably prudent person would have paid him any substantial amount for his leasehold interest, as part of the assets of his slaughter-house business or otherwise. It seems that such small slaughter-house businesses are on the way out in British Columbia. It is said that it is almost impossible to get new licenses for such a business, and that the authorities are becoming more strict in relation to existing ones. There is no doubt, however, that Muzyka's lease does adversely affect the value of the expropriated property for its highest and best use, whatever that may be. Furthermore, Muzyka is a butcher by trade and has shown by the way in which he has developed his business since he acquired it in 1958, putting both his labour and earnings into the development and expansion of the physical assets of the business, that he sets great store on being able to continue to operate his own slaughter-house business. I am satisfied that a reasonably prudent man with Muzyka's trade, interests and desire to pursue the way of life to which he had become accustomed would, had he been in possession of the leasehold property at the time of the expropriation without any interest in the land, have paid $12,500 for the balance of the lease rather than lose the property and with it practically all ability to get any usefulness or return from the quite substantial assets that he had built up around his business. I therefore find that the value to Muzyka of his interest in the expropriated property at the time of the expropriation was $12,500.

The next question is what was the value to Middlebrook of the expropriated property subject to Muzyka's leasehold rights. All the evidence is to the effect that

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Middlebrook's claim must be for market value and that there was no special value for him as an owner in possession. It is a fact that he was using the land for beef and pig farming, and it seems clear that this was not the highest and best use of the land. The defendants' position was that the highest and best use of the expropriated property was as a small fruits farm devoted exclusively to the production of raspberries. Indeed, the evidence from both sides is to the effect that the property in question is specially well suited to a raspberry operation.

The defendants' evidence values all the expropriated land for raspberry production as follows:

(*a*) 47 84 acres that at the time of the expropriation were cleared and ready for raspberries, at $1,250 per acre, or...	$ 59,800
(*b*) 35 42 acres that were cleared and useable as pasture but still had tree stumps, at $800 per acre, or	30,107
(*c*) 8.97 acres of bush and stumps, at $300 per acre, or	2,691
TOTAL LAND VALUE	$ 92,598

The defendants' evidence as to value proceeded on the assumption that none of the improvements on the expropriated property were of value for raspberry production except the new house and the well. A value of $12,140 was placed on the house and a value of $1,000 was placed on the well and pump. The three items therefore result in a value, according to the defendants' evidence, of

Land	$ 92,598
House	12,140
Pump and well	1,000
TOTAL	$ 105,738

From this amount the defendants deduct the sum of $10,000, being the amount, they recognize, by which the value of the property for raspberry raising is reduced through the existence of Muzyka's lease. The claim, in accordance with the defendants' evidence, was therefore rounded off at $95,000.

Two different opinions as to the value of the expropriated property were put before the Court by the plaintiff. The first opinion for the plaintiff was based upon the view that the highest and best use of the expropriated property was for dairy or mixed farming. On that basis, the expropriated property was valued as follows:

Land		
52 acres of cleared land at $850		$ 44,200
39.87 acres of uncleared land, at $350		13,954
TOTAL LAND VALUE		$ 58,154
Improvements		
House	$ 11,000	
Machine shed	400	
Barn	4,000	
Old shed	500	
Well and water system	1,000	
Family orchard and shrubs	100	
		17,000
TOTAL PROPERTY VALUE		$ 75,154

This approach was tested by comparison with sales of dairy and other farms, which, it was thought, showed a value for the expropriated property of .. $ 73,500

Putting the two conclusions together, the first opinion for the plaintiff was that the property was worth ..... $ 74,000

The second opinion for the plaintiff was based on a view that the highest and best use for the expropriated property was as a dairy farm combined with some raspberry production, with a view to changing over a period of time to raspberry production to the exclusion of dairy farming. On this view the land was valued as follows:

37 acres of cultivated area, at $850 per acre, or	$ 31,450
18 acres of pasture at $750	13,500
32.5 acres of rough pasture and hill area, at $450	14,625
4.34 acres of bush and swamp at $300 per acre	1,302
TOTAL LAND VALUE	$ 60,877

and the improvements were valued as follows:

House and well	$ 13,000	
Barn and silo	5,000	
Machine shed	300	
		18,500
TOTAL PROPERTY VALUE		$ 79,177

On testing this approach by a comparison with the sales of farms, a value of $76,000 was reached, and the second opinion for the plaintiff was then expressed, that the expropriated property was worth $77,000 at the time of the expropriation.

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Both of the opinions expressed on behalf of the plaintiff were based on the assumption that Muzyka's lease was non-existent, and that some allowance would have to be made for whatever effect it might have on value for the uses on which those opinions were based. I do not think any better estimate of that amount can be made than that contained in the defendants' evidence, and I adopt the amount of $10,000 accordingly. In effect, therefore, the opinions given for the plaintiff as to the market value of Middlebrook's interest in the expropriated property are $64,000 and $67,000, respectively.

There are certain aspects of the defendants' evidence that I cannot accept without qualification. I am satisfied that insufficient allowance was made for improvements in analyzing the prices of some of the sales that were relied on. I am not satisfied that an arbitrary addition of $400 as the cost of clearing is a proper way of determining market value of cleared land on the basis of a sale of uncleared land. No evidence was given to show the relationship of prices as of December 1962, the date of the expropriation, to prices in 1964 and 1965 when some of the sales relied upon took place. On the whole, I am of opinion that the acreage rates adopted in the defendants' case are substantially higher than a willing purchaser would have paid or a willing vendor would have demanded for the expropriated property at the time of the expropriation.

On the other hand, I am of opinion that, as of the time of the expropriation, having regard to all the potentialities of the expropriated property, a purchaser would have been willing to pay something more than the amounts set out in the plaintiff's evidence.

I am of the view that such amount need not necessarily be computed by applying a number of different rates to the acreages of different classes of lands comprised in the expropriated property. Having considered all the potentialities, as revealed by the evidence, of the expropriated property, and the state of the market for properties such as the expropriated property, I am of the opinion that a reasonably prudent purchaser, as of the date of the expropriation, would have paid $70,000 for the land, and would have paid an additional $20,000 for the improvements that were on it at the time of the expropriation. I therefore find

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that the market value of the expropriated property at the time of the expropriation, except mines and minerals, was $90,000. Deducting $10,000 for Muzyka's lease, I reach the sum of $80,000 as being the market value of Mr. Middlebrook's interest in the land.

I therefore direct that judgment be entered in the form usual in expropriation cases in this Court:

(*a*) in favour of the defendant Muzyka in the sum of $12,500 (less the advance of $5,000 that has been paid to him) with interest on the sum of $7,500 from March 4, 1964, to this date, at the rate of 5 per cent. per annum;

(*b*) in favour of the defendant Middlebrook in the sum of $80,000 (less the advance of $56,000 that has been paid to him) with interest at the rate of 5 per cent. per annum on

(i) $51,000 from the date of the expropriation to February 1, 1963,

(ii) $68,000 from February 1, 1963, to September 13, 1963, and

(iii) $12,000 from September 13, 1963, to this date.

The defendants will have their costs. If there is any difficulty in settling the Minutes of Judgment, the matter may be spoken to.

BETWEEN:

MANSFIELD HOLDINGS INC. ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Montreal 1964

Apr. 21, 24

Ottawa 1965

July 9

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Profit from a re-sale of laneway property not a capital gain—Taxable income derived from a venture in the nature of trade—Intention at the time of acquisition of land—Appeal allowed—Reassessment is referred back to the Minister.

The appellant is a company engaged in the real estate business. It had, for many years, derived income by leasing the property, a 4-storey hotel known as the Laurier Hotel, on a profit-sharing basis, to one or more hotel operators and had been regarded as a personal holding company.

It had also acquired lots concerning a scheme for erecting a high-rise hotel. This project never materialized and neither did a later one to build an

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apartment hotel and an office building. In each instance failure occurred.

On March 17, 1957 appellant sold its hotel property for $461,000 and realized a profit of $150,000.

The Minister assessed the appellant for income tax whereby a sum of $142,583 22 was added to the appellant's otherwise taxable income for its taxation year 1957, on the ground that it was income from a business.

An appeal to the Tax Appeal Board was allowed and from that decision the appellant company appeals to this Court.

Held, that the profit realized by the appellant is income and subject to tax.

2. That the profit of $150,000 realized was not a capital gain but a taxable income derived from a venture in the nature of trade, within the meaning of the *Income Tax Act,* R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(*e*).

3. That the profit made by the appellant is a profit from a business within the statutory definition of the word in the *Income Tax Act.* These principles are enunciated in the decision of the Supreme Court of Canada in *Regal Heights Ltd. v. Minister of National Revenue* [1960] S.C.R. 902.

4. The primary aim of the appellant company in acquiring the laneway property was to consolidate it with the adjoining parcels of land, to be held as an investment. The intention was to re-sell the consolidated block at a profit. So it happened.

5. That the appeal is allowed and the assessment is referred back to the Minister for reconsideration and re-assessment.

APPEAL from a decision of the Tax Appeal Board.

Philip F. Vineberg, Q.C. for appellant.

Paul Boivin, Q.C. and *Paul Ollivier, Q.C.* for respondent.

KEARNEY J.:—This is an appeal from a decision of the Income Tax Appeal Board[1] of March 11, 1963, which dismissed the appellant's appeal from a reassessment made by the Minister on April 21, 1961, whereby a sum of $142,583.22 was added to the appellant's otherwise taxable income for its taxation year 1957 on the ground that it was income from a business.

The alleged profit in question resulted from the re-sale of a parcel of land acquired by the appellant, consisting of an east-west and north-south strip of an L-shaped lane which had been regarded as public property but which turned out to be privately owned and over which neighbouring properties enjoyed rights of ingress and egress. The lane provided a rear entrance to the Laurier Hotel, which was located in the city of Montreal, on the south side of and fronting on Dorchester St. W. near Drummond Street.

[1] 31 Tax A.B.C. 349.

The Board held that the aforesaid profit was not a capital gain, as submitted by the appellant, but taxable income derived from a venture in the nature of trade within the meaning of the *Income Tax Act*, R.S.C. 1952, c. 148, ss. 3, 4 and 139 (1)(*e*).

The events, both prior and subsequent to the transaction in issue, may broadly be described as follows.

In 1954, the city of Montreal expropriated 95′ x 40′ of the property belonging to the aforesaid hotel, which was fully licensed and contained 70 rooms. As a result of the expropriation one third of the building was demolished. The compensation paid by the City to Laurier Hotel was $229,500, which amount was arrived at by mutual consent. The shares of the hotel company, for all practical purposes, were held exclusively by Moses Feldman. The company had, for many years, derived income by leasing the property, on a profit-sharing basis, to one or more hotel operators, and had been regarded as a personal holding company.

Moses Feldman, for many years, had been engaged in the operation in another part of Montreal of a departmental store known as St. Henry Syndicate, located on a property owned by his wife. Two sons of Moses Feldman—Isidore and Max—gradually took over from their father the management of the store. In 1946 the Feldman brothers incorporated a company called I. & M. Holdings Inc. which acquired the above-mentioned property owned by their mother. Except perhaps for one qualifying share issued to Moses Feldman, the stock was held in equal proportions by Isidore and Max Feldman.

Apart from some adjacent property acquired for the extension of the departmental store, the appellant company, for a period of nearly ten years, did not own any other property and did not enter into any sort of real estate transaction until 1955, when it purchased the lane property already referred to. In the same year, Max Feldman became the sole owner of I. & M. Holdings Inc. through the purchase of his brother's share-holdings therein and shortly thereafter the name of the company was changed to Mansfield Holdings Inc.

Moses Feldman was concerned as to what should be done with the unexpropriated portion of the Laurier Hotel

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property, which was 95′ wide by 70′ deep. After consultation with his sons, it was decided to purchase lot 606, located immediately south of the east-west lane strip, in order to recover approximately as much land as had been expropriated. Moses Feldman was only interested in repairing and restoring the original 4-storey Laurier Hotel but the cost of doing so was estimated at $400,000 and, on expert advice, it was decided that such a course was inadvisable.

Isidore and Max Feldman thought it would be a good idea to acquire enough additional property to build a high-rise hotel. Their father agreed if they decided to go ahead with the project he would sell them the residuary property at a very reasonable price. Pursuant to the proposed scheme, Isidore and Max caused to be incorporated two companies called 1126 Drummond Inc. and 1220 Dorchester Inc., in which they each had a 50 per cent interest, and in July 1954 the first named company acquired lot 606 and in August next the other purchased the residue of lot 607-2, being the next one east of the Laurier property and situated at the corner of Dorchester and Drummond Streets. A tavern was located on the said property which was expropriated to the extent of 30′ x 40′ and later demolished. It was while effecting the purchase of the two above-mentioned lots that it was discovered that the lane property was owned by the heirs of the late Lydia Hoyle and it was decided to acquire it if possible. The said heirs were widely scattered but with the aid of legal counsel they were located. The Feldman brothers thereupon decided to have the appellant company—which was still known as I. & M. Holdings Inc.—acquire the said lane property. The purchase was effected by four notarial deeds of sale which were signed in February and March 1955.

In the above complex, the only piece of land owned by the appellant was the lane property for which it paid $2,500 to about 23 heirs and, in addition, about $7,000 representing legal, notarial and investigation costs, or in all approximately $10,000, and concerning which counsel for the parties declared there was no dispute.

The scheme of erecting a high-rise hotel never materialized, neither did a later one to build an apartment hotel, and the same is true of a still later one envisaging an office

building; in each instance the failure was allegedly due to the inability of the interested parties to obtain the necessary mortgage money from insurance companies.

Early in 1957, the appellant received an offer, through a real estate agent, on behalf of parties who had acquired contiguous properties with the intention of constructing a very large scale office building and required the four properties with which we are here concerned for the purpose of rounding out their own holdings.

By pre-arrangement, on March 17, 1957, Laurier Hotel—which acted as a Clearing-House—bought 1) the lane property from Mansfield Holdings Inc.; 2) lot 606 from 1126 Drummond Inc.; 3) lot 607-2 from 1220 Dorchester Inc., in each case for $1 and other valuable consideration. Two weeks later, at the end of March 1957, Laurier Hotel Limited sold, together with its own residual property, the three above-mentioned parcels of land to Dorchester-Drummond Corporation Ltd. for $461,000.

On distribution by Laurier Hotel Limited of the proceeds from this last-mentioned sale, the appellant company admittedly received $150,000 as the sale price of the lane property, and as the Court is not called upon to adjudicate on the taxability of the proceeds realized on this sale by Laurier Hotel Limited, 1126 Drummond Inc. or 1220 Dorchester Inc., the only issue before it is whether the profit realized by the appellant on the aforesaid $150,000—the amount of which is not in dispute—constitutes a capital gain or taxable income.

On these facts, the only question to be determined on this appeal is whether the profit made by the appellant on the re-sale of the laneway property is a profit from a "business" within the statutory definition of the word in the *Income Tax Act*. In my opinion that question can be answered by application of the decision of the Supreme Court of Canada in *Regal Heights Limited v. The Minister of National Revenue*[1].

There is no doubt that the primary aim of the appellant company in acquiring the laneway property was to consolidate it with the adjoining parcels of land that were owned by other companies controlled by the Feldman family and to erect on that consolidated property a hotel or other

[1] [1960]) S.C.R. 902.

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building to be held as an investment. There can be equally no doubt that the intention was to resell the consolidated block at a profit if it were not found possible to carry out the primary aim.

This is not a case where, at the time of acquisition, the taxpayer's building plans had proceeded to such a point that it could be said that it intended to use the land for building to the exclusion of any other intended use for it. At the time of acquisition in this case none of the problems involved in a decision to build had been solved. For example, no arrangements had been made for the financing of a building.

The almost irresistible inference in these circumstances of a secondary intention to sell at a profit is supported by the evidence of the principal shareholder of the appellant, which reads in part:

> Q. Did you then discuss with Mr. Rudberg or with any of your other advisers about the necessity of acquiring rights to this lane?
>
> A. Mr. Rudberg pointed out to us very strongly that no matter what happened in the future we must acquire this in order to get the full value of this piece of land He insisted whether we went ahead with him or not it was ridiculous to leave this lane as it was and we must acquire it no matter what the cost, and the same also applied to the property at the corner of Drummond street.

In my opinion the amount in question was income within the meaning of the *Income Tax Act* and taxable accordingly and I so find.

In view of the agreement arrived at between counsel during the hearing that the cost to the appellant of acquiring the instant property instead of being $7,416.78—as assessed by the Minister—was in fact approximately $10,000, the appeal is allowed and the assessment is referred back to the Minister for reconsideration and reassessment accordingly.

As the Minister has been successful in the main matter in controversy, he shall be entitled to his costs.

Appeal allowed.

BETWEEN:

FARBWERKE HOECHST AKTIEN-GESELLSCHAFT VORMALS MEISTER LUCIUS & BRUNING. APPELLANT;

Ottawa 1965
June 21-23
July 16

AND

THE COMMISSIONER OF PATENTS .... RESPONDENT.

Patents—Application for reissue—Patent for process and class of substances —Proposed new claim for specific substance made by particular process —Whether disclosed in original patent—Defects in original patent—Whether error inadvertent—Whether mistaken view of law is inadvertence—Decision of Commissioner of Patents—Appeal—Patent Act, ss. 36, 38(1), 41(1), 42, 44, 50.

Appeals—From Commissioner of Patents—Dismissal of application for reissue patent—Whether appeal lies—Patent Act, ss. 36, 44.

In September 1959 a patent was issued to appellant for an invention entitled "Manufacture of New Sulphonyl Ureas". The patent contained two process claims for the manufacture of a class of substances, a claim for the whole class of substances made by such processes, and a number of claims for specific substances of the class, amongst them tolbutamide The specifications and process claims were broad enough to cover an infinite number of substances, and a statement in the specifications that experiments demonstrated that the products of the invention substantially lowered the blood sugar level and were therapeutically useful was incorrect as the great bulk of conceivable substances covered by the patent had not been produced or tested and nothing was known of their pharmacological effects or usefulness.

In August 1963 appellant applied under s. 50 of the *Patent Act* for a reissue patent on the ground that the original patent claimed more or less than appellant had a right to claim as new and that the error arose from inadvertence, accident or mistake. By its amended specification appellant made five further claims: one for a process for the manufacture of substances of a sub-class of the broad class, two for such substances and their salts when produced by that process, one for a particular process for making tolbutamide and one for tolbutamide when so made. Appellant gave two grounds for deeming the original patent defective: (1) that it did not exhaustively define certain substituents of substances of the class, and (2) that it did not claim specific products when prepared by specific processes; and the application stated that the error resulted from legal advice shown to be wrong by a decision pronounced by the Exchequer Court in 1962 that a specific product claim must be dependent upon a process claim which defines specifically the production of that substance.

Held, affirming the decision of the Commissioner of Patents, the application must be refused.

1. The original patent was defective but not for the reason put forward by appellant, *viz:* failure to define the substituents of the class more exhaustively. The original patent was defective because the description of the invention in the patent was false. An application for a reissue patent under s. 50 assumes that the patentee was entitled to a patent.

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Moreover the alleged error in the original patent did not in fact arise through inadvertence, accident or mistake.

2 The original patent was not defective because of its failure to contain a claim for tolbutamide when prepared by specific processes. That was a different invention from the invention of the class of substances described in the patent, and s. 38(1) of the *Patent Act* would have prohibited its inclusion in the original patent.

Quaere, whether a defect in a patent due to an erroneous view of the law can be regarded as due to inadvertence within the meaning of s. 50 of the *Patent Act.*

Semble, section 44 of the *Patent Act* confers a right of appeal to the Exchequer Court from a refusal by the Commissioner of Patents of an application under s. 50 for a reissue patent.

[*Hoechst v. Gilbert* [1965] 1 Ex. C.R. 710; *Re May & Baker Ltd. et al,* 65 R.P.C. 255; 66 R.P.C. 8; 67 R.P.C. 23, discussed.]

APPEAL from dismissal of application for reissue patent under s. 50 of *Patent Act.*

Chistopher Robinson, Q.C. and *Russell S. Smart* for appellant.

George W. Ainslie and *M. A. Mogan* for respondent.

THURLOW J.—This is an appeal taken pursuant to s. 44 of the *Patent Act*[1] from a refusal by the Commissioner to entertain an application by the appellant for a reissue of Canadian patent number 528,623 granted to the appellant on September 1, 1959 in respect of what is therein referred to as an invention entitled "Manufacture of New Sulphonyl Ureas".

The application for a reissue patent was made under s. 50(1) of the Act which reads as follows:

50. (1) whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more or less than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent within four years from its date and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the same invention for the then unexpired term for which the original patent was granted.

The principles affecting the right of a patentee to obtain a reissue patent are discussed in the judgment of the Supreme Court in *Northern Electric Company Limited v. Photo Sound Corporation*[2] and it is unnecessary for present purposes to repeat what is there set out beyond reiterating that reissue is a form of relief which is available only

[1] R.S.C. 1952, s. 203. [2] [1936] S.C.R. 649.

within the limits of the statutory provision therefor. While the provision has been enlarged in one important respect since the judgment in that case, that is to say in making reissue available in cases where a patent is deemed defective or inoperative by reason of the patentee having claimed less than he was entitled to claim as new, the provision for relief is still strictly limited to cases in which the patent is deemed to be defective or inoperative "by reason of insufficient description or specification or by reason of the patentee claiming more or less than he had a right to claim as new". As will presently appear the present is a case in which the application for reissue was based on the patent being deemed to be "defective or inoperative" not by reason of "insufficiency of description or specification" as in the *Northern Electric* case, but by reason of the applicant having claimed "more or less than he had a right to claim as new". It will also appear that the Commissioner refused to entertain the appellant's application on two grounds the first of which was that the appellant could not rightly invoke any of the reasons for reissue open under the terms of the statute, that is to say, either insufficiency of description or specification or claiming more or less than the applicant was entitled to claim as new, and the other of which was that there was no inadvertence, accident or mistake from which the alleged errors arose. The question whether the application for reissue was in respect of the same invention was not dealt with by the Commissioner and the parties have agreed that if the appeal succeeds the application should be referred back to him for further consideration and, *inter alia,* for consideration as to whether the amended specification attached to the petition for reissue is for the same invention as the patent in question.

The patent in question is one of the ten patents involved in the action in this Court numbered 162,296[1] brought by the appellant against Gilbert and Company and others for alleged infringement of the patents by selling a substance known as tolbutamide which is useful for its blood sugar lowering effect in the treatment of diabetes and which is one of a large class of substances known as sulphonyl ureas referred to and claimed in the patents. For the purposes of this appeal the parties have agreed to admit as facts all the facts found in the reasons for judgment in that action and

[1] [1965] 1 Ex. C.R. 710.

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that *inter alia* certain facts, which are set out later in these reasons were found. The latter are therefore to be taken as facts for the purposes of this appeal though as stated they purport to relate in part to claims which were not in issue and which were not considered in the reasons for judgment in the action.

The specification of the patent is described in some detail in the reasons for judgment in that action and for the present purpose a brief outline of it will be sufficient. It begins by referring to the inventors having made an invention entitled "Manufacture of new Sulphonyl-ureas" and proceeds to state that the disclosure which follows contains a correct and full description of the invention and of the best mode known to the inventors of taking advantage of the same. It next refers to certain sulphonyl compounds known to have blood sugar lowering effect and then states that "the present invention provides sulphonyl ureas" of a general formula the scope of which as defined is broad enough to include an infinitely large number of such sulphonyl ureas. Next it sketches a number of general methods each consisting of a well known type of chemical reaction between known types of chemical compounds by which sulphonyl ureas of this broad class may be prepared. It is then stated that:

> As has been demonstrated by experiments on animals and in clinical tests, the products of the invention produce a substantial lowering of the blood sugar level. They may be used as such or in the form of their salts, or in the presence of substances that cause salt formation. For salt formation there may be used, for example, ammonia, an alkaline substance such as an alkali metal or alkaline earth metal hydroxide, an alkali metal carbonate or bicarbonate, or a physiologically tolerated organic base. The compounds can be made up, inter alia, into preparations suitable for oral administration and lowering the blood sugar in the treatment of diabetes

This is followed by data concerning the results of tests of some of the substances of the class on animals and then by the statement that:

> Clinical tests performed on a large number of patients have fully established the efficacy of the products of the present invention, for example, N-(4-methyl-benzene-sulphonyl)-N'-(n-butyl)-urea and N-(4-methyl-benzene-sulphonyl)-N'-isobutyl-urea, in lowering the blood sugar level. For example, the first named compound lowers the blood sugar level of healthy human beings by an average of 20-40 mg/per cent. In the case of certain diabetics a lowering, for example, of about 300 mg/per cent to the normal value of about 120 mg/per cent has been observed. The products of the invention have been tested as anti-diabetics in light and severe cases of diabetes mellitus.

The substance first mentioned as an example in this passage is the substance known as tolbutamide. This is followed by a number of further references to the use, administration and effects of what are variously called "the products of the invention" or "the compounds of the invention" and in several places the use, administration and effects of tolbutamide and of some of the other substances of the class are cited by way of example.

Some fifty-three examples of processes for the preparation of sulphonyl ureas of the class are then given and the specification then concludes with nineteen claims. Of these the first two are process claims and the remaining seventeen are product claims.

Claim 1 is for a process for the production of all the substances of the class by a particular chemical reaction being one of the known general chemical reactions mentioned earlier in the specification. Claim 2 is for a process for the production of salts of the substances of the class.

The product claims are all for substances when made by the process of claim 1 or the obvious chemical equivalent thereof. Of these the first seven, that is to say, claims 3 to 9 inclusive are claims for classes of substances when produced by that process. Claim 3 embraces the whole class of substances when so produced. Claim 4 embraces the salts of all the substances of the class. Claims 5 to 9 inclusive embrace substances of different sub-classes of the broad class and their salts when so produced. Each of the remaining ten claims is for a particular substance of the broad class and of these claim 10 is for the substance known as tolbutamide.

The facts which, as previously mentioned, the parties have agreed were *inter alia* found in the reasons for judgment in *Hoechst v. Gilbert*[1] action and are to be taken as facts in the present appeal are as follows:

(*a*) Process claims 1 and 2 in Patent No 582,623, to which claims 3 to 19 inclusive refer, are claims to processes for the manufacture of a large class of substances, and the number of mathematically conceivable substances embraced in the class defined in claims 1 and 2 is infinite.

(*b*) Claims 1 and 2 do not state specifically the starting materials from which tolbutamide and the other specific substances defined in claims 10 to 19 inclusive may be made.

[1] [1965] 1 Ex. C.R. 710.

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(c) The disclosure in Patent No. 582,623 does not purport to be one of an invention of tolbutamide alone, or of any of the other specific substances defined in claims 10 to 19 and a process or processes for their preparation, but on the contrary, relates to a class of sulphonyl ureas of which tolbutamide and the other specific substances defined in claims 10 to 19 are members; and the disclosure proceeds to outline in general terms the methods by which ureas of the class may be produced, and asserts utility for the substances of the class. Tolbutamide and the other specific substances defined in certain of the claims are mentioned from time to time in the disclosure as examples, but not until one reaches claims 10 to 19 is there any indication that the invention is concerned with anything but a whole class of substances and general methods of producing them.

(d) The method used in process claims 1 and 2 was not new, nor were the starting materials which were used new.

(e) The great bulk of conceivable substances embraced within the class defined in claims 1 and 2 have not, in fact, been produced or tested and nothing is, in fact, known of what their pharmacological effects or usefulness may be; pharmacological effects of new and untried substances are not generally predictable or, if predictable at all, are not predictable to any great extent.

(f) It is highly improbable that all, or substantially all, of the infinitely large class of substances produced by processes within the scope of claims 1 and 2 have either the blood sugar lowering activity to a useful extent or the freedom from toxicity or harmful side effects necessary to render them useful; and it cannot be predicted that all or substantially all of the substances produced by the process claimed in claim 1 have advantages for lowering and controlling the blood sugar level of patients suffering from diseases such as diabetes, over the known methods of (1) dieting, and (2) the administration of insulin.

It may be useful to pause and consider for a moment what monopoly could properly be claimed on the basis of the disclosure of this specification. Assuming the statements in it to be true it would I think warrant claims in respect of an invention of the whole class of substances falling within the definition of claim 1 and thus avail to protect to the patentee during the life of the patent every substance within the class when produced by the processes claimed. There would, on that assumption, as I view it be no occasion to add a claim or claims in respect of any specific substance of the class. On the other hand if any of the material statements respecting the testing and utility of the substances of the class defined in the specification are untrue, and on the admitted facts that, in my opinion, is the situation, both with respect to the statement that the products of the invention have been tested and that they are all therapeutically useful for their blood sugar lowering

effects, no claim at all in respect of the alleged invention of the class is warranted for no such invention has been made. The alleged invention is nothing but an unproved and untrue hypothesis. So preposterous are the assertions in the specification that the products of this alleged invention (grammatically the expression embraces all the substances of this infinitely large class) have been tested and found to have the therapeutic qualities of those cited as examples that no one skilled in the art would consider for a moment believing the statements in that sense, but that is the sense in which these statements must be true if this alleged invention of a class is to constitute a true and patentable invention. Since the specification is to be considered as addressed to those skilled in the art it may be possible to explain the statements on the basis that such persons would understand them as meaning that the inventors having prepared and tested some of the substances were expressing a theory as to the characteristics and utility of the others and were seeking to monopolize both the class and the sub-classes on the basis of a hypothesis or hypotheses, however tenuous, as to their utility and the specific substances as well on the basis of actual preparation and testing.[1] On any other approach to their meaning the assertions of the specification with respect to the testing and utility of the class appear to me to be not only false but unexplainable as well, otherwise than as being fraudulent, but whether interpreted as a mere hypothesis or as something which is falsely described in such a way as to make it appear to be an invention no monopoly for the alleged invention of a class of substance can properly be obtained under the statute. Moreover, as the alleged invention of a class of substances is the only matter which in the disclosure portion of the specification is particularly indicated and distinctly claimed as the invention, there is no basis upon which claims (under s. 36(2)) in respect of any other or different invention which may incidentally be revealed by the disclosure though not described and claimed as an invention as required by the concluding words of s. 36(1) could properly be included.

[1] *Vide* Lord MacDermott in *Re May & Baker et al.* (1950) 67 R P C. at page 51, lines 9 to 44.

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In the reasons for judgment in the *Hoechst v. Gilbert* action it was held *inter alia* that as a matter of interpretation this specification should be regarded as purporting to disclose several different inventions, one or more pertaining to a class or classes of substances, another to the single substance known as tolbutamide and several others to the particular substances claimed in claims 11 to 19 inclusive. The features of the specification which led to this conclusion are stated in subparagraph (*c*) above of the agreed statement of facts precisely as they are stated in the reasons for judgment in the action and the reasoning upon which such interpretation was adopted was that set out in the reasons for judgment of this Court in *C. H. Boehringer Sohn v. Bell Craig Limited*[1] at pages 209 to 215. The reasoning is supported in my opinion by the judgments therein mentioned in *Re May & Baker Limited et al*[2] in all three Courts. In the *May & Baker* case the problem was whether a proposed amendment would make the specification claim an invention "substantially different" from that described in the unamended specification. The unamended specification described and claimed an alleged invention of a large class of substances which were claimed to have therapeutic value and on the patent being attacked it was held invalid for a number of reasons among which was lack of subject matter since the substances did not all have the utility claimed. That the patent was bad for this reason was not seriously contested. The patentee, however, sought leave to amend the specification so as to make it describe the invention of two members of the large class which were of proven utility and so as to claim only those two substances. Leave to make the amendment was refused on the ground that the amendment would make the specification claim a substantially different invention from that claimed in the unamended specification. That the inventions were different was scarcely open to doubt but as I understand the judgments and particularly those of Jenkins, J.[3], at the trial, Lord Green, M.R. and Evershed, L.J.[4], in the Court of Appeal and Lord Simonds, Lord Normand and

[1] [1962] Ex. C.R. 201. [2] 65 R.P.C. 255; 66 R.P.C. 8; 67 R.P.C. 23.
[3] 65 R.P.C. 255 at p. 294, line 30 to p. 295, line 21.
[4] 66 R.P.C. 8 at p. 15, line 23 to p. 24, line 8 and p. 21, lines 11 to 22.

Lord MacDermott[1] in the House of Lords the difference was not regarded as being merely one of breadth or scope of the respective inventions but as a difference in their character and quality as well, corresponding to the difference in

[1] 67 R.P.C. 23 at p. 32, lines 19 to 29 LORD SIMONDS said:

Is there then a difference in the inventions claimed in the original and amended specifications? On the one hand a vast range of possible compounds, a fragment no doubt in the whole sphere of organic chemistry yet so numerous that the number becomes meaningless, within which no one can say what hidden things might be brought to light, what benefits discovered for the relief of humanity. On the other hand two specific drugs Are these inventions the same or different inventions? My Lords, I hesitate to appeal to common sense, lest others should take a different view of the case Yet in the consensus of opinion of all the learned judges who have dealt with this matter I find justification for the view which I most emphatically hold that it is plain common sense to say that the inventions are not the same but different: and I think that, if they are different, the substantial difference could not be denied.

At p. 33, lines 20 to 32 LORD SIMONDS also said:

If a drug, which falls within the genus generally described, has a therapeutic value which depends on its unique characteristic, then the invention of it must be different from the invention of the genus It cannot in this respect, because it is given a name and used as an illustration, be distinguished from its anonymous brethren in the same genus. But then it is said that by definition "invention" includes an alleged invention, and that it follows that the Court must, in comparing the inventions claimed in the old and new specifications respectively, assume the truth of what is alleged It must proceed on the basis that all members of a certain group of chemical compounds have therapeutic value, and that sulphathiazole, being a member of that group, therefore has therapeutic value: a perfect syllogism, which precludes all further enquiry, and requires the Court to ignore two facts which have been clearly proved or admitted, first, that not all members of the group have therapeutic value; and secondly, that the therapeutic value of sulphathiazole depends on special features which are not common to the group.

At p. 38, lines 27 to 47 LORD NORMAND said:

Whether the invention asserted in the amended specification differs substantially from the invention asserted in the unamended specification, becomes, after the construction of the two specifications has brought us to the point at which the two terms of the comparison have been ascertained, a question of fact and degree

But it is said that Jenkins, J., and not only he but the Court of Appeal also, have misdirected themselves by contrasting the inventive steps required for the inventions instead of the inventions themselves. It is true that in the Courts below the inventive step which is the basis of the discovery that an enormous range of substances having a common chemical characteristic have therapeutic virtue as a generic property was said to be substantially different from the inventive step underlying the discovery that each of two specific substances has therapeutic value. I think myself that the difference between the two inventive steps and the difference between the two inventions are in this case really the same thing. The difference between the two inventions is to my mind obvious. In the one case the inventor is saying that every

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the character and quality of the inventive steps leading to them, the invention claimed in the unamended specification being one resulting from a discovery of a characteristic common to members of a class making the class useful in the patent sense and the other being one resulting from a discovery of useful characteristics of particular substances not as common to any such class but as peculiar to the particular substances. The invention with respect to any of

member of a certain genus is therapeutic. From that it follows that further tests of any substances that can be made within the genus by experiments on mice or on men are superfluous. In the other case he is saying nothing like that, but merely that two new drugs have the therapeutic virtue. When the Appellants put their pen through the genus they deleted the whole invention, and when they wrote in the two specific substances they wrote into the specification an invention different in kind from that which they had deleted. The amendment is not a means of reducing too broad an alleged invention to a part of it, or even to a narrow invention of the same kind.

At p. 52, lines 5 to 29 LORD MACDERMOTT said:

The question, then, is whether the inventions claimed by the amended and original specifications, and based on what I have held to be the true inventive steps, are substantially different. That they are different admits, in my opinion, of no real doubt once the inventive steps have been ascertained and contrasted. But is the difference substantial? The Appellants contended that all that required assessment in this connection was a difference in quality and not in size. "Substantially larger than", it (was) pointed out, constituted a distinct test, and so an amendment would not, it was said, be claiming an invention substantially different merely because it was substantially smaller. Up to a point there is force in that argument. Quantity and quality cannot, however, be entirely disassociated and I think *Jenkins*, J., was entitled, on this issue, to take into account, as he did, the extent of the disclaimer which, on any reading of the evidence, was of such magnitude that it might reasonably be considered as marking more than a difference in size. Another contention advanced by the Appellants, and which in one aspect is akin to that just considered, may be mentioned conveniently here, though I do not find it easy to classify. It was said that if the original specification has included a claim limited to the two named drugs the amendment now sought would necessarily have been within the power of the Court to grant under Sec. 22 for, as it was put, one could always "amend down" so as to shed all but a narrow claim to the preferred embodiment. If the views I have already expressed as to the nature of the inventive steps underlying the amended and original specifications are well founded this argument, in my opinion, really begs the question and can lead nowhere. The process of amending down to which reference is made does not, as I understand it, involve any change in the nature of the inventive step which remains intact and available to support the narrow claim. But that is not the position here, for the amendment sought is based on a different inventive step, and the issue of competence arises directly and must be settled according to the terms of Sec. 22.

the specific substances was thus not something lying within the bounds of the alleged class invention.

This distinction between the two inventions as I understand it, flows from the fact, which in the present case is admitted, that the pharmacological effects of new substances are not predictable but must be ascertained by empirical methods. The discovery that any particular new substance has therapeutically useful characteristics is thus a discovery on its own for while speculation may thereby be generated as to the possible characteristics of other substances of similar or related chemical structure it is not possible in the state of the art to predict from any such discovery that other similarly constituted substances will have the therapeutic characteristics of the particular substance or to say what the therapeutic properties of such other substances may be until they have been made and tested and their therapeutic properties have been thus ascertained.[1]

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[1] Compare the remarks of Lord Simonds in *Re May & Baker Limited et al* 67 R.P.C. 23 at p. 29, lines 7 to 30. At lines 18 to 30 he said:

> There is no doubt that the discovery of these drugs has been a valuable contribution to the therapeutic art. But it must be said at once that the general character of the methods to be employed in producing derivatives of compounds such as sulphanilamide was known before 1938, and that the production of any particular derivative such as sulphathiazole would not in itself involve invention, although considerable work of a routine character would be necessary in working out the details of a satisfactory process. And it must be emphasised (for this may go to the root of the matter) that it is only by empirical methods that the therapeutic value of any particular drug can be ascertained. I quote a pregnant passage from the evidence of Sir *Lionel Whitby*, a witness for the Appellants, whose pre-eminence in the science of chemo-therapy is unchallenged. "There is no theory", he said, and later "the chemo-therapeutic value (if any) of any particular substance could only be assessed by careful tests of that substance first upon animals . . . and secondly on human beings."

The remarks of Lord MacDermott at p. 50 are to the same effect. At lines 32 to 50 he said:

> Before proceeding to consider the original specification and the nature of the invention it claims it will be appropriate to mention two matters which, while this particular art remains in an empirical state, appear to me to be necessary consequences of that characteristic. In the first place an invention in this chemo-therapeutic field must be in respect of a substance which has actually been produced. There cannot be an empirical discovery in respect of a bare formula. And secondly, the discovery of each new compound having a therapeutic value is a separate invention. If the inventor is bound to say—"I have made a new substance which I find has therapeutic value, but I cannot be

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For similar reasons I reached the conclusion both in the *Boehringer* case and in the *Hoechst v. Gilbert* case that the alleged invention of a class of substances is to be treated as a different invention from that of the particular substance or substances the utility of which had been established even though such substances are members of the class. In each of these cases, however, the specification differed from both the unamended and the proposed amended specification considered in the *May & Baker* case in that both the Boehringer and Hoechst specifications while describing in each case only an alleged invention of a class included claims not only with respect to the class but claims with respect to a specific substance or to specific substances as well. This led me to conclude that as a matter of interpretation the Boehringer specification should be construed as purporting to disclose more than one invention, that is to say, a class invention and a specific substance invention.

It also led me to conclude that the Hoechst specification should be construed as purporting to disclose a multiplicity of inventions some of which are class inventions and others of which, including that of tolbutamide, are specific substance inventions. Further pursual of the judgments in the *May & Baker* case and further consideration of the matter has served to confirm me in the opinion that this is the proper construction of these specifications. It may be worth mentioning at this point, however, that the question whether what is contained in either the Boehringer or the Hoechst specifications with respect to any specific substance invention would satisfy the requirements of s. 36(1) with respect to such invention without recasting the specification (as was proposed in the *May & Baker* case) so as to assert it as the invention or one of the inventions

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certain that any other substance, no matter how similar its molecular structure, will have such a value until I make and test it" then, as it seems to me, the inventive step he has taken must attach to the single substance he has made and to it alone. And if he has made and proved several such substances the position must, I think, remain the same for, while the art retains its empirical nature, the worth of each new substance is a new discovery. But when the inventor can say that his inventive step is such that each of the various new products which manifest it must have therapeutic value, and that although some of them have never been made, then, as I see the matter, the state of the art will have changed. It will have lost its empirical nature, at least to some extent, and the chemist will have found some law or principle by which he may predicate therapeutic effect in advance.

(which latter would have shown that s. 38(1) was being contravened), was not determined in either case. Without such a recasting of the specification such a claim "does not fit the character of the invention asserted in it".[1] But whether the inventions disclosed are so described as to comply with s. 36(1) or not the specification in question in these proceedings in my opinion on its proper interpretation purports to disclose a plurality of inventions that is to say several with respect to alleged inventions of classes of therapeutically valuable substances and several with respect to alleged inventions of specific substances alleged to be therapeutically useful. For present purposes, however, two only of these need be considered, *viz.*, that of the class of substances referred to in claims 1, 3 and 4 and that of the specific substance known as tolbutamide referred to in claim 10.

The amended specification upon which the appellant prayed for a reissue patent consisted of the whole of the original specification unchanged except by the addition of five new claims. The first of these, which is numbered 20, is a claim for a process for the manufacture of substances of a sub-class of the broad class and salts thereof; the second is a claim for the substances of the sub-class whenever prepared or produced by the processes defined in claim 20 or the obvious chemical equivalent thereof and the third is a claim for the salts of the substances of the sub-class whenever so prepared. The other two additional claims relate only to tolbutamide. The first of these (claim 23) is a claim for a process for making that substance by a particular type of chemical reaction consisting of reacting a particular substance with any member of a large class of substances and the second (claim 24) is for the substance itself when so made.

The material portions of the appellant's petition for the reissue patent stated as follows:

1. THAT Your Petitioner is the patentee of Patent No. 582,623 granted on September 1st 1959, for an invention entitled MANUFACTURE OF NEW SULPHONYL-UREAS.

2. THAT the said Patent is deemed defective or inoperative by reason of the patentee having claimed more or less than he had a right to claim as new.

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[1] *Vide* Lord Normand in *Re May & Baker Limited et al* 67 R.P.C. at p. 37, lines 40 to 48.

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3. THAT the respects in which the patent is deemed defective or inoperative are as follows:

Claims 1, 3 and 4 of the patent cover the production of new compounds of a general formula in which certain substituents are not exhaustively defined.

The patent contained claims directed to the production of the new compounds when prepared by the process of claim 1 and to certain specific products when prepared by the process of claim 1 but did not contain claims to specific products when prepared by specific processes.

4. THAT the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention in the following manner: Applicant on the advice of his attorneys believed at the time the application was pending that for compliance with Section 41(1) all that was required was that a product claim be dependent on a process claim by means of which the specific claimed substance could be prepared, whereas on March 21, 1962, it was pronounced in a judgment of the Exchequer Court of Canada that for compliance with Section 41(1) a claim covering a specific product should be dependent on a process claim which defines specifically the production of that substance.

THAT at the time the application was pending, applicant also believed that for the production of a medical substance, broad terms of theoretically unlimited scope would not result in any defect in the claims, whereas following a judgment in the Exchequer Court of Canada on March 21, 1962, it became apparent that the validity of such claims was in doubt.

5. THAT knowledge of the new facts in the light of which the new claims have been framed was obtained by Your Petitioner on or about April 1962 when the fact and effect of the said judgments of the Exchequer Court was communicated to Your Petitioner by its Canadian patent agents, whereupon the specification of the Patent was reviewed carefully for the presence of these and other defects.

. . .

8. Your Petitioner therefore surrenders the said original patent and prays that a new patent may be issued to it in accordance with the amended specification herewith, for the unexpired term for which the original patent was granted.

It will be observed that paragraph 3 of the petition describes two separate respects in which the patent is said to be deemed defective or inoperative the first of which relates to claims 1, 3 and 4 and consists in alleged failure to define exhaustively certain substituents of new substances of the general formula embraced within these claims and the other of which relates to the specific product claims and consists in failure to claim them when prepared by specific processes. As the only proposed change with respect to any specific substance claim is the addition of claims 23 and 24 relating to the specific substance known as tolbutamide this alleged failure may I think be treated as concerned only with defectiveness or inoperativeness in the claim or claims in respect of the invention of that substance that is to say

claim 10 of the patent. It follows, however, that there are two separate subject matters involved in the application for reissue and thus to be considered in the present appeal, one relating to alleged defects in claims 1, 3 and 4 and the other relating to alleged defects in claim 10. As different considerations apply to each I find it more convenient to deal with them separately but the Commissioner dealt with them jointly and as his reasons for refusing the application are involved in what follows I shall set them out before dealing with the matters on which the application was based.

The Commissioner's decision was expressed in a letter to the appellant's patent attorneys dated March 1, 1965 the body of which reads as follows:

> Careful consideration has been given to the admissibility of this reissue application for prosecution in the Office.
>
> Whether an application for reissue is acceptable for prosecution before the Office depends on the reasons given in the petition for wanting to correct what is said to be the defect or inoperativeness of the patent.
>
> Section 50 of the Patent Act is the governing section. The reasons for reissue are insufficiency of description or specification or claiming more or less than what the patentee had the right to claim. I do not believe that the patentee in this case can rightly invoke any of these reasons.
>
> In addition to the reasons the section is conditional on certain circumstances which occurred or were present at the time of issue. The error must have arisen from inadvertence, accident or mistake at that time.
>
> Here there was no inadvertence, accident or mistake at the time of issuing the patent. The applicant was satisfied to obtain his patent with claims submitted and was satisfied on the advice of his agent that the provisions of section 41 subsection 1 had been complied with. There was no defect that the applicant had in mind and failed through inadvertence to correct, (1936 S C.R. 649 at page 661 Northern Electric Company Limited v. Photo Sound Corporation). It is not enough that an invention might have been claimed in the original patent because it was suggested or indicated in the specification. It must appear from the face of the instrument that what is covered by the reissue was intended to have been covered and secured by the original, (In re Sawyer 624 O.G. 960, 81 UBPQ 374, Decisions of the Commissioner 1949 at page 343).
>
> I do not believe that a change in the legislation or a different interpretation of the legislation was ever contemplated to be a reason for reissue In this case the courts interpreted the sufficiency of the claims in a patent in a manner different from the generally accepted views of the patent agents and patentees, thereby creating a situation which did not exist at the time of issue of the original patent.
>
> My ruling is that the present application for reissue cannot be entertained.

Turning now to the matters alleged with respect to claims 1, 3 and 4, for the reasons which I have already

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discussed, claims 1, 3 and 4 are in my opinion invalid and for that reason inoperative. But I am unable to understand in what way any of the substituents of the new compounds of the general formula set out in those claims can be said to be not defined exhaustively or how lack of more exhaustive definitions of such substituents renders these claims inoperative either as claiming more or as claiming less than the inventors had a right to claim as new. There are two fundamental limitations on the extent of the monopoly which an inventor may validly claim. One is that it must not exceed the invention which he has made, the other is that it must not exceed the invention he has described in his specification. If it be assumed that what is set out in the specification with respect to the alleged invention of a class of substances is true and constitutes in fact an invention of that class of substances, as it purports to do, I can see nothing about the definition of the substituents which would afford a basis upon which claims 1, 3 and 4 could reasonably be deemed, either by the appellant or by the Commissioner, to be defective or inoperative as claiming more or less than the inventors had a right to claim as new. On the other hand if the description is false and what has been described as an invention is in fact not an invention at all there is no basis whatever for an application for reissue since s. 50(1) assumes that the patent to be reissued is one for a *de facto* invention in respect of which the patentee was entitled to obtain a patent. The latter in my opinion on the admitted facts is the situation with respect to claims 1, 3 and 4. While in one sense these claims claim more than the inventors had a right to claim as new they do so not because the substituents of the substances of the class are not defined more exhaustively but because the inventors had made no invention whatever of the class of substances which the specification describes as their invention and they were therefore not entitled to any patent with respect thereto. In the amended specification no change in the description of the invention has been proposed and the effect of adding the proposed new claims 20, 21 and 22, as I view the matter, would be to cause the patent to claim not merely yet another and different invention of a class but one which would be supported neither by a description of it as the invention nor by so much as an assertion that it was in fact

an invention. Moreover, the invention represented by these proposed new claims, if indeed it can be taken to have been an invention, in my opinion cannot be regarded as a narrower but included part of the invention as described because of the empirical nature of any such invention. I am therefore of the opinion that with respect to the alleged defectiveness or inoperativeness of claims 1, 3 and 4 s. 50(1) does not apply and that the Commissioner was right in deciding that the appellant could not rightly invoke any of the statutory reasons.

I should say a word, however, with respect to what was put forward as an explanation of the alleged error in claims 1, 3 and 4. The Commissioner plainly did not accept it. The explanation was that the alleged error arose through inadvertence, accident or mistake in that at the time the application was pending the applicant believed that for the production of a medical substance broad terms of theoretically unlimited scope would not result in any defect in the claims whereas after a judgment of this Court it became apparent that the validity of such claims was in doubt. Assuming this to be true (which is a matter of some difficulty in view of the fact that the *May & Baker* case had already been decided and had been considered and in some respects adopted in this country in *Commissioner of Patents v. Ciba*[1]) I do not see how the Commissioner could have been expected to accept it as showing that the alleged failure to define certain substituents exhaustively arose from inadvertence, accident or mistake for it shows on its face that the applicants knew their alleged invention was limited to substituents that required to be more exhaustively defined but refrained from so defining them not by inadvertence, accident or mistake but deliberately so as to claim and thus get a monopoly under the statute on something which on the admitted facts they had not invented and must have known they had not invented and which was not in fact an invention at all. This is not a case of the applicants having claimed more than they were entitled to claim as new through inadvertence, accident or mistake but one of their having deliberately set out to monopolize what was for the most part an unexplored field of organic chemistry so as to prevent others during the life of the

[1] [1959] S.C.R. 378.

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patent from exercising their right to search in that field for, and if successful to put on the market, new substances which might turn out to be as useful or more useful than the several specific substances in that field which the applicants had found to be useful.[1]

I therefore agree with the conclusion of the Commissioner on this question as well.

The other matter put forward in the petition for reissue as a reason for deeming the patent defective or inoperative as claiming more or less than the applicant had a right to claim as new relates to what appears to have been in fact a very good invention of the specific substance known as tolbutamide and is that the patent does not contain a claim for that substance when prepared by specific processes. That invention, however, was not described in the specification as the invention. If it had been described as the invention the fact would have been apparent that this

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[1] *Vide* Lord Simonds in *Re May & Baker Limited* 67 R.P.C. at p. 34, lines 26 to 31:

> It is a field in which as a rule empirical research industriously pursued will win the prize, and it may well be, as learned Counsel for the Appellants was inclined to urge, that the inventive chemist will obtain inadequate protection for his empirical discovery, if he cannot make a general claim and, upon challenge, amend it to a narrower one. That may be so, but it will not justify the Court in applying to a case like the present words used in relation to a wholly different subject matter.

In the Court of Appeal Lord Greene, M.R., had said, 66 R.P.C. at p. 12, lines 47 to 50, p. 13, lines 1 to 9:

> The patent was obtained on the faith of the assertion in the original specification that the compounds described—all of them—had certain favourable chemo-therapeutic qualities. This statement may, at the time, have been a useful scientific hypothesis; but patents are not granted for mere scientific hypotheses, nor can an unproved hypothesis form sufficient subject matter to support a patent. In this case when the validity of the assertion was challenged, the Appellants at once abandoned any attempt to support it. A scientific hypothesis, particularly in a branch of science in which, according to Sir *Lionel Whitby*, "there is no theory" and "the chemo-therapeutic value (if any) of any particular substance could only be assessed by careful tests of that substance first upon animals and secondly . . . on human beings", could not, on any view, justify the assertion in question; and the danger of making such assertions in regard to the unknown action of new drugs, possibly of a highly toxic nature, is obvious, and may be thought to deserve every discouragement in any case where a discretion falls to be exercised.

See also Somerville, L.J., at p. 19, lines 10 to 19; and Evershed, L.J. at p. 20, line 32 to p. 21, line 10.

was not a preferred embodiment of the alleged invention of a class of substances[1] as indeed it was not, but was a different invention which could not properly be included in the same patent with that of the alleged invention of a class of substances because it would have been obvious that two different inventions or alleged inventions were being described and that their inclusion in the same patent would contravene the prohibition of s. 38(1) of the Act. As the disclosure portion of the specification stood the applicant was therefore not entitled to have claim 10 included in it[2]

[1] The opinion of Lord Morton of Henryton 67 R P C at p. 41 to 42 which treated the specific substances as preferred embodiments of the class invention was not that of the majority.

Vide Lord Simonds 67 R P.C. at p 32, line 51 *et seq* ; Lord Normand at p. 37, lines 40 to 48; Lord MacDermott at p. 51, lines 9 to 44.

[2] *Vide* Lord Simonds in *Re May & Baker et al* 67 R P.C. at p. 34, lines 1 to 10:

> My Lords, I do not think that the Appellants get any help from this somewhat tentative observation In the first place, as I have already pointed out, no claim was made for the two specific drugs and no explanation was offered why a patentee, who was by no means *inops consilii,* did not make it. In the second place it is a sheer begging of the question to say that in this case "the claims could originally have been separated up without difficulty", if by that is meant that the *Comptroller,* having the knowledge of this art and of the facts which this case has disclosed, ought to have treated the invention of a group having a general therapeutic value as the same thing as the invention of a specific drug having a particular therapeutic value, and ought accordingly to have granted one patent to cover them both. I am clearly of opinion that he ought to have done no such thing.

Lord Normand said at p. 37, lines 35 to 48:

> It was said for the Appellants that this was "mere draftsmanship", an error of omission which could be rectified by supposing that such a claim had been made, and that the specification might be construed as if it contained the claim. Specifications like other documents must be construed as they are, not as they might have been The absence of a claim of this particular kind, which is almost a matter of style where it is appropriate, cannot be dismissed as a negligible inadvertence The addition of a claim for the two specific substances would involve the recasting of the specification, for the claim would not fit the character of the invention asserted in it as it stands. That invention is a generic invention in which the utility is a generic property invariably associated with the chemical characteristics of the genus. It is really not possible to read the specification as a compendious manner of claiming a vast number of substances, each of which has been found to have therapeutic virtue, and of claiming among them the two specific substances as especially satisfactory or effective examples. Such a claim if made would be rejected by the least sceptical of qualified addressees as a gross and palpable falsehood.

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nor to have the proposed new claims 22 and 23 included, both because they relate to a different invention from that described in the specification as the invention and their presence makes the patent a patent for more than one invention and because the invention of tolbutamide had not been described and claimed as the invention. As the appellant for these reasons is not entitled to have claims in respect of the invention of tolbutamide included in this specification I do not think it can invoke s. 50(1) to require the Commissioner to insert them.

The conclusions which I have expressed are sufficient to dispose of the appeal but as the remaining question whether the alleged error with respect to the tolbutamide claim was due to inadvertence, accident or mistake within the meaning of s. 50 was also argued I should mention it before parting with the case. The explanation offered was that the error arose from inadvertence, accident or mistake in that the applicant on the advice of his attorneys believed at the time the application was pending that for compliance with s. 41(1) all that was required was that a product claim be dependent on a process claim by means of which the specific claimed substance could be prepared whereas later it was held by this Court that compliance with s. 41(1) required that a claim covering a specific product should be dependent on a process claim which defines specifically a process for the production of that substance. What was in fact held in the judgment mentioned[1] was that the claim sued on was invalid for several reasons one of which was that compliance with s. 41(1) requires that a claim for a specific new substance be accompanied by and be limited to the substance when prepared by a process claim which is a process claim in respect of the specific substance and that limiting the product claim to the product when produced by the process of a claim which was in respect of a different invention would not serve the purpose. The point submitted in the present appeal was that inadvertence may consist in an erroneous view of the law and that here an erroneous view of the law was the reason for the patentee having claimed more or less than he was entitled to claim as new.

[1] *C. H. Boehringer Sohn v. Bell Craig Limited* [1962] Ex. C.R. 201 at pp. 234 to 237.

While, in view of the conclusion I have reached on the matters already discussed no concluded opinion on this question either in general or as applied to the facts of this case appears to be necessary, as at present advised I am not persuaded that cases cannot arise in which a defect due to an erroneous view of the law could be regarded as due to inadvertence within the meaning of s. 50 and, if the reasons of the Commissioner are intended to be to the contrary, in this Court the question should I think be regarded as an open one.

The appeal therefore fails and it will be dismissed with costs.

As the appellant is not entitled to succeed on the merits of its appeal it is also unnecessary to express a concluded opinion on the question whether or not there is any right of appeal to this Court from a decision of the Commissioner refusing an application for a reissue patent, but as this question as well was argued at some length I shall add some comments on it.

Sections 42 and 44 provide that:

42. Whenever the Commissioner is satisfied that the applicant is not by law entitled to be granted a patent he shall refuse the application and, by registered letter addressed to the applicant or his registered agent, notify such applicant of such refusal and of the ground or reason therefor.

44. Every person who has failed to obtain a patent by reason of a refusal or objection of the Commissioner to grant it may, at any time within six months after notice as provided for in sections 42 and 43 has been mailed, appeal from the decision of the Commissioner to the Exchequer Court and that Court has exclusive jurisdiction to hear and determine such appeal.

Section 2(*a*) provides that the expression "applicant" "includes an inventor and the legal representatives of an applicant or inventor" and s. 2(*e*) provides that the expression "legal representatives" includes "heirs, executors, administrators, guardians, curators, tutors, assigns and all other persons claiming through or under applicants for patents and patentees of inventions".

The patent in question in these proceedings was issued to the appellant on September 1, 1959 and the appellant filed its petition surrendering the patent and praying for a reissue patent on August 30, 1963. By the letter dated March 1, 1965 already referred to the Commissioner ruled that the application for reissue could not be entertained. Whether or not the letter was registered does not appear

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but no question was raised on that detail and the argument proceeded on the basis of the Commissioner having refused the application.

The submission put forward on behalf of the Commissioner was that though there are express provisions in a number of sections of the *Patent Act*, (notably, ss. 19, 33(6), 41(4) and 73) for appeals to this Court from decisions of the Commissioner made in the exercise of particular functions committed to him under various sections of the Act to which such provisions refer, there is no general right of appeal to this Court from decisions made by him in the carrying out of his functions under the Act, that in cases of refusal by him to issue patents an appeal is provided by s. 44 but that this applies only in cases of refusal of original applications for patents and not in cases of refusal of applications for reissue patents and that since there is no other provision for such an appeal no right of appeal to this Court from the refusal of such an application exists and the Court is without jurisdiction to entertain such an appeal.

There is not much to be found either in the statute or in the legislative development of its various provisions to indicate clearly that a right of appeal to this Court in a case of this kind has been conferred and the matter is therefore not free from doubt, but there are several features of the statute which suggest to me that the right of appeal conferred by s. 44 applies in a case of this kind.

First, it is, I think, clear that the requirements for the specification for a reissue patent are those set out in s. 36 which apply to the specification for any patent. If there could be any doubt on this point it would I think be dissipated by the fact that s. 36(3) contains an express reference to reissue patents. It therefore appears to me that nothing turns on the fact that in the scheme of the statute the provisions of s. 50 with respect to reissue patents follow those with respect to original applications for patents including s. 44 which provides for an appeal to this court from refusal to grant such applications.

Next it is I think also clear that the provisions of ss. 37, 38, 39, 40 and 41 are just as applicable in cases of applications for reissue patents as for original patents. An application for a reissue patent is in fact an application for a

patent of the same nature as that which may be granted on an original application and so it seems to me that a reissue application despite its special features involving as they do the surrendering of a patent already held by the applicant falls within the ordinary meaning of the term "application" as used in s. 42 and that having regard to the definitions of "applicant" and "legal representatives" in ss. 2(*a*) and 2(*e*) a patentee (at least where he is the person to whom the patent issued) seeking a reissue patent also falls within the meaning of the term "applicant" as used in s. 42. If this is the correct view it would follow that the patentee has a right of appeal under s. 44.

The third feature is that s. 50 while authorizing the Commissioner to grant reissue patents does not prescribe any particular procedure to be followed by the Commissioner either in granting or refusing applications therefor and this suggests to me that the legislative intention was that the procedure with respect to original applications for patents should apply. This as well leads to the conclusion that the refusal of such an application is to be carried out in accordance with s. 42 and that there is a right of appeal under s. 44.

Finally, it is noteworthy that while the appeals provided for by ss. 19, 33(6), 41(4) and 73 are all expressed as being appeals from decisions under particular sections of the Act, s. 44 is not so expressed but applies in the case of "Every person who has failed to obtain a patent by reason of a refusal or objection of the Commissioner to grant it."

Accordingly, I am inclined to the view that in the present case the appellant had a right to appeal to this Court under s. 44 from the refusal by the Commissioner pursuant to s. 42 to entertain its application for a reissue patent and if it were necessary to reach a firm conclusion on the point I would so hold. As already mentioned, however, I do not think a concluded opinion on the point is necessary in view of the result of the appeal on its merits.

Appeal dismissed.

Ottawa 1965
septembre 8
octobre 8

ENTRE:

LE MINISTRE DU REVENU NATIONAL ..... APPELANT;

ET

LAURENT GAGNON ..... INTIMÉ.

Revenu—Loi de l'Impôt sur le Revenu, S.R.C. 1952, ch. 148, arts 3, 5(1)—Couronne—Loi sur l'Administration financière, S.R.C. 1962, ch. 116, art. 7—Règlements de l'Ordre du Conseil du Trésor, C.T. 574431, 9 janvier 1961—Loi du Service civil, ch. 57, art. 14, S. du C. 1960-1961—Gratification décernée à un employé de la Couronne pour services rendus à son employeur le Gouvernement du Canada—Récompenses considérées comme «autre rémunération» et imposables en vertu des dispositions de la Loi de l'Impôt sur le revenu.

L'intimé, employé de la Couronne comme commis principal au Bureau fédéral de la statistique, avait la responsabilité d'une partie du travail d'un projet appelé «Étude des revenus et des dépenses de la ferme». En avril 1961, l'intimé suggéra l'utilisation de cartes I.B.M. pour l'impression de «l'index des rues» dans la division de recensement du Bureau fédéral de la statistique. Cette suggestion fut adoptée et lui valut une gratification de son employeur le Gouvernement du Canada au montant de $170, moins l'impôt sur le revenu, qu'il accepta. En conséquence de cette suggestion, une économie estimée à $2,175 pour la première année fut réalisée par le Gouvernement.

L'intimé n'ajouta pas cette gratification de $170 dans sa déclaration d'impôt sur le revenu pour l'année 1962. Mais, par contre, le Ministre le cotisa à un montant supérieur de $29 au montant d'impôt calculé par l'intimé dans sa déclaration.

De là ce litige pour savoir si la création et l'élaboration sous une forme utilisable d'une suggestion pour l'amélioration d'une opération gouvernementale ou commerciale, est un genre de service qu'un employeur peut obtenir de ses officiers ou employés. Par conséquent, un paiement pour une suggestion est un paiement pour un service. Or, le paiement d'un service est ordinairement un «revenu» pour celui qui le reçoit. Cela découle d'une des «provenances» au sens qu'ont ces mots dans l'article 3 de la *Loi de l'Impôt sur le revenu.* Cela importe peu que le bénéficiaire reçoive ce revenu comme employé ou en tant que personne engagée dans une entreprise ou dans une tâche spécifique.

S'étant pourvu en appel devant la Commission, l'appel de l'intimé fut accueilli. D'où le présent pourvoi du Ministre devant cette Cour.

Jugé: Appel maintenu. La décision de la Commission est infirmée. La cotisation telle que déterminée par le Ministre est rétablie.

2° Les récompenses décernées sous l'empire des règlements du Plan des récompenses pour suggestions sont un revenu provenant d'un emploi et sont incluses dans l'article 5(1) de la *Loi de l'Impôt sur le revenu,* S.R.C. 1952, ch. 148, parce qu'elles sont payables aux employés du Gouvernement du Canada pour services rendus à ce Gouvernement.

3° Le Parlement a autorisé expressément l'attribution de ces rétributions en tant que récompenses supplémentaires ou compensation devant être payées aux fonctionnaires pour des services rendus au delà de leurs devoirs habituels.

4° De telles rétributions sont certainement comprises dans les mots «autre rémunération» mentionnés au dispositif préliminaire du paragraphe 1 de l'article 5 de la *Loi de l'Impôt sur le revenu.*

APPEL d'une décision de la Commission d'appel de l'impôt sur le revenu.

La cause fut instruite devant l'Honorable Président de cette Cour, à Ottawa.

R.-P. Coderre et *D. G. H. Bowman* pour l'appelant.

J.-Claude Couture, c.r. pour l'intimé.

JACKETT P.:—Il s'agit d'un appel, par le Ministre du revenu national, d'un jugement de la Commission d'appel de l'impôt, maintenant l'appel logé par l'intimé devant cette Commission, de la cotisation de l'intimé, en vertu de la *Loi de l'impôt sur le revenu,* pour l'année d'imposition 1962.

La seule question en litige entre les parties, est de savoir si, comme le prétend le Ministre, on doit tenir compte, dans le calcul du revenu annuel de l'intimé, du montant d'une récompense en argent, reçue par celui-ci, sous l'empire des règlements du «Plan des récompenses pour suggestions», du Gouvernement du Canada, ou si, suivant la prétention de l'intimé, on ne devrait pas en tenir compte, pour les fins de ce calcul. Le montant de la récompense en question est de $170 et le montant additionnel d'impôt sur le revenu payable par l'intimé, si la prétention du Ministre est bien fondée, est de $29.

Au moment où la suggestion a été faite et la récompense reçue, l'intimé était à l'emploi du Gouvernement du Canada. Il était employé comme commis principal, sujet à une surveillance générale, au Bureau fédéral de la statistique, où il avait la responsabilité d'une partie du travail relatif à un projet appelé «Étude des revenus et des dépenses de la ferme». Les responsabilités de sa position comportaient celles de reviser les méthodes et les procédés, au besoin.

Les règlements du Plan des récompenses pour suggestion sont déterminés par le Conseil du Trésor, en vertu des pouvoirs qui lui sont conférés par l'article 7 de la *Loi sur*

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l'administration financière, S.R.C. 1952, chapitre 116, d'établir des règlements «nonobstant la *loi du service civil*».[1] Ces règlements autorisent le paiement, aux employés de la fonction publique, «de rétribution ou autre rémunération pour . . . des suggestions pratiques de perfectionnement». Les règlements édictés par l'Ordre du Conseil du Trésor C.T. 574431, en date du 19 janvier 1961, établissent une procédure détaillée, en vue de l'attribution de récompenses soit en espèces, soit en nature, aux fonctionnaires, pour des propositions, plans, ou suggestions pratiques ayant pour but d'améliorer les opérations des départements du Gouvernement.

En avril 1961, l'intimé suggéra l'utilisation de cartes I.B.M. pour l'impression de «l'index des rues» dans la division de recensement du Bureau fédéral de la statistique. Cette suggestion fut adoptée et en conséquence une économie fut réalisée dans le coût de la préparation d'un manuscrit des index des rues. L'économie ainsi réalisée fut estimée à $2,175 pour la première année. Par conséquent, en 1962, l'intimé obtint, à titre de récompense, «$170 moins l'impôt sur le revenu».

L'intimé n'ajouta pas cette récompense de $170 à son revenu, tel qu'établi dans la déclaration d'impôt sur le revenu pour l'année 1962, mais le Ministre additionna cette somme à son revenu tel que déclaré et le cotisa par conséquent, à un montant supérieur de $29, au montant d'impôt calculé par l'intimé dans sa déclaration.

L'intimé porta cette cotisation en appel devant la Commission d'appel de l'impôt et le 17 mars 1965, cette Commission rendit jugement, maintenant l'appel. Le présent appel en est de ce jugement.

La réponse la plus simple à la question de savoir si la gratification décernée à l'intimé, est d'une nature imposable ou non, doit se trouver dans la détermination du caractère de toute récompense accordée sous l'empire des règlements du Plan des récompenses pour suggestion. En vertu de l'article 7 de la *Loi sur l'administration financière,* toutes telles gratifications doivent être «une rétribution

[1] A mon point de vue, ces mots sont nécessaires, parce que ce qui est autorisé est un paiement à un employé «en sus de la rémunération autorisée par la loi». Ceci est mentionné à l'article 14 de la *Loi du service civil,* chapitre 57 des status de 1960-1961.

ou autre rémunération pour «des suggestions pratiques de perfectionnement».»[1]

A mon sens, la création et l'élaboration sous une forme utilisable, d'une suggestion pour l'amélioration d'une opération gouvernementale ou commerciale, est un genre de service qu'un employeur peut obtenir soit de ses officiers ou employés, soit de personnes indépendantes (V.G. comptables, experts en bon rendement etc.) Il s'ensuit donc, à mon point de vue, qu'un paiement pour une suggestion est un paiement pour un service.

Bien qu'il puisse y avoir des exceptions, je suis d'avis que le paiement d'un service, est ordinairement un «revenu», pour celui qui le reçoit d'une des «provenances» au sens qu'ont ces mots dans l'article 3 de la *Loi de l'impôt sur le revenu,* que le bénéficiaire reçoive ce paiement à titre d'employé ou en tant que personne engagée dans une entreprise dont le but est de fournir des services ou en tant que personne qui a accompli une tâche dans un cas spécifique. (Il est d'ailleurs intéressant de lire le jugement de monsieur le Juge Noël dans *Steer vs Le Ministre du Revenu national*[2] à ce sujet.) A tout événement, que cette interprétation soit trop large ou non, je n'ai aucun doute que les récompenses décernées sous l'empire des règlements du Plan des récompenses pour suggestion sont un revenu provenant d'un emploi et sont incluses dans l'article 5 de la *Loi de l'impôt sur le revenu,* parce qu'elles sont payables aux employés du Gouvernement du Canada pour des services rendus à ce Gouvernement. A mon sens, le fait que ces services en particulier ne soient pas rendus dans le cadre strict des responsabilités habituelles dévolues à la fonction d'un employé, n'a aucune importance. Le Parlement a autorisé expressément, l'attribution de ces rétributions en tant que récompenses supplémentaires ou compensation devant être payées aux fonctionnaires pour des services

[1] Les différentes causes, dont *Laidler vs Perry* (1965) 2 A.E.R. 121 (H.L) est une des plus récentes, ayant rapport à la question de savoir si un paiement fait à un employé est un cadeau purement personnel, inspiré seulement par la bonne volonté, ne nous apportent aucune aide véritable dans une cause comme celle-ci, où la nature du paiement concerné est déterminée par les termes mêmes du Statut qui l'autorise. Ces gratifications doivent être des «compensations» ou «des récompenses» sans quoi elles ne sont pas autorisées par le Statut.

[2] [1965] 2 Ex. C.R. 458.

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rendus au delà de leurs devoirs habituels. De telles rétributions sont à mon point de vue certainement comprises dans les mots «autre rémunération», mentionnés au dispositif préliminaire du paragraphe (1) de l'article 5.

Étant donné le point de vue que j'ai exprimé, je n'ai pas à retenir les arguments qui m'ont été apportés concernant l'interprétation de l'alinéa (*a*) du paragraphe (1) de l'article 5.

L'appel est maintenu. Le jugement de la Commission d'appel de l'impôt est infirmé et la cotisation telle que déterminée par l'appelant est rétablie.

L'appelant a mentionné, par l'entremise de son procureur, qu'il ne demandait pas que l'intimé soit condamné à payer les frais, advenant le cas où l'appel serait maintenu. Il est même disposé à payer les frais de l'intimé quelle que soit l'issue de la cause. J'aurais eu des doutes quant à la question de savoir s'il était juste d'accorder à une partie défaillante, des frais contre un Ministre de la Couronne, en me basant uniquement sur son consentement, attendu qu'un tel jugement de cette Cour est l'autorisation d'un paiement à même le fonds consolidé du revenu. Cependant, il est évident que l'intimé, qui avait eu gain de cause devant la Commission d'appel de l'impôt, a été emmené devant cette Cour par le Ministre en raison de l'intérêt général du principe en cause et non en raison du montant d'impôt dû par l'intimé. Sous ces circonstances, je suis d'avis que l'octroi des frais à l'intimé, nonobstant son échec, représente un exercice juste de la discrétion judiciaire. L'intimé a donc droit d'être payé de ses frais d'appel à cette Cour, par l'appelant.

Toronto 1965 Oct. 4

Ottawa Oct. 12

BETWEEN:

ALVIN LOCKWOOD GUNN .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Questions of law disposed of before trial made under Rule 149 of the General Rules and Orders of the Exchequer Court—Application of s. 31 of the Exchequer Court Act, R.S.C. 1952, c. 98—Crown Liability Act, S. of C. 1952-53, c. 30, s. 19—Articles 2262 and 2267 of Civil Code of Quebec—Canadian Bill of Rights, S. of C. 1960, c. 44, s. 2(3)—Determination of suppliant's rights—Cause of action arising in Province

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of Quebec—"Laws relating to prescription" in force in Province of Quebec "between subject and subject".

This case was a hearing before trial of a question of law pursuant to an order of the Court made under Rule 149 of the General Rules and Orders of this Court.

When this Petition of Right for bodily injuries was filed, more than one year had elapsed since the injuries were alleged to have been sustained.

The question the Court had to decide was whether, on those facts, assuming them to be true, the suppliant's right to relief against the respondent had been "prescribed".

The present problem must be resolved by the application of s. 31 of the *Exchequer Court Act*, R S C. 1952, c. 98 and s. 19(1) of the *Crown Liability Act*, S. of C. 1952-53, c. 30.

The cause of action set out in the Petition of Right is an assault that occurred in St. Vincent de Paul Penitentiary in the Province of Quebec. Being so, the Court came to the conclusion that the cause of action disclosed by the Petition of Right was a cause of action arising in that province within the meaning of s. 31 of the *Exchequer Court Act* and s. 19(1) of the *Crown Liability Act*.

The relevant provisions of the law of Quebec is Article 2262 of the Civil Code.

There is no Act of the Parliament of Canada to the contrary and there is no special law regulating cases such as that disclosed by this Petition of Right.

"Laws relating to prescription" in force in the Province of Quebec "between subject and subject" apply to this Petition of Right proceeding. Article 2267 of the Civil Code says that, in all cases mentioned in Article 2262 "the debt is absolutely extinguished".

It was held, therefore, that, subject to consideration of the Canadian *Bill of Rights*, s. 31 of the *Exchequer Court Act* and s. 19 of the *Crown Liability Act* operated to make the one year prescription contained in Article 2262 of the Civil Code of Quebec applicable to these proceedings.

The submission that the Canadian *Bill of Rights* applied in the circumstances of this case was rejected. Section 2(*e*) of the Canadian *Bill of Rights* requires that s. 31 of the *Exchequer Court Act* and s. 19 of the *Crown Liability Act* be not "construed" or "applied" so as to deprive the suppliant of the right to "a fair hearing in accordance with the principles of fundamental justice" of his claim for relief against the respondent. In this case the suppliant was not deprived of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights. The statutory provisions in question do not relate to the procedure for the "determination" of the suppliant's rights. They operate to extinguish rights that the suppliant would otherwise have and must therefore be taken into account in the process of determining what his substantive rights are.

Held, the right to relief in respect to the bodily injuries sustained by the suppliant on June 22, 1962 was prescribed before this Petition of Right was filed on April 14, 1965.

2. The question of law was therefore answered in the affirmative.

3. The "laws relating to prescription" apply to this Petition of Right proceeding.

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PETITION OF RIGHT claiming damages for assault.

Harvey R. Daiter for suppliant.

Paul M. Ollivier, Q.C. for respondent.

JACKETT P.:—This was a hearing before trial of a question of law pursuant to an order of the Court made under Rule 149 of the General Rules and Orders of this Court.

These proceedings were instituted by a Petition of Right claiming damages for assault. By his defence, the Deputy Attorney General of Canada takes the position that the relief claimed by the suppliant is prescribed by reason of the fact that when the Petition of Right was filed more than one year had elapsed since the injuries are alleged to have been sustained. By the order of the Court for the hearing of the question of law before trial, the question of law was stated in the following terms:

> Assuming the allegations of fact contained in the Petition of Right to be true, is the relief claimed in the Petition of Right prescribed?

While the Petition of Right is not as explicit as it might be, it appears, according to the Petition, that the suppliant was an inmate of Kingston Penitentiary in the Province of Ontario on January 29, 1962, and that, on that date, he was transferred to, and became, an inmate of St. Vincent de Paul Penitentiary, which is in the Province of Quebec. It further appears, according to the Petition of Right, that, for reasons that are irrevelant to the question of law that I have to decide, the suppliant was, while at St. Vincent de Paul Penitentiary on June 22, 1962, "assaulted and viciously beaten" by a number of the respondent's servants who were "entrusted with the duty of guarding prisoners in the said penitentiary" and who were "purportedly acting in the course of their duty as servants" of the respondent.

The question that I have to decide is whether, on those facts, assuming them to be true, the suppliant's right to relief against the respondent has been "prescribed".

Statutes providing for limitation of actions as between subject and subject do not, in the absence of some special provision, apply to proceedings by way of Petition of Right

against the Crown because proceedings by way of Petition of Right are not, strictly speaking, suits or actions. It is not so clear that the same situation would exist in respect of prescription provisions inasmuch as they, generally, operate to extinguish the right and not merely to bar the enforcement of it (compare Article 2267 of the Civil Code of Quebec). That problem does not, however, in my view, arise in connection with the present problem, which must be resolved by the application of section 31 of the *Exchequer Court Act,* R.S.C. 1952, chapter 98, which reads:

> 31. Subject to any Act of the Parliament of Canada, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceeding against the Crown in respect of a cause of action arising in such province.

and section 19 of the *Crown Liability Act,* chapter 30 of the Statutes of 1952-53, subsection (1) of which reads as follows:

> 19. (1) Unless otherwise provided in this Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings against the Crown under this Act in respect of any cause of action arising in such province, and proceedings against the Crown under this Act in respect of a cause of action arising otherwise than in a province shall be taken within and not after six years after the cause of action arose.

The cause of action set out in the Petition of Right is an assault that occurred in St. Vincent de Paul Penitentiary in the Province of Quebec. Counsel for the respondent says that that is a cause of action arising in the Province of Quebec. Counsel for the suppliant agrees that it is a cause of action arising in the penitentiary, and that the penitentiary is in the Province of Quebec, but he says that the penitentiary, being Federal property, should not be regarded as part of the Province of Quebec for the purposes of section 19 of the *Crown Liability Act* and, presumably, section 31 of the *Exchequer Court Act*. He suggests an analogy to United Nations property in New York and to foreign embassies and legations, to which the doctrine of exterritoriality applies. While I was impressed with the ingenuity of this argument, in support of which no authority was cited, I cannot accept it. I cannot escape the

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conclusion that St. Vincent de Paul Penitentiary is in the Province of Quebec and that the cause of action disclosed by the Petition of Right is a cause of action "arising" in that province within the meaning of the two provisions quoted above. Unless, therefore, there is some Act of the Parliament of Canada to the contrary, "laws relating to prescription" in force in the Province of Quebec "between subject and subject" apply to this Petition of Right proceeding.

The relevant provision of the law of Quebec is Article 2262 of the Civil Code of Quebec, which reads, in part:

> 2262. The following actions are prescribed by one year:
>
> . . . .
>
> 2. For bodily injuries, saving the special provisions contained in article 1056 and cases regulated by special laws.[1]
>
> . . . .

I know of no special law regulating cases such as that disclosed by this Petition of Right and my attention has not been drawn to any such special law. Article 1056, to which special reference is made in Article 2262, concerns the case where the injured person dies in consequence of that injury and it has, therefore, no application here. There is no doubt in my mind, therefore, that, subject to consideration of the Canadian *Bill of Rights*, section 31 of the *Exchequer Court Act* and section 19 of the *Crown Liability Act* would operate to make the one year prescription contained in Article 2262 of the Civil Code of Quebec applicable to these proceedings.

The question concerning the Canadian *Bill of Rights* arises out of a submission made by counsel for the respondent, which may be summarized as follows:

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[1] See *The City of Montreal v. McGee*, [1900] 30 S.C.R. 582 for an example of the application of Article 2262.

Counsel for the suppliant conceded that being a prisoner did not deprive the suppliant of capacity to sue. He did not invoke Article 2232 of the Civil Code nor do the facts pleaded provide any support for its application in my view. See "Some Aspects of the Suspension and of the Starting Point of Prescription" by John W. Durnford in Thémis Revue Juridique, 1963, page 244 at pages 266 et seq.

(*a*) an inmate of a penitentiary could not hope to obtain a fair hearing of a claim against members of the custodial staff of the institution while he continued to be an inmate;

(*b*) the suppliant continued to be an inmate of St. Vincent de Paul Penitentiary until after the expiration of the prescription period of one year; and

(*c*) it follows that section 2(*e*) of the Canadian *Bill of Rights*, chapter 44 of the Statutes of 1960, which reads as follows:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> . . . .
>
> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

requires that section 31 of the *Exchequer Court Act* and section 19 of the *Crown Liability Act* not be "construed" or "applied" so as to deprive the suppliant of the right to "a fair hearing in accordance with the principles of fundamental justice" of his claim for relief against the respondent.

Assuming, without making any finding with regard thereto, that

(*a*) an inmate of a penitentiary could not hope to obtain a fair hearing of a claim against members of the custodial staff of the institution while he continued to be an inmate; and

(*b*) the suppliant continued to be an inmate of St. Vincent de Paul Penitentiary until after the expiration of the prescription period of one year;

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I have come to the conclusion that this submission must be rejected. What section 31 of the *Exchequer Court Act* and section 19 of the *Crown Liability Act* do, on the facts of this case, is to extinguish the substantive rights that the suppliant would otherwise have. (See article 2267 of the Civil Code of Quebec, which says that, in all cases mentioned in Article 2262, "the debt is absolutely extinguished".) What the portion of section 2 of the Canadian *Bill of Rights* on which the suppliant relies says is that, in the absence of an appropriate declaration, no law of Canada shall be "construed" or "applied" so as to "deprive a person of a fair hearing . . ." for the determination of his rights. Section 2(*e*) is a prohibition against giving a statute the effect of depriving a person of a fair hearing for the "determination" of his rights unless it is expressly declared by the statute that it shall so operate "notwithstanding the Canadian Bill of Rights". The statutory provisions in question here do not relate to the procedure for the "determination" of the suppliant's rights. They operate to extinguish rights that the suppliant would otherwise have and must therefore be taken into account in the process of determining what his substantive rights are.

It follows that the right to relief in respect of the bodily injuries sustained by the suppliant on June 22, 1962, was prescribed before this Petition of Right was filed on April 14, 1965. The question of law is therefore answered in the affirmative.

The costs of the application to set the question of law down for hearing before trial and the costs of the hearing shall be costs in the cause.

Montreal
1965
June 2, 3
Ottawa
Sept. 28

BETWEEN:

PFIZER CORPORATION and PFIZER COMPANY LIMITED—LA COMPAGNIE PFIZER LIMITÉE ..... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Sales tax—Exemptions—Whether biscuit sold as dietary aid for obesity a pharmaceutical—Construction of exempting provisions—Excise Tax Act, R S C. 1952, c. 100, s. 2(1)(cc), s. 30, Sch. III.

Suppliants petitioned for a refund of sales tax and old age security tax paid by them under s 30 of the *Excise Tax Act*, R S C. 1952, c 100, and s. 10 of the *Old Age Security Act*, R S C. 1952, c. 200, on the sales of a food product in biscuit form sold under the trade mark "Limmits" and advertised as a dietary aid to weight control.

Held, dismissing the petition, "Limmits" were a pharmaceutical within the meaning of s. 2(1)(*cc*) of the *Excise Tax Act* (as amended by S. of C. 1959, c. 23, s. 1(5)), being "sold or represented for use in the . . . treatment . . . of an abnormal physical state", i.e. obesity, and, as pharmaceuticals, were not within the exemption of Schedule III, *viz* "bakers' cakes and pies including biscuits . . . ". Exceptions in a taxing statute should not be presumed or given the benefit of doubt.

[*The Queen v. Continental Air Photo Ltd.* [1962] Ex. C.R. 461 at pp 471-472; *Federal Comm'r. of Taxation v. Farey Bros.*, 2 Aust. T C. 140 at p. 143; *Jackett v. Federal Comm'r of Taxation*, 2 Aust. T.C. 203 at pp. 205-207 considered]

PETITION OF RIGHT for refund of sales tax and old age security tax.

Julian C. C. Chipman for suppliants.

C. R. O. Munro, Q.C. and *D. G. H. Bowman* for respondent.

DUMOULIN J.:—By their joint petition of right the suppliants are claiming from the respondent a refund in the sum of $59,235.62 for sales tax imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, and old age security tax, s. 10 of the *Old Age Security Act*, R.S.C. 1952, c. 200, allegedly because ". . . all sales tax paid by the Suppliants, . . . were paid under mistake of law or fact and may be recovered" (cf. petition, s. 19).

Should this assertion be vindicated, then, no procedural impediment would bar its way since it is admitted that "on or about March 13, 1964, the Suppliants made application in writing for refund of all said taxes" paid "under protest . . ." (this last statement denied but satisfactorily

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substantiated at trial), from April 24, 1963, down to February 18, 1964, in compliance with s. 46(5) of the *Excise Tax Act*.

Of the two suppliants, the first, Pfizer Corporation, has its head office in Panama City, Republic of Panama, the second, Pfizer Company Ltd.—La Compagnie Pfizer Ltée, maintains its principal place of business in the City of Montreal, Province of Quebec.

The petition, of which the leading passages should be reproduced for a clearer statement of the case, sets out that:

> 1. Until March 27th, 1963, the Suppliant Pfizer Corporation had been selling and since that time the Suppliant Pfizer Company Ltd.—La Compagnie Pfizer Ltée, a wholly-owned subsidiary of the Suppliant Pfizer Corporation, has been selling to retail outlets in Canada a food product in biscuit form under the trade mark "Limmits" (hereinafter called "Limmits").
>
> 2. Limmits was sold and advertised for sale as a limited calorie meal plan for weight control.
>
> 3. Limmits was made and baked for the Suppliants by Christie, Brown & Co. Ltd., bakers. (a fact admitted by respondent's counsel).

with para. 4 the recital of litigious facts begins:

> 4. On January 17th, 1962, the Deputy Minister of National Revenue ruled that Limmits was exempt from sales tax under Schedule III of the Excise Tax Act and from the related old age security tax . . . as coming under the exemption of "biscuits, cookies or other similar articles".
>
> 5. At about the same time the Deputy Minister of National Revenue had ruled that "Metrecal and MinVitine", both dietary products for weight control in concentrate form, were not exempt from sales tax.

This apparently conflicting attitude came to a head by way of a hearing before the Tariff Board in the Appeal No. 650, instituted by Mead Johnson of Canada, Limited, "urging that the Department of National Revenue, Customs and Excise, wrongly held the product known as 'Metrecal' to be subject to sales tax . . .".

On February 25, 1963, the Tariff Board issued its declaration, the gist of which is hereunder excerpted:

> The Respondent (i.e., National Revenue, Customs and Excise Branch) urged that Metrecal is a pharmaceutical within the provisions of Section 2(1)(*cc*) of the Excise Tax Act which is as follows:
>
> > "pharmaceuticals" means any material, substance, mixture, *compound or preparation, of whatever composition or in whatever form, sold or represented for use* in the diagnosis, treatment,

> mitigation, or prevention of a disease, *disorder, abnormal physical state,* or the symptoms thereof, in man or animal, *or the restoring correcting,* or ***modifying*** *organic functions* in man or animal.
>
> (Italics not in text)

The Metrecal label stresses a "dietary plan for weight control". It is clear from the evidence that the words "weight control" mean the control of excessive weight. The labels on Metrecal packages and the advertising by the applicant advise consumers of Metrecal to consult physicians on weight control.

Metrecal is designed for human consumption, without other food, over a period, for the purpose of reducing or preventing excessive weight.

It is undisputed in the evidence that overweight in man is an abnormal physical state.

Section 2(1)(*cc*) of the Act is very broad in its application, but is binding in the determination of what is a pharmaceutical within the meaning of the Excise Tax Act; from the evidence it is clear that Metrecal was "sold or represented" by the applicant "for use in the . . . treatment, mitigation, or prevention of . . . abnormal physical state . . . in man".

Accordingly, the Board finds that Metrecal is a pharmaceutical within the meaning of the Excise Tax Act; it cannot, therefore, be exempt from sales tax under the exempting provision of Schedule III of the Act. . . .

Leave to appeal this ruling to the Exchequer Court was refused by the then President, Honourable Mr. Justice Thorson.

Although the Tariff Board's decision is dismissed as irrelevant to the issue in the Statement of Defence (para. 2), it seems crystal clear that it at once induced in the respondent a complete change of mind and brought about the rescinding of its January 17, 1962, ruling.

This new and altered policy was made known to Pfizer Corporation through a departmental letter on March 5, 1963, saying that "...in view of the above declarations of the Tariff Board, it was decided that Limmits was not exempt from sales tax and that sales tax should be accounted for and paid with respect to sales made on and after February 26th, 1963..." Hence, the payment of $59,235.62, under protest, and the instant petition for a refund, to which the respondent replies, in substance, that Limmits is not exempt from the sales taxes imposed by the *Excise* and *Old Age Security Acts* "...because it is not an article mentioned in Schedule III to the *Excise Tax Act,* and in particular it is not included in the item 'bakers' cakes and pies including biscuits, cookies and similar articles' contained in the said Schedule III". I have in the opening lines

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disposed of respondent's objection based upon s. 46 of the *Excise Tax Act*.

A protracted scrutiny of the moot question leads me to the belief that it should be answered by a strict adherence to the terms of s. 2(1)(*cc*) and a correlative interpretation of Schedule III in the two first lines of its subdivision headed "Foodstuffs".

As noted by the Tariff Board, the expression "pharmaceuticals" in s. 2(1)(*cc*) is very broad; so wide, indeed, as to encompass within the enunciation of "any material, substance, mixture, compound or preparation, of whatever composition or in whatever form" unlimited varieties of products, were it not for the restricting condition that the pharmaceutic qualification only applies if and when such wares are "sold or represented for use in the ... treatment, mitigation, or prevention of ... abnormal physical state ... in man"; and it goes without saying that none concerned disputed the physical abnormality of obesity or overweight.

With this assumption in mind, my initial investigation should be directed towards the advertising publicity, or, as the French put it "la réclame commerciale et publicitaire", according to which Limmits "are sold or represented" in appropriate retail outlets throughout Canada.

Possibly, the most cogent illustration consists in a standard package of Limmits, filed as ex. S.-1, advertising the product as a "Limited Calorie Meal Plan for Weight Control" with directions indicated and contents described. This attending publicity reads thus:

DIRECTIONS

FOR WEIGHT LOSS: Replace breakfast and lunch with two Limmits biscuits plus tea or coffee (no cream). Eat a well-balanced, calorie-restricted meal (see specimen menus on inside flap) for dinner.

FOR WEIGHT MAINTENANCE: Replace lunch with two Limmits biscuits and coffee or tea (no cream). Eat a well balanced, calorie-restricted breakfast and dinner (see specimen menus on inside flap).

Limmits is a nutritious, satisfying calorie-limited meal in delicious biscuit form. Limmits provide essential vitamin and food elements and help satisfy your appetite, *yet provide so few calories that you lose weight.*

(emphasis added)

I interrupt the rather verbose citation to note that a substance advertised as appeasing hunger "yet (providing) so few calories that you lose weight", wears the appearance

of being "sold or represented for use in the ... treatment, mitigation or prevention of ... an abnormal physical state" consequent to overweight.

Next comes, on the longitudinal side of the cardboard container, a chemical and pharmaceutical nomenclature of the various contents compounded in "Limmits"; I quote:

CONTENTS: This package contains 6 LIMMITS. Each biscuit weighing 1.14 oz. contains soya, baking and whole meal flour, sugar, malt extract, glucose syrup, powdered milk, sodium carboxymethyl cellulose (850 mg) and the following essential minerals and vitamins: vitamin A (as palmitate) 894 I.U.; vitamin B1 0.31mg; riboflavin (vitamin B2) 0.52 mg.; vitamin C 10.74 mg; niacinamide 3.1 mg; calcium (as dibasic calcium phosphate) 115.4 mg; phosphorus (as dibasic calcium phosphate) 88.6 mg.; iron (as reduced iron) 2.5 mg

Each biscuit provides 175 calories, 3.07 gm. protein, 15.5 gm. carbohydrate, and 11 gm fat

The closing paragraph surely underscores a certain degree of connexion between the objects thus "sold or represented" and the "treatment, mitigation or prevention" of some disorder or abnormal physical state, when it cautions the eventual purchaser as follows:

Consult your physician on any long term program of weight reduction.
Not recommended for use during pregnancy and lactation, unless under the direction of a physician.

In telling contrast with the curative or preventative properties claimed for Limmits on its wrapping envelope is ex. S-2, a package of "Afternoon Tea, assorted biscuits", made by the well-known English manufacturers, Peek, Frean & Co. Ltd., of London. No special hygienic or restorative virtues are mentioned on this container, nothing but the company's name, its Royal appointment, the net weight contained; no physician need be consulted, nor is there any warning that pregnant or nursing women should refrain from eating those biscuits except with medical advice.

Also produced as exs. R-2, 3 and 4, and commented upon by respondent's counsel, were the December, 1962, December, 1963, and September, 1964, issues of what can properly be called a technical publication, "Drug Merchandising", plus the explanatory sub-title of "Drug Index". These trade magazines, it should be noted in all fairness, extend their listings to the entire schedule of drug stores' non-pharmaceutical wares such as: Toiletries & Cosmetics, Photographic, Sundries and Store Equipment.

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This professional catalogue is credited by respondent's witness, Mr. O. L. Christie, a graduate pharmacist of Toronto University, presently purchasing agent for G. Tamblyn, Ltd., the largest retail drug chain in Canada, as reaching every pharmacy in the country (evidence, p. A-27) because "in our profession, pharmacists are not familiar with every product by name or supplier; and we use this as an indication where to procure the merchandise that is listed in this index" (ev. p. A-30).

On p. 32 of ex. R-2 appears the product "Limmits" with code number 1165, which at p. 98 locates the manufacturer as Lee-Cliff Products, a division of Pfizer Corp. A similar listing is found in R-3, p. 36, with Pfizer's name as producer, and in R-4, a full page advertisement asserting, in bold print, that "You can't turn your back on profit. Limmits are profitable to promote" (next, in smaller characters) "because the total dietary market is not shrinking! because over 60% of the total dietary business is done through drug stores...; *because Limmits are the most heavily promoted dietary products in Canada!*..." (italics mine). It seems hard to deny some significance to the listing and promotional literature of "Limmits" in this "Drug Index", when contrasted with a total omission of all ordinary brands of table or bakers' biscuits. An explanation of this one-sided publicity might well be the undisputed dietary or medicinal nature of Limmits, differentiating them, without a doubt, from the non-pharmaceutically treated varieties of biscuits.

The April, 1963, number of Reader's Digest, possibly the most widely read monthly booklet in North America, (Canadian Edition), filed as ex. R-4, ran a full-page (7) advertisement captioned:

> Remarkable Limmits Diet Plan Gives Overweight Canadians New Lease on Life.
>
> No medicinal tasting pills, powders, liquids . . . but a delicious cream-filled two-biscuit meal with flavoursome variety!

Such are the alluring introductory lines, followed by the statistical lament that:

> Canadians are carrying around 20 million pounds in excess weight. One man in seven and one woman in four are overweight. *Most are aware that being overweight poses a serious threat to health and shortens life.*

(emphasis added throughout)

Necessarily, the victorious weapon in this daily "battle of

the bulge", so reads the "ad", can be none other than Limmits about which, I quote:

Medical opinion and marketing experts attribute Limmits' success to the fact that, unlike the nutrient liquids, they can be eaten and are filling . . .

And the concluding paragraph:

Health experts agree that obsession with obesity is here to stay as long as we continue to enjoy an affluent society. Not only will there be those who need a drastic weight reduction program, but thousands who will wish to exercise permanent control to maintain an ideal weight level. It looks like Limmits are here to stay. Lee-Cliff Products, Montreal, Canada.
(a wholly-owned subsidiary of Pfizer Corporation)

If this style and form of propagandizing Limmits, country-wide, as "*a drastic weight reduction program*", a treatment or preventative against "*overweight*" which "*poses a serious threat to health and shortens life*", bears no relation to "*any material, substance, mixture, compound or preparation, of whatever composition or in whatever form, sold or represented for use in the... treatment or prevention of an... abnormal physical state, or the symptoms thereof, in man...*", I had as well confess my inability to conceive what could ever give rise to such an application.

Before entering upon another chapter of the case, it is apposite to inquire into the statutory scope of s. 2(1)(*cc*). so frequently cited in these notes.

It is, of itself, the sole interpretative provision of the Act and, as such, exercises throughout the statute a pervasive, overriding authority, that a positive and unequivocal exception might alone curtail. Sub-section (*cc*) pursues a single objective of a fiscal, tax imposing, nature, in nowise concerned with scientific or technical matters. The wording of the text confirms this conclusion since, of its own authoritative determination, a "pharmaceutical" is an object of any possible shape, form, substance or size, whether pharmaceutically prepared or totally devoid of drugs or medicaments, "if" it is "*sold or represented* for use in the . . . treatment, mitigation or prevention . . . of (an) abnormal physical state . . . in man". Here, the chemical substance is of no practical avail; here again, the specific essence of the ingredients is not considered, merely the way in which, through a promotional campaign, the resulting compounds are "*sold or represented*".

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In my humble opinion those three governing words have paramount sway over the Act and are mandatory unless superseded by an exception, expressed or logically inferred.

It was convincingly shown, I believe, that the particular products, in biscuit form, called Limmits, were "*sold or represented*" to the public at large precisely in the manner and for the purposes foreseen by s. 2(1)(*cc*). How, then, could they escape the consumption taxes of eight percent and two percent imposed, respectively, by the *Excise Tax* and *Old Age Security Acts*?

The suppliant replies by a reference, initially, to s. 32(1) of the *Excise Tax Act* (also applicable to the *Old Age Security Act*, s. 10(2)) decreeing that:

> 32 (1) The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III.

In the first lines of Schedule III, entitled "Foodstuffs", we reach the rub of the problem, exempting, as they do, from sale taxes:

> Bakers' cakes and pies including biscuits, cookies and similar articles but not including simulated chocolate bars or candy bars.

Now is the time to give a description of the object in dispute, the "Limmits" biscuit, with frequent references to the evidence of a professional chemist, Alfred Bendin Deans, the technical director of Pfizer Company, Ltd.:

> The full ingredients of that biscuit (Limmits) would—conveniently be divided into the ingredients that enter into . . . the two shells of the biscuit and the ingredients that enter into the icing which goes between the two shells of the biscuit . . . ,

explains the witness, who continues thus:

> The shells of the biscuit are baked in equipment used for the manufacture of all other type of biscuits, and the ingredients that enter into the process are of necessity the same type of ingredients that go into ordinary everyday biscuits—flour, sugar, vegetable oil, malt syrup . . . milk powder, some salt, iron, sodium bicarbonate (i.e. baking soda).

(cf. transcript, pp. 54 and 55)

All of the components aforesaid relate to the double shell.

Mr. Deans next describes the filling or icing contents that can have vanilla, chocolate, orange or cheese flavourings, as "hydrogenated palm kernel oil . . . sugar . . . carboxymethyl cellulose", a bulking agent that "probably swells to form a thickened solution. It helps to break down the biscuit and make it more digestible when it is consumed. At the same time it imparts a feeling of fullness . . . so that the consumer's sensation of hunger is, in part, reduced" (trans. pp. 57

and 67). Other additives are "Dicalcium phosphate ... a normal ingredient of infant formulas. It supplies things like phosphorus and calcium, that are needed to build up the bone structure in the body." (trans. p. 58). Skimmed milk is added, but the most active and probably distinctive agents in the filling would be vitamins, mentioned by the suppliants' technical director as Vitamin A in its combined form of Palmitate, resulting from the treatment of Vitamin A with palmitic acid. Then come vitamins B-1, B-2, C and Niacinamide (trans. pp. 60, 61, 62).

My impression persists that the same Mr. Deans approached the matter in more scientific and revealing fashion in a business communication, dated February 9, 1965, addressed to Mr. R. Brewerton, a chartered accountant, and comptroller of Pfizer Co. Ltd. It forms part of a brief, comprising seven documents produced as ex. R-1. Additional references will be made to this letter, but, for the time being, I will quote from its second page (2), headed "Limmits, Vitamin Mix Formula", the components listed, attaching particular attention to the medicinal functions attributed to six of them by the suppliants:

INGREDIENT	FUNCTION	GM/1000 GM
(1) Vitamin A Palmitate in Corn Oil	Medicament	41.0
(2) Vitamin A Palmilets	"	82.0
(3) Thiamine Hydrochloride	"	17.8
(4) Riboflavin	"	26.2
(5) Ascorbic Acid	"	615.4
(6) Niacinamide	"	177.6

Nowhere did the evidence reveal any kindred mixtures of medicinal preparations in regular table biscuits, either Peek, Frean's (ex. S-2), Gray, Dunn's, or other brands whatsoever.

Because of these medicated ingredients and remedial objectives, Limmits fall in the category of "Dietary Aids", segregated from candies and biscuits in all the stores owned or controlled by the Tamblyn organization, testified that company's purchasing agent, Mr. Orval L. Christie, to whom one of respondent's counsel put this question:

> Q. . . . if a person came into your store, to Tamblyn store or any of the other stores that you operate and asked for biscuits, would they be given "Limmits"?

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The answer:

> A. I would say definitely not. "Limmits" would be sold on request; and the customer wanting biscuits would not ask for "Limmits" or vice versa. (trans. p. A-23)

Limmits, supplied by Pfizer Corporation to the Tamblyn chain of drug stores, figure in the heavy sellers' list, though costing three times the price of Peek, Frean's and Gray, Dunn's biscuits, says the witness.

On this topic of expert evidence, I note Mr. Deans' attempt at waving aside the caution on the boxes of Limmits: "not recommended for use during pregnancy and lactation unless under the direction of a physician". To suggest, as he did (trans. p. A-3) "that during pregnancy and lactation it is quite common for stomach upsets and that type of thing to occur; and if the people at the same time were using a product, say, of this nature, they are quite likely to blame the upsets on the product rather than blame it on the normal type of thing that happens during pregnancy and lactation" sounds like a lame endeavour to minimize a risk quite apparent to his principals. The undeniable fact that, alive as any to the protection of their own commercial repute, none of the biscuit manufacturing firms ever print warning advices of this kind, conclusively refutes the tentative plea of the petitioners' chemical director.

This summarization of the oral evidence will be, I hope, a helpful introduction to the suppliants' basic argument.

Mr. Chipman, for Pfizer Corporation, started off by citing several dictionary definitions, both English and French, of the nouns: cake, pie and biscuit, to prove the undisputed and rather meaningless fact that the "shells" used in Limmits are made of biscuit components.

In a similar vein of reasoning, one could argue that a codein pill was a speck of sugar because sugar-coated, or a capsule of morphia nothing but a wisp of wafer because robed in that air-thin substance. Since, in the instant case, the shells are not sold without the filling, but simply serve the ancillary purpose of enticements, the decisive factor resides precisely in the preventative or restorative effects of the pharmaceutically compounded mixture pressed between the double shell. If this assumption proves true it does away with the possibility of Limmits being a "bakers'

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biscuit" as required by the exempting clause. Moreover, Limmits though baked by regular confectioners, Christie, Brown & Co. Ltd., are prepared in strict and partly blind compliance with the formulas handed down by Pfizer Corporation. Conclusive evidence of this appears in Alfred Deans' communication to R. Brewerton, ex. R-1, already mentioned, stating that:

At your request, a copy of the manufacturing instructions for the shells and fillings of these biscuits is attached.

Not all the information in these manufacturing instructions was supplied to Christie, Brown & Co. Limited. *The vitamin mixture and several ingredients were coded. Instead of the actual name of the ingredients, only the code letters were supplied.*

(italics added)

NAME OF INGREDIENT	CODE LETTER
Sodium Carboxymethyl Cellulose	Ingredient A
Dicalcium Phosphate	Ingredient B
DL. Methionine	Ingredient D
Reduced Iron	Ingredient E

The Tamblyn Stores' purchasing agent, Orval Christie, testified that Limmits were obtained directly from the Pfizer people. The information on the end parts of the container (ex. S-1) reads: "Limited-Calorie Meal Plan for Weight Control. Pfizer Company Ltd. Montreal, Quebec —Contrôle du poids, peu de Calories par Repas. La Compagnie Pfizer Ltée. Montréal, Québec."

Lastly, I cannot detect how the definitions, hereunder, of the word "biscuit" could enhance the suppliants' demands. I am referring to pages B-17 and B-18 of the record:

Mr. Chipman:

. . . Now, let us turn to "biscuits". The Shorter Oxford Dictionary, "a kind of crisp, dry bread more or less hard, made generally in thin, flat cakes. Essential ingredients are flour and water or milk without leaven."

. . . And Petit Larousse says: "Biscuit; n.m. (pref. bis. deux fois, et cuit). Galette très dure, constituant autref. un aliment de réserve pour les soldats et les marins. Pâtisserie faite de farine, d'œufs et de sucre. Ouvrage de porcelaine qui, après deux cuissons, est laissée dans son blanc mat, imitant le grain du marbre: statuette de biscuit."

Webster, "biscuit, any or certain hard or crisp dry baked products; a quick bread made in a small shape from dough which has been rolled and cut or dropped; and that is raised in the baking by a leavening agent other than yeast (baking powder)".

Those defining lines do not allude to biscuits used in subservient conjunction with pharmaceutical or medicated agents. Even though these definitions could apply to the

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shells alone, they hardly extend to filling and shells jointly. It remains doubtful whether or not Limmits, a chemical preparation, fit in with the popular notion of "biscuit", a light, innocuous pastry eaten at mealtime or between meals. At all events, I believe the evidence, exhaustively sifted, excludes them from the class of "bakers' biscuits" written in the exception of Schedule III, prepared, as they are, according to a complex, partly coded, recipe, and "sold or represented" not by bakers, confectioners or regular biscuit manufacturers, but exclusively through the selling facilities of Pfizer Corporation, a chemical organization of international extent, absolutely alien to the bakery trade.

The suppliants' contention lends itself, fairly enough, to the very concise summarization submitted, in these words, by their learned counsel, Mr. Chipman, at the close of his address (transcript, p. B-60):

> A biscuit is a biscuit; and it does not change the quality because a variety of vitamins may have been added to it....It is still a biscuit and it is nothing else.

That brings us back, albeit repetitiously, to that which, in my humble opinion at least, operates as the mandatory condition of the tax exemption in Schedule III. The determining, decisive, factor does not consist in the quantity of vitamins contained in, or calories excluded from, an edible substance; it is set and prescribed by the interpretative authority of s. 2(1)(*cc*) decreeing that: must be considered "pharmaceuticals", unmentioned in Schedule III, "any material, substance, mixture, compound or preparation, of whatever composition or in whatever form, *sold or represented* for use in the... treatment, mitigation or prevention of a ... disorder (or) abnormal physical state ... in man."

On that score, more than enough has been shown and said as to how the disputed product is "sold or represented", to label it with the etiquette of "pharmaceuticals".

There was also a suggestion at trial that, either in Schedule III itself, or elsewhere in the statute, it should be clearly expressed that "Foodstuffs" drop out of the exempted category, whenever the manner in which they "*are sold or represented*" renders them "pharmaceuticals" in the intent of the law.

The necessity of repeating a legal prescription distinctly uttered in the interpretation part of the Act, all embracing

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in its scope, is, to my mind at least, a novel proposition, at variance, it would seem, with the principle that derogations to the general rule require special mention. Had Parliament meant to hold tax-free weight-control simili-biscuits, it could have manifested its intention thus, for instance: "Bakers' cakes and pies including biscuits, even though pharmaceuticals...".

Honourable Mr. Justice Noël, in the matter of *Her Majesty the Queen* and *Continental Air Photo Ltd.*,[1] aptly commented upon the restricted field of exempting clauses. The learned Judge wrote:

> We are not dealing here with a tax charging section but with an exemption provision, and therefore, if there is any doubt as to which of the two possible conclusions should be preferred, the narrowest and strictest should be adopted in order to give the benefit of exemption to the narrowest group, consistent with the meaning to be given to the words . . .

In line with the doctrine that exceptions to a taxation statute, especially, should not be presumed nor given the benefit of doubt, are two Australian decisions. The first one, *F.C. of T. (Federal Commissioner of Taxation) v. Farey Bros.*[2] dealt with a taxing statute in which "bread" was exempted. The court had to decide if bread derivatives such as: milk loaves, currant loaves, cinnamon loaves, raisin bread, were extended the exemption decreed in favour of "bread". The presiding judge found that:

> A baker making all or most of such articles, would, for most purposes call them bread, though I do not think that he would think of supplying them on an order which asked for "bread" without more.

As a result, the Court decided that milk loaves, raisin bread and similar foodstuffs were not "bread" within the meaning of the law.

In the second case: *Jackett v. F.C. of T.*[3], ordinary flour was exempted from sales tax. A manufacturer, milling self-raising flour out of plain flour with certain leavening additives, claimed this exemption for his product. The Supreme Court of Australia, three judges sitting, unanimously agreed that self-raising flour was not the kind of flour privileged by the Act. Chief Justice Murray held in his notes that:

> In the retail grocery trade, customers sometimes ask for flour when they want self-raising flour . . . The effect of the evidence, as a whole, I think is

[1] [1962] Ex. C.R. 461 at 471-472.
[2] 2 Australian Tax Cases, 140 at 143.
[3] 2 Australian Tax Cases, 203 at 205-207.

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to show that the difference between the two (2) is substantial and well understood by manufacturers, shop-keepers and retail purchasers; and that although a much lesser proportion of flour than of self-raising flour is now used in cooking, self-raising flour is not commonly known simply as flour, but is only so described by purchasers in exceptional circumstances and then is not supplied without further inquiry or some indication that it is the article required.

Mr. Justice Piper spoke to the same effect:

> People carelessly use the word "flour" sometimes to mean self-raising flour. I do not regard self-raising flour as flour from a practical point of view. It is a different article.

A mere transposition of words, substituting "biscuits" for "bread" in the one case, or for "flour" in the other, renders the reasoning in both these precedents quite suitable to the instant suit dealing with medically treated biscuits. I agree with this observation of respondent's counsel, Mr. C. R. O. Munro, Q.C., asserting as follows:

> . . . I think it is quite clear from the evidence of Mr. Christie that the consuming public regards biscuits as ordinary bakers' biscuits and they regard "Limmits" as reducing aids, which is what they are sold for. There is a substantial distinction between ordinary bakers' biscuits and "Limmits".

For the above reasons, the Court reaches a threefold conclusion that:

1. "Limmits" are not biscuits in the ordinary or statutory sense of the word.
2. They cannot be considered "bakers' biscuits" as intended by Schedule III.
3. Above all else, the "*suprema ratio decidendi*" is that "Limmits", pursuant to the clear language of paragraph (*cc*), s-s. (1) of s. 2, are "sold or represented" in such a way, and intended to secure specified results that unmistakably stamp them with statutory qualification of "pharmaceuticals".

Therefore, the suppliants' petition of right is dismissed with costs in favour of the respondent.

Petition dismissed.

BETWEEN:

CONSOLIDATED BUILDING CORPORATION LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Toronto 1965 June 24, 25 Ottawa Aug. 13

Income Tax—Real estate company—Principal business sale of houses—Building built for investment—Sale to preserve bank credit—Whether profit from business or trading venture. Income Tax Act, ss. 3, 4 and 139(1)(e).

Appellant company was mainly engaged in the business of building houses for sale on a large scale in the Toronto area but on four occasions built or bought properties which were leased to others. On the last of these occasions, in 1959, it constructed a large office building but as the cost of the building greatly exceeded the estimated cost the company sold the building in 1960 in order to preserve its bank credit, making a profit of $588,000, for which it was assessed to tax. On appeal the Court reviewed the objects and actual operations of the company and concluded that the transaction was part and parcel of the general trading operations of the company.

Held, dismissing the appeal, appellant had not demolished the basic fact on which the assessment rested, *viz* that the profit was from a business or adventure in the nature of trade.

[*Johnston v. M.N.R.* [1948] S C.R. 486; *Sutton Lumber and Trading Co. Ltd. v. M.N.R.* [1953] 2 S.C.R. 77, p. 83 applied.]

Income tax—Lease-option agreement—99 year lease with option to purchase—Determination of capital cost allowance—"Price fixed by contract or arrangement", meaning of—Income Tax Act, ss. 11(1)(a), 18(1)(b).

In November 1960 appellant as lessee leased an office building for 99 years at specified rentals ranging from approximately $240,000 a year for the first 24 years to approximately $175,000 a year for the next 55 years and approximately $575,000 a year for the final 20 years, plus additional amounts varying with the gross rental received by the company from tenants The contract also gave appellant an option to purchase the building at the end of the lease for $1,500,000. In its 1961 taxation year, which ended on February 28, appellant claimed a capital cost allowance of some $1,400,000, being 5 per cent of the total of the specified annual rentals for the 99-year term plus the sum payable upon exercise of the option less the value of the land, totalling approximately $28,000,000, but the Minister permitted a deduction only of the rent payable under the lease for the four months of the appellant's 1961 taxation year, approximately $81,000.

Held, dismissing the appeal, under s. 18(1) of the *Income Tax Act* appellant was entitled to a capital cost allowance calculated on $1,200,000, which was "the price fixed by the contract", i.e. the amount required to exercise the option to purchase ($1,500,000) less the value of the land ($300,000).

[*Harris v. M.N.R.* [1965] 2 Ex. C.R. 653 followed.]

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APPEAL from income tax assessment.

H. Howard Stikeman, Q.C. and *Wolfe D. Goodman* for appellant.

T. Z. Boles and *D. G. H. Bowman* for respondent.

CATTANACH J.:—This is an appeal from an assessment under the *Income Tax Act,* R.S.C. 1952, c. 148 of Consolidated Building Corporation Limited for its taxation year ending February 28, 1961.

In this appeal there are two issues.

The first issue is whether a profit of $588,162.11 realized by the appellant upon the sale of an office building erected by the appellant on lands municipally known as 99 Avenue Road, in the City of Toronto, in the Province of Ontario, constituted income from a business or an adventure in the nature of trade within the meaning of sections 3, 4 and paragraph (*e*) of subsection (1) of section 139 of the *Income Tax Act,* as contended by the Minister, or whether the aforesaid office building was erected as an investment, for the purpose of gaining or producing rental income and not for resale, and the sale thereof became necessary through circumstances, to be related, over which the appellant had no control and that, accordingly, the sum of $588,162.11 so realized by the appellant did not constitute income within the meaning of the Act but was merely the realization of the enhancement in value of an investment, as contended by the appellant.

The second issue is whether the appellant is entitled to deduct a capital cost allowance of $1,409,391.38 which it has claimed under section 18 of the *Income Tax Act* as the said section applied to its 1961 taxation year.

By his assessment dated July 5, 1962 the Minister added to the appellant's declared income the aforesaid sum of $588,162.11 and disallowed as a deduction the capital cost allowance of $1,409,391.38 but did allow as a deduction the sum of $81,159.15 being rent paid by the appellant under a lease of the premises at 99 Avenue Road in its 1961 taxation year.

The appellant duly objected to such assessment by Notice dated September 21, 1962. As the Minister did not

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reply to the said Notice of Objection within 180 days of the service thereof, the appellant appealed to this Court in respect of the assessment.

The appellant was incorporated pursuant to the laws of the Province of Ontario by Letters Patent dated April 4, 1957, as a private company under the name of Fairfield Builders Limited. John D. Feinberg, who was president of the appellant company at all material times testified that the appellant came into being as a result of the "merger" of four existing companies which were owned by four different groups of shareholders. He further testified that these four companies were in the business of building houses for sale. The business of these four companies was continued by the appellant. The objects for which the appellant was incorporated are set out in seven paragraphs of the Letters Patent filed in evidence as Exhibit F and may be summarized as follows: to carry on the business of builders and contractors, engineering, to purchase lands and to take mortgages for any unpaid balance of the purchase price of any land, buildings or structure sold by it and to deal in real and personal property.

Mr. Feinberg also testified that the business of the appellant was to build homes for sale and to develop raw land for building sites. The appellant frequently sold lots without having first built homes thereon.

The shares in the capital stock of the appellant were owned equally by the shareholders of the four predecessor companies.

By supplementary Letters Patent dated May 24, 1957, the original corporate name of Fairfield Builders Limited was changed to Consolidated Building Corporation Limited by which name the appellant is described in the style of cause.

By further supplementary Letters Patent dated June 2, 1961, the objects for which incorporation had been obtained were extensively varied to authorize the appellant to engage in a plethora of objects bearing some relationship to the business of builders and contractors. While neither the original objects nor the revised objects make a specific or direct reference to erecting buildings for rental purposes, nevertheless, I have no doubt that such activity would be within the corporate competence of the appellant under the

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wide ancillary powers provided in the *Ontario Corporation Act*.

The supplementary Letters Patent dated June 2, 1961, in addition to varying the objects, converted the status of the appellant from that of a private to a public company, so that the public could be invited to subscribe to its securities, and substantially increased its authorized capital stock.

Since 1955 the appellant, either on its own behalf or through its four predecessor companies above mentioned in association with each other and under the trade name of Consolidated Building Corporation, constructed and sold about 3,800 houses located in various sub-divisions in or near Metropolitan Toronto.

Mr. Feinberg also testified that in addition to the construction of residential buildings for resale, the appellant also constructs and purchases properties for investment purposes. Among such properties he made specific mention of a residential project in Aurora, Ontario. In accordance with an arrangement with the municipal authorities the appellant was obliged to build and lease three small factory buildings to preserve the balance between residential and industrial assessment. There is no question in my mind that the appellant would sell these factories were it not for the necessity, as explained by Mr. Feinberg, of building others to maintain the proportional relationship of industrial to residential assessment. In addition he also mentioned one hundred and four garden courts or maisonnettes in the Township of Etobicoke which were held for rental purposes. However, in cross-examination Mr. Feinberg admitted frankly that the appellant offered to sell this development to the Ontario Housing Authority as low cost housing in view of the urgent need of housing of this type but the appellant's offer to sell was not accepted.

Another project of the appellant mentioned in the evidence of Mr. Feinberg is one known as Don Valley Village, undertaken in association with other interests, which is comprised of a number of single family homes which were sold and 840 apartment dwelling units. Mr. Feinberg was emphatic that these apartments were not for sale.

The fourth and last property which Mr. Feinberg mentioned in his examination in chief as being held by the

appellant for rental income is 99 Avenue Road which is the subject matter of the present appeal.

In June 1958 the appellant acquired land on the east side of Avenue Road, being municipal number 99, from Brighton Apartments Limited, a company owned and controlled by Mr. Feinberg's family, at a cost of $300,000.

In 1959 the appellant began the construction of a ten storey office and medical building in which the head office of the appellant was to be located. The original plan was for a seven storey building with two or three floors to be rented to doctors exclusively. However, as early as August, 1958 it is quite apparent from the minutes of the meetings of the executive committee of the appellant that substantially more than three floors were to be devoted to use as doctors' offices. The original plan also provided for one floor of basement parking but the revision of plans to provide for an additional three storeys of office space also necessitated a revision of the parking facilities to provide for three floors of parking by acquisition of a lot abutting the back of the property. The basement which was originally to be used for parking became a banquet room connected to the Regency Towers Hotel, located at 89 Avenue Road, by an underground tunnel. The appellant also owned the eight storey building occupied by the hotel and all furniture and equipment. The hotel business was operated through a wholly owned subsidiary of the appellant.

Mr. Feinberg testified that these changes resulted in a cost far in excess of the estimated cost.

The appellant obtained a first mortgage in the amount of $1,600,000 with the hope that the construction costs would be covered entirely by the mortgage. The appellant had a line of credit with its bank to the extent of $950,000, one of the conditions being that no more than $200,000 should be used for the acquisition of land or land development. It was a revolving type of credit, as homes were sold the proceeds went to reduce the bank loan and further money to the extent of the limit of the line of credit was then available to the appellant for its further use. While the bank had made an exception in the case of the appellant to the extent of $200,000 to permit it to acquire raw land and provide the necessary services so homes could be built by

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the appellant, nevertheless, it was contrary to the bank's policy to have its money tied up in fixed assets.

The construction of 99 Avenue Road was undertaken by the appellant without prior consultation with its bank. However, the bank was aware that the construction costs exceeded the amount of the mortgage money that the appellant had obtained and that the appellant had an equity in the building of approximately $500,000. The appellant's application to the bank for an increase in its line of credit was refused. The appellant therefore took steps to reduce its overdraft by obtaining second mortgages on vacant land which it possessed and applied the proceeds thereof to the reduction of its bank indebtedness. The appellant decided that to preserve its bank credit, 99 Avenue Road should be sold.

To that end Mr. Feinberg began negotiations with a New York firm which suggested a sale and lease-back arrangement. However, this arrangement was not consummated because the appellant considered the terms too onerous. The appellant then engaged the services of Henry B. Sussman, the president of a real estate firm with extensive experience in the sale and purchase of larger properties to find a buyer in a sale and lease-back transaction. Mr. Sussman approached several groups unsuccessfully. After these abortive attempts to complete such a transaction, Mr. Sussman approached Alvin Rosenberg, Q.C., who was acting on behalf of a number of clients, who made an offer in the name of Ontario Asphalt Paving Materials Limited, which company was the nominee of six companies, Denver Investments Limited, Samolyn Investments Limited, Leaford Developments Limited, Minifor Developments Limited and Pettifor Developments Limited.

The appellant accepted this offer and on November 1, 1960 sold the office building at 99 Avenue Road for a consideration in cash of $1,100,000 and the assumption of an existing first mortgage then standing at $1,578,623.65 whereby the appellant realized the sum of $588,162.11 in excess of its cost. There is no dispute between the parties as to the amount of the profit so realized by the appellant but the dispute between them is as to the taxability thereof. From the $1,100,000 cash received, the appellant discharged

its obligation to the bank and the balance was put into the appellant's working capital.

During the negotiations for the sale of 99 Avenue Road, the property known as Regency Towers Hotel at 89 Avenue Road, also owned by the appellant was also to be included in the transaction because of a common right of way. A compromise was eventually worked out which permitted the sale of 99 Avenue Road without including the adjoining property at 89 Avenue Road. Incidentally, I might mention that prior to the construction of the office building at 99 Avenue Road, the appellant contemplated and attempted to dispose of 89 Avenue Road on a lease-back arrangement which did not materialize.

As part of the transaction for the sale of 99 Avenue Road, the appellant entered into a lease dated November 1, 1960, filed in evidence as Exhibit 24, with the new owners for a term of 99 years commencing on November 1, 1960 at a yearly rental of $241,529.60 per annum until December 15, 1984, i.e. the first 24 years, $175,674.84 per annum from December 16, 1984 until October 21, 2039 i.e. the next 55 years, and $575,760 per annum from November 1, 2039 until October 31, 2059, i.e. the last 20 years of the currency of the lease. The lease also provided for the payment of additional rent equal to one third of the amount by which the gross rent received from the property, less realty taxes, exceeded $269,000 per year.

Paragraph 6 of the Lease dated November 1, 1960 provides as follows:

> The Tenant shall have the option to purchase the property herein being leased at any time between the first day of October 2059 A.D. and the first day of November 2059 A.D. by paying the sum of One Million Five Hundred Thousand Dollars ($1,500,000) by cash or certified cheque, and shall be entitled to receive a deed to the property free and clear of all encumbrance upon such payment being made. Provided that if payment is not made on or before the first day of November A.D. 2059, this option shall be null and void, notwithstanding that the Tenant may or may not remain in possession of the property after said date.

These terms were arrived at by the parties following protracted bargaining over a period of approximately five months.

The rental for the first period was designed to cover the principal and interest on the mortgage plus a 10% return on the purchaser's equity of $1,100,000.

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In the second period the annual rent was reduced because of the expiry of the mortgage on the beginning of that period.

The substantial increases during the last 20 years of the lease was based primarily upon a projection of an increase in the land value.

The total of the rental payable under the lease during its 99 year term is $26,987,827.65. When the option price of $1,500,000 is added to the total rental the result is $28,487,827.61. When $300,000, being the value of the land, is deducted, the resulting figure is $28,187,827.61 and that is the figure upon which the appellant contends it is entitled to an annual capital cost allowance of 5%, which amounts to $1,409,391.40 per annum.

I might add that, by agreement between the appellant and the new owners of 99 Avenue Road, completed on an unspecified date in December, 1961 and filed in evidence as Exhibit 23, paragraph 6 of the agreement dated November 1, 1960 (Exhibit 24) was deleted and replaced by the following language:

> The Tenant shall have the option to purchase the premises herein leased at any time during the ninety-ninth year of the term hereof or at any time during the twenty-first year after the death of the last to die of the issue now alive of the following persons:
>
> (*a*) His late Britannic Majesty King George V
>
> (*b*) Joseph P. Kennedy, father of the thirty-fifth President of the United States of America
>
> (*c*) John D. Feinberg of the City of Toronto, in the County of York, presently Chairman of the Board of Consolidated Building Corporation Limited, and
>
> (*d*) Alvin D. Rosenberg, Q.C., of the City of Toronto, in the County of York, Barrister and Solicitor
>
> whichever period shall first occur, by paying the sum of $1,500,000 by cash or by certified cheque, and the Tenant shall then be entitled to receive a deed to the property free and clear of all encumbrances upon such payment being made. Provided that if payment is not made on or before the last day of the year for exercise of this option as set out above, this option shall be null and void notwithstanding that the Tenant may or may not remain in possession of the demised premises after the said date. A Certificate of the Secretary of State or Assistant Secretary of State of the Dominion of Canada shall be conclusive proof of the date upon which the last of the issue of His late Britannic Majesty King George V died.

However, since such amendment was effective subsequent to the appellant's 1961 fiscal year the present appeal must be considered upon the basis of the unamended option

clause being paragraph 6 as appearing in the agreement dated November 1, 1960 and reproduced above.

It was also agreed at trial that the amount fixed by the contract or arrangement as the price at which the property might be repurchased by the appellant is an amount not less than 60% of the fair market value of the property at the time the lease for 99 years was entered into. Therefore, the exception in subsection 4 of section 18 is not applicable.

Turning to the first issue in the present appeal, that is whether the profit of $588,162.11 arising from the appellant's disposition of 99 Avenue Road constituted part of its income as profit from its business within the meaning of sections 3 and 4 of the *Income Tax Act*, I am of the opinion that the Minister was right in adding that amount to the appellant's income for its 1961 taxation year as he did.

The objects for which the appellant was incorporated and as subsequently amended, though unduly prolix, are those of the wide and general character which is normally appropriate to company trading in real estate. However, one is not entitled to infer from the circumstance that a company has been incorporated for trading purposes that the transactions in which it engages necessarily constitute any particular transaction a part of the company's trade or business. The fact that a particular transaction falls within the objects contemplated by the Letters Patent is merely a *prima facie* indication that a profit so derived is a profit derived from the business of the company. However Locke J. in *Sutton Lumber and Trading Co. Ltd. v. M.N.R.*[1] said:

> The question to be decided is not as to what business or trade the company might have carried on under its memorandum, but rather what was in truth the business it did engage in.

To determine this, I must consider what the appellant has actually done since its incorporation. The appellant owes its existence to the fact that it was a convenient entity through which the business of building and selling houses carried on by its four predecessor companies in concert could be conveniently continued. In this business the appellant was successful selling and disposing of in excess of 3,000 houses. The appellant was so successful that when a sufficient supply of serviced lots was not readily

[1] [1953] 2 S.C.R. 77 at p. 83.

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available it adopted the policy of acquiring raw land supplying the services and constructing houses thereon. In many instances the appellant sold such building lots to other builders when it was advantageous to do so.

Mr. Feinberg also testified that in addition to constructing residential and commercial buildings for sale the appellant also constructed properties for investment purposes as illustration of which he mentioned four such properties as being retained by the appellant:

(1) three factories built in connection with a residential project in Aurora;

(2) a number of garden courts in Etobicoke;

(3) Don Valley Village, undertaken as a joint venture with other interests; and

(4) 99 Avenue Road.

It transpired however that the factories in Aurora would be sold were it not for the necessity of replacing them, the garden courts were offered to the Ontario Municipal Authority, and the apartments at Don Valley Village are a joint enterprise which would, in all likelihood, require the consent of the other joint entrepreneur to this sale. This I assume because no evidence was adduced on the point and accordingly I do not know.

Mr. Feinberg admitted that the appellant was not in the least adverse to selling any of its assets which it termed investment properties whenever the opportunity arose and whenever it was advantageous to do so. If the advantage so dictated the appellant would take active steps to sell such properties. The only exceptions, as Mr. Feinberg testified, to this general policy were the apartments at Don Valley Village and 99 Avenue Road. Mr. Feinberg was quite emphatic that the apartments were not for sale and stated that 99 Avenue Road was only sold because of the circumstances above related so strongly militated against its retention.

I can see no convincing reason why 99 Avenue Road should be considered an exception to the appellant's general policy.

It is well established that a taxpayer's statement of what his intention was in entering upon a transaction, made subsequent to its date, should be carefully scrutinized.

What its intention really was may be more accurately deduced from what it actually did than from its *ex post facto* declarations.

Here the appellant erected a building designed to cater to a profitable type of tenant, the medical profession, knowing that such tenants required an expensive and technical type of accommodation. To an experienced builder such as the appellant this fact was well known. The original plans for about five floors of the building being devoted exclusively to doctors was increased by the addition of three more storeys with an appreciable increase in rental returns exceeding the additional cost of construction but necessarily increasing that cost and also resulting in greater cost for further parking facilities. These additional costs were foreseen. Instead of the cost of the building being entirely covered by the mortgage as originally contemplated by the appellant, the appellant utilized its line of credit with its bankers and acquired an equity in the building of about $500,000.

This resulted in the appellant's line of credit with its bank being placed in jeopardy to the detriment of its corporate activities as a whole, a circumstance of which the appellant could not have been unaware. The appellant, therefore, undertook deliberate steps to negotiate the sale of 99 Avenue Road, but necessarily at a price in excess of the cost to it. The appellant received $1,100,000 in cash on closing which was used to discharge its bank indebtedness thereby preserving its credit with its bank for the more effective carrying on of the appellant's corporate enterprises as a whole and the balance of the cash payment was placed in the appellant's working capital to be devoted to the same end.

Therefore, there is no doubt in my mind that this particular transaction was part and parcel of the general trading operation of the appellant conducted from its inception and that it was doing precisely what it was formed to do, namely, dealing in real estate.

Accordingly, in my opinion, the appellant has not discharged its onus which, in the language of Rand J. in *Johnston v. M.N.R.*[1], was "to demolish the basic fact on

[1] [1948] S.C.R. 486.

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which the taxation rested". The appeal against the Minister's addition of the sum of $588,162.11, being the profit on the sale of 99 Avenue Road, to the appellant's declared income for its 1961 taxation year, is therefore unsuccessful.

I now pass on to the second issue raised in the appeal, which is whether the appellant was entitled to deduct, in computing its income, capital cost allowance of $1,409,-391.40 which it has claimed under section 18 of the *Income Tax Act* and, if so, whether the capital cost allowance claimed was properly calculated having regard to subsections (1) and (2) of section 18.

The basis for the appellant's contention is found in section 11 (1)(*a*) and section 18(1) of the *Income Tax Act* reading as follows:

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

18. (1) A lease-option agreement, a hire-purchase agreement or other contract or arrangement for the leasing or hiring of property, except immovable property used in carrying on the business of farming, by which it is agreed that the property may, on the satisfaction of a condition, vest in the lessee or other person to whom the property is leased or hired (hereinafter in this section referred to as the "lessee") or in a person with whom the lessee does not deal at arm's length shall, for the purpose of computing the income of the lessee, be deemed to be an agreement for the sale of the property to him and rent or other consideration paid or given thereunder shall be deemed to be on account of the price of the property and not for its use; and the lessee shall, for the purpose of a deduction under paragraph (*a*) of subsection (1) of section 11 and for the purpose of section 20, be deemed to have acquired the property,

(*a*) in any case where, at the time the contract or arrangement was entered into, the lessee and the person in whom the property was vested at that time (hereinafter referred to as the "lessor") were persons not dealing at arm's length, at a capital cost equal to the capital cost thereof to the lessor, and

(*b*) in any other case, at a capital cost equal to the price fixed by the contract or arrangement minus the aggregate of all amounts paid by the lessee

(i) in the case of a contract or arrangement relating to moveable property, before the 1949 taxation year, and

(ii) in the case of any other contract or arrangement, before the 1950 taxation year,

under the contract or arrangement on account of the rent or other consideration

Counsel for the Minister contended that section 18(1) did not apply because the option granted by the owners under this leasehold agreement with the appellant dated November 1, 1960 is void as being contrary to the rule against perpetuities and therefore section 18(1) does not apply to the transaction. Counsel for the Minister went on to submit that if, contrary to the above contention, section 18(1) did apply, the appellant did not acquire depreciable property for the purpose of gaining a producing income but as part of a scheme calculated to avoid the incidence of tax, and is not entitled to capital cost allowance with respect thereto in accordance with the provisions of section 1102(1)(*c*) of the Income Tax Regulations and, being a transaction which, if allowed, would unduly and artificially reduce the appellant's income, the deduction is prohibited by section 137 of the *Income Tax Act*.

In view of the manner in which I propose to deal with this issue of the appeal it is not necessary for me to express any opinion on the foregoing contentions.

It was also contended on behalf of the Minister that on the correct interpretation of section 18, as applied to the transaction, the capital cost allowance should be computed on a capital cost of $1,500,000 less the cost of the non-depreciable land, since such amount was the price fixed by paragraph 6 of the contract or arrangement rather than on a capital cost of $28,187,827.61, being the total of the rents payable over the period of the lease and the option price less the value of the land, as contended by the appellant.

I have had the advantage of reading the judgment of my brother Thurlow in *Harris v. M.N.R.*[1], the facts of which I consider to be on all fours with those of the present appeal.

In the *Harris* case, the appellant was a successful obstetrician and the first tenant of 99 Avenue Road whereas in

[1] 64 D.T.C. 5332.

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the present appeal the appellant is a corporate entity. A natural person has a limited life expectancy while, in theory, a corporation never dies. In the *Harris* case a service station was purchased by Douglas Leaseholds Limited who leased it to B.P. Canada Limited at an annual rental of $3,900 for 25 years. By concurrent lease Douglas Leaseholds Limited as lessor leased the same property to Harris for a period of 200 years at an annual rental of $3,100.08. Harris was required to deposit $10,000 with the lessor as security for the performances of his covenants, which was to be returned to Harris on the expiration of the lease. Harris therefore received the difference in the annual rent paid by B.P. Canada Limited of $3,900 and that of $3,100.08 paid by himself, that is $799.92. It was also agreed in the lease that Harris should have the option of purchasing the property from the lessor for $19,500 at the expiration of the term of the lease if not in default thereunder. In my view, the facts that Harris was a natural person rather than a corporation as the appellant herein is, that the lease was for 200 years rather than 99 years as in the present case, and that the lease in the *Harris* case was a concurrent one rather than a sale and lease-back as in the present case, are differences that do not form any basis for distinguishing the facts of the *Harris* case from those of the present case.

Thurlow J., in agreeing with the contention of the Minister advanced in the *Harris* case that, on the correct interpretation of section 18, the deduction must be based on the capital cost as being the price fixed by the contract for the eventual purchase, had this to say:

> On the first submission in (*f*) the matter to be determined is the capital cost to be fictitiously attributed for the purpose of s. 11(1)(*a*) to the property which is the subject matter of the fictitious purchase created by s. 18(1). This is defined in s. 18(1) as "the price fixed by the contract or arrangement" and in approaching the interpretation to be put upon these words a few observations of a general nature may be useful.
>
> First, s. 18(1) must in my opinion be taken as meaning neither more nor less than precisely what it says. Its interpretation may be influenced by reading it with the other provisions of s. 18, of which it is a part, but the principle that there is no equity about a tax is well established and there is no basis for the admission of any principle of "equitable construction".

Vide Partington v. Attorney General (1869-70) L.R. 4 H.L. 100 where Lord Cairns said at p. 122:

> "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The principle so expressed is usually cited in support of a taxpayer's submission but it appears to me to operate both ways.

Secondly, the subsection is plainly divided into two parts. The first is directed to achieve a statutory conversion of the contract or arrangement into an agreement for the sale of the property and to declare that the rent or other consideration which the taxpayer has agreed to pay shall be regarded as having been paid or given on account of the price of the property and not for its use. The consequence of regarding the transaction as an agreement for the sale of the property to the taxpayer is that the property of which he is then in fact only lessee, is regarded as his and in computing his income he is entitled to the deduction provided by s. 11(1)(*a*). The consequence of the declaration that the rent or other consideration paid or given shall be deemed not to have been paid or given for the use of the property is that it cannot be deducted as an expense in computing the taxpayer's income. The statute also declares that the rent or other consideration paid or given is to be regarded as paid or given on account of the price of the property. A consequence of this is that if the money was borrowed the interest on it would qualify for deduction under s. 11(1)(*c*)(ii). This part of the subsection, however, as I read it is concerned only with the statutory conversion of the transaction into an agreement of sale and with certain stated consequences which are to flow from such conversion. The definition of the capital cost of the property to the taxpayer for the purpose of calculating the deduction under s. 11(1)(*a*) to which the taxpayer is to be entitled is not dealt with in this part of the subsection but is the subject matter of the second part of it. In the second part the subsection declares that the taxpayer shall for the purpose of s. 11(1)(*a*) be deemed to have acquired the property at a capital cost equal to "the price fixed by the contract or arrangement" less, in the case of contracts made before 1950, amounts paid as rent or other consideration prior to certain stated times. Here it is I think of importance to note that the expression used is "the price fixed by the contract or arrangement" and that the expression "contract or arrangement" appeared earlier in the subsection in company with the words "for the leasing or hiring of property . . . by which it is agreed that the property may, on the satisfaction of a condition, vest in the lessee or other person to whom the property

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is leased or hired". It is thus this contract or arrangement, rather than the "agreement for the sale of the property" fictitiously created by the subsection, which is referred to in the expression "the price fixed by the contract or arrangement".

Thirdly, in the subsection the expression "rent or other consideration paid or given thereunder" is used in contradistinction to the expression "the price fixed by the contract or arrangement" the former being used with reference to rent or consideration for the use of the property during the lease or hiring and for the option itself while the latter includes the word "price" and appears to me to refer to the consideration to be given for the property under the terms of the contract in the event of the transaction resulting in the property vesting in the taxpayer.

Fourthly, it is apparent that contracts or arrangements of the kind with which s 18(1) deals may take more than one form. One well known variety consists of a leasing or hiring at a rental but contains a provision that at the conclusion of the lease or hiring the owner will at the option of the lessee or hirer sell the property to him for the amounts paid as rental, or for parts of such amounts, in some cases with, and in others without some further consideration payable at that time. Another variety provides for payment of either a nominal or substantial payment on acquisition of the property by the lessee or hirer but does not purport to treat any part of the rental payments as part of the price payable for the property. Cases are also readily conceivable wherein no price whatever may be payable at the time of vesting as for example where the vesting might be simply dependent on some extraneous or fortuitous event In all these cases it appears to me that the determination of what is "the price fixed by the contract or arrangement" must accordingly depend on the interpretation of the particular contract or arrangement.

Next it is to be observed that Parliament in enacting s. 18 appears to have contemplated that "the price fixed by the contract or arrangement" may be less than the total rent or other consideration paid or given under the contract or arrangement since it provides in s-s. (2)(*b*) that on rescission of the contract or arrangement the amount of such rent or consideration paid in excess of the capital cost at which the lessee is deemed to have acquired the property shall be deemed to have beeen paid for use of the property and not on account of its price and would accordingly be deductible as expense in the year in which rescission occurred.

Finally, neither the remaining clauses of s-s. (1) nor the definitions of s-s. (3) nor the exclusions effected by s-s. (4) appear to me to have any influence one way or the other on the interpretation of the expression "the price fixed by the contract or arrangement" in s 18(1).

These considerations lead me to conclude that the words "rent or other consideration paid or given thereunder shall be deemed to be on account of the price of the property" do not bear the interpretation which the appellant's contention requires They do not say that rent or other consideration is deemed to be part of the "price fixed by the contract or arrangement" or of the capital cost of the property for the purpose of

s. 11(1)(*a*) but merely that for the purpose of computing the taxpayer's income rent or other consideration paid or given shall be deemed to be "on account of" the price of the property. To find what the capital cost of the property is to be for the purpose of s. 11(1)(*a*) one must look to the contract or arrangement itself.

In the present case the pertinent provision of the contract or arrangement is paragraph 6 of the indenture dated November 1, 1960 which has been quoted above.

As I accept the reasoning of Thurlow J., it is clear that as a matter of interpretation paragraph 6 means that $1,500,000 is the price and the whole price to be paid for the property at the material time. There is no other provision in the lease nor anything about the nature of the property to indicate any other intention. It follows that $1,500,000 is "the price fixed by the contract" within the meaning of section 18(1) and the capital cost at which for the purpose of section 11(1)(*a*) the appellant is deemed to have acquired the property.

During argument, counsel for the appellant submitted that Thurlow J. was in error in concluding as he did and did not give full effect to the legislative intent. The original purpose of section 18, as I conceive it, was to overcome the use of lease option agreements to enable a purchaser to deduct substantial amounts of the purchase price in the form of rent thereby gaining an advantage of a person who purchased property outright and got a much lower write off through capital cost allowances. By a number of tables counsel sought to show that under the interpretation put upon the section by Thurlow J., the appellant herein was deprived of a greater portion of the rent paid which, but for section 18, would have been deductible otherwise thereby leading to manifestly absurd results. In answer to such contention I can only say that the appellant has no monopoly upon absurdities and as pointed out by Thurlow J., the principle expressed by Lord Cairns in *Partington v. Attorney General* (*supra*) "if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute,

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where you can simply adhere to the words of the statute"—operates both ways.

I am satisfied that my brother Thurlow was right in the *Harris* case and that the same reasoning applies in this case.

Therefore, in my opinion, the Minister was right to disallow the deduction of the capital cost allowances claimed by the appellant in the amount of $1,409,391.40.

Upon the basis of the above conclusions, I would compute the correct amount of the deductible capital cost allowance to have been $60,000 which I arrive at by taking the price fixed by the contract at $1,500,000 deducting $300,000 for the cost of the land and by applying the rate of 5% in accordance with Schedule B of the Income Tax Regulations to the resultant figure of $1,200,000.

In my view, the Minister wrongly allowed a deduction of $81,159.15 as rent which is in excess of the deduction of $60,000 to which I believe the appellant to be entitled. For the reasons outlined by Thurlow J. upon this same point in the *Harris* case, I do not propose to allow the appeal and refer the matter back to the Minister to disallow the rent deduction and to allow a proper deduction for capital cost allowance. In respect of the second issue, the appeal is also unsuccessful.

It follows that the appeal herein must be dismissed, with costs.

Appeal dismissed.

BETWEEN:

BERNARD RANDOLPH and WORLD WIDE MAIL SERVICES CORPORATION ..... SUPPLIANTS;

Ottawa 1965
July 13, 14
July 23

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Post Office—Prohibition of postal services—Order of Postmaster General—Whether right to be heard before order made—Whether order of judicial nature—Post Office Act, R.S.C. 1952, c. 212, s. 7.

Crown—Petition of Right—Order of Postmaster General prohibiting mail services—Liability of Crown in damages for tort—Remedies—Post Office Act, R.S.C. 1952, c. 212, ss. 7, 38—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3—Exchequer Court Act, R.S.C. 1952, c. 98, s. 17.

The suppliant, Bernard Randolph, carried on the business in Montreal and elsewhere of selling films, books, photographs, etc. which were mailed for him by the suppliant, World Wide Mail Services Corp., which was in the business of mailing merchandise for customers. On 22 April 1965 Post Office officers temporarily suspended the postal service of the corporation and on 28 April, following an examination of Randolph's merchandise by Post Office officials, the Postmaster General, without affording suppliants an opportunity to be heard, made interim orders under s. 7 of the *Post Office Act*, R.S.C. 1952, c. 212, prohibiting the delivery of mail to or for both suppliants.

By their petitions of right suppliants sought redress for interference with their property rights in mail.

Held, suppliants were entitled to have delivered to them the mail withheld from delivery and to damages.

1. Since the suppliants claimed for interference with property rights only, their claims were restricted to mailable matter sent to them by post, which by s. 38 of the *Post Office Act* becomes the property of the addressee when deposited in a Post Office.

2. Unless the omission to deliver suppliants' mail was justified at law the Crown was liable in damages to the suppliants in tort under s. 3 of the *Crown Liability Act*, S. of C. 1952-53, c. 30, for wrongfully withholding their property.

3. Section 17 of the *Exchequer Court Act*, R.S.C. 1962, c. 98, gives the Court jurisdiction to entertain suppliants' claim for recovery of their mail.

4. The *Post Office Act* contains no implied power to withhold delivery of mail addressed to a person prior to the making of a prohibitory order.

5. The power conferred on the Postmaster General by s. 7 of the *Post Office Act* to make orders prohibiting the delivery of mail to or for a person is of a judicial or quasi-judicial character and there is nothing in the section expressly or impliedly excluding the necessity to afford a person affected by such a prohibitory order an opportunity to be heard before the power is exercised.

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[*Board of Education v. Rice*, [1911] A.C. 179; *Local Government Board v. Arlidge*, [1915] A.C. 120; *Esquimalt and Nanaimo Railway Co. v. Wilson*, (B C. C A.), (1921) 59 D L.R. 577, per Eberts, J.A., at page 590; (P C.) 61 D.L.R. 1; *Errington v. Minister of Health*, [1935] 1 K B. 249; *Mantha v. The City of Montreal*, [1939] S C.R. 458; *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*, [1947] 1 D.L.R. 721, per Lord Greene at pp. 732-3; *L'Alliance des Professeurs Catholiques de Montréal v. The Labour Relations Board*, [1953] 2 S C.R. 140; *Ridge v. Baldwin* [1964] A.C. 40; *Rex v. Leman Street Police Station Inspector; Ex parte Venicoff*, [1920] 3 K.B. 72, per Earl of Reading, C.J., at pp. 79-80; *The King v. Noxzema Chemical Company of Canada Ltd.*, [1942] S.C R. 178; *Franklin v. Minister of Town and Country Planning*, [1948] A.C. 87; *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66; *Calgary Power Ltd. v. Capithorne*, [1959] S C.R. 24; *Regina v. Governor of Brixton Prison; Ex parte Soblen*, [1963] 2 Q.B. 243; *Triefus & Co. Ltd. v. Post Office*, [1957] 2 Q B. 352; *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E R. 395, per Lord Greene, M.R, at pp. 399 and 405; *Robinson v. Minister of Town and Country Planning*, [1947] 1 K B. 702; *Rex v. Housing Appeal Tribunal*, [1920] 3 K.B. 334 per Earl of Reading, C.J., at p. 340; *Literary Recreations Ltd. v. Sauvé*, (1932) 58 C.C.C. 385, per Martin J.A. at p. 391; *Rex v. Halliday*, [1917] A C. 260 and *Liversidge v. Anderson*, [1942] A.C. 206, referred to.]

PETITION OF RIGHT.

Jean-Paul Ste. Marie, Q.C. and *Conrad Shatner* for suppliants.

Paul Ollivier, Q.C. for respondent.

JACKETT P.:—This is a Petition of Right in respect of mail sent by, or addressed to, the suppliants during a period commencing on Thursday, April 22, 1965, and ending with the filing of the Petition of Right.

Certain facts having been established as follows,

(*a*) by paragraph 1 of the Amended Statement of Defence, the Deputy Attorney General of Canada admitted the first four numbered paragraphs of the Petition of Right,

(*b*) counsel for the suppliants, in open court, admitted

(i) all of sub-paragraph (*a*) of paragraph 3 of the Amended Statement of Defence except the words "ayant des motifs sérieux de croire que la requérante, World Wide Mail Services Corporation, employait la poste pour des fins défendues par la Loi",

(ii) sub-paragraph (*b*) of the said paragraph 3,

(iii) sub-paragraph (*c*) of the said paragraph 3 subject to his right to challenge the correctness of anything in the memorandum of the Deputy Postmaster General referred to therein or the attachments thereto,

(iv) paragraph (*d*) of the said paragraph 3,

(v) paragraph 4 of the Amended Statement of Defence,

(vi) sub-paragraph (*a*) of paragraph 8 of the Amended Statement of Defence,

(*c*) by paragraph 9 of the Amended Statement of Defence, the Deputy Attorney General of Canada admitted the allegations in sub-paragraphs (*b*) and (*c*) of paragraph 15 of the Petition of Right,

the suppliants offered no evidence at the trial except certain documents which were tendered and accepted as exhibits without objection. It was agreed by both parties that, in the event that it transpires that the suppliants are entitled to damages, the ascertainment of the amount thereof will be the subject of a reference to a judge or some other officer of the Court.

No evidence was adduced on behalf of the Deputy Attorney General of Canada.

Neither party put in evidence the memorandum referred to in sub-paragraph (*c*) of paragraph 3 of the Amended Statement of Defence or the attachments thereto.

The facts, as established, so far as they are relevant, may be stated briefly as follows:

1. The suppliant Randolph does business in the city and district of Montreal and elsewhere under the registered firm name of "Al Brino Services Reg'd."

2. The corporate suppliant does business in the city and district of Montreal and elsewhere.

3. Randolph's business consists in offering to sell and selling films, books, photographs and similar objects.

4. The corporate suppliant's business consists in sending, by mail, on behalf of its customers, merchandise, documents, correspondence and other things that they ask it so to send.

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5. On Thursday, April 22, 1965, officers of the Post Office Department in Montreal suspended temporarily the postal service of the corporate suppliant for the purpose of an investigation.

6. On Friday, April 23, 1965, the suppliant Randolph, at the request of officers of the Department, agreed to submit to them samples of films, books and photographs that he offered for sale by means of the facilities of the corporate suppliant. These samples were immediately sent to higher officers of the Department in Ottawa with a view to determining whether there were grounds, on the basis of such samples, for recommending to the Postmaster General that he exercise, in respect of the suppliants, the powers conferred upon him by section 7 of the *Post Office Act*, R.S.C. 1952, chapter 212. In the meantime, the corporate suppliant's postal services remained suspended by authority of the Deputy Postmaster General.

7. On Monday, April 26, 1965, the aforesaid samples were seen and examined by the Deputy Postmaster General and two other officers of the Post Office Department.

8. On Wednesday, April 28, 1965, the Deputy Postmaster General wrote a memorandum to the Postmaster General recommending that an interim prohibitory order be made against the suppliants under section 7 of the *Post Office Act* and, on the same day, the Acting Postmaster General signed two documents purporting to be interim orders under that section prohibiting the delivery of mail directed to them or deposited by them in the Post Office. These orders were made without the suppliants having been previously heard and without the suppliants having had any opportunity of objecting thereto or presenting evidence.

9. The mail to which these orders relate, and mail that was not delivered as a result of the action taken by the Montreal Post Office officials on April 22, is detained by officers of the Post Office Department in a safe place.

By virtue of section 38 of the *Post Office Act*, mailable matter, which includes anything that may be legally sent by post, "becomes the property of the person to whom it is addressed when it is deposited in a post office". The suppli-

ants, by virtue of this provision, ceased to have any property in mail sent by them when they deposited it in a post office. On the other hand, all mail addressed to either of them became the property of the suppliant to whom it was addressed when it was deposited in a post office. As counsel for the suppliants made it clear that the Petition of Right is designed only to obtain redress in respect of an alleged interference with property rights in mail, and is not designed to put forward any claim for breach of contract or breach of statutory rights, I am of opinion, and I so hold, that there is no basis for any claim in respect of mail sent by the suppliants during the periods when their mailing rights were in fact interrupted. During the balance of these reasons, I shall be considering the matter from the point of view of mail sent to them.

In so far as the Petition of Right is for damages, it is, in effect, founded upon the *Crown Liability Act*, chapter 30, of the Statutes of 1952-53, section 3 of which makes Her Majesty in right of Canada liable "in tort" for the damages for which, if She were a private person of full age and capacity, She would be liable, in respect of a tort or "un acte préjudiciable" committed by a servant of Her Majesty. In so far as the Petition of Right is for recovery of mail that is the property of one or other of the suppliants, it is based upon section 17 of the *Exchequer Court Act*, R.S.C. 1952, chapter 98, which gives this Court jurisdiction, *inter alia*, in cases where property of the subject is in the possession of Her Majesty in right of Canada. Compare section 7 of the *Petition of Right Act*, R.S.C. 1952, chapter 210, and see *Miller v. The King*[1].

Inasmuch as the officials of the Post Office Department, who in my view are servants of the Crown, have deliberately omitted to deliver to the suppliants mailable matter in due course of the operation of the postal service, it is clear that property of the suppliants is in the possession of the Crown and is being wrongfully withheld from them and that a tort or "un acte préjudiciable" has been committed against the suppliants by servants of the Crown, *unless* there is in law some justification for the omission to deliver such mailable matter.

In so far as mail addressed to the corporate suppliant before the Postmaster General made his order in respect of

[1] [1950] S.C.R. 168.

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the suppliant on April 28, 1965, is concerned, no justification in law has been suggested to me for failing to deliver it to the suppliant in due course of the operations of the postal service. An argument was addressed to me by counsel for the Deputy Attorney General that a power in post office officials to interrupt a person's mail service and temporarily to detain his mail while they are seeking a decision from the Postmaster General with reference to the exercise of his statutory powers with regard thereto must be implied—although it is admittedly nowhere expressly set out in the statute—to enable such officials to prevent, during such interim period, the carrying on of operations that appear to them to be fraudulent. No authority was cited to me for any such implying of statutory powers to interfere with the property rights and statutory privileges of presumably law-abiding citizens and I reject such argument. The corporate suppliant is therefore entitled to judgment in respect of mail addressed to it that was detained prior to the making of the order on April 28, 1965.

In so far as mail addressed to either of the suppliants after the making of the two orders of April 28, 1965, is concerned, the right of the suppliants depends on the validity of such orders.

Those orders purport to have been made under subsection (1) of section 7 of the *Post Office Act*, which reads as follows:

> 7. (1) Whenever the Postmaster General believes on reasonable grounds that any person
>
> (*a*) is, by means of the mails,
>
> (i) committing or attempting to commit an offence, or
>
> (ii) aiding, counselling or procuring any person to commit an offence, or
>
> (*b*) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,
>
> the Postmaster General may make an interim order (in this section called an "interim prohibitory order") prohibiting the delivery of all mail directed to that person (in this section called the "person affected") or deposited by that person in a post office.

The attacks on the orders made under section 7 may be summarized as follows:

(*a*) section 7 of the *Post Office Act* must be so read as to make it a condition precedent to the validity of an interim prohibitory order thereunder against any person that such person has first been given an opportunity

to be heard and to correct or contradict any relevant statement prejudicial to him (hereinafter referred to as "an opportunity to be heard"), and, no such opportunity to be heard having been given to either of the suppliants before these two orders were made, they are nullities;

(*b*) regardless of how the *Post Office Act* might otherwise be read, the Court is required by the *Bill of Rights Act* to read section 7 thereof as

(i) not authorizing the abrogation, abridgement, or infringement, of the suppliants' right to the enjoyment of their property except by due process of law (section 1(*a*)),

and to construe and apply section 7 so as

(ii) not to deprive the suppliants of a fair hearing in accordance with the principle of fundamental justice for the "determination" of their "rights", and

(iii) not to deprive the suppliants, who are charged with criminal offences, of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal,

and, when so read, construed and applied, section 7 does not authorize the orders in the manner in which they were made and they are therefore nullities; and

(*c*) there was not evidence before the Postmaster General upon which he could have concluded that he had reasonable grounds for believing that either of the suppliants had, by means of the mail, committed or attempted to commit any criminal offence and the said orders were therefore null and void as not having been made within the powers conferred by section 7.

I shall deal first with the contention that the orders are nullities, having regard only to section 7 of the *Post Office Act,* because the Postmaster General did not give the suppliants an opportunity to be heard before he made them.

It is common ground that the orders in question purport to be interim prohibitory orders under section 7 and that they were made without affording to the persons affected any opportunity to be heard.

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It is a general rule that, unless Parliament has, in a particular class of matters, otherwise provided, every person has a right to be heard and to be given a fair opportunity for correcting or contradicting what is alleged against him before an order is made against him. This is a fundamental rule of British justice that is read into statutes conferring power to make decisions[1]. It applies not only when the power to make decisions is conferred upon judicial tribunals constituted as such but whenever such a power is conferred upon administrative agencies, Ministers of the Crown or other purely executive authorities. The rule only applies, however, in the absence of any express statutory rule to the contrary, to decision making powers conferred by statute that are of the kind sometimes referred to as being of a judicial or quasi-judicial nature because they are primarily directed to the determination or abrogation of rights of members of the public by application of a statutory rule to the facts of a particular case as determined by the tribunal. In other words, the rule that I am discussing does not apply to decisions that are primarily of an administrative or executive nature in the sense that they are arbitrary because they are made having regard primarily to public policy or expediency considerations[2] but does apply to decisions as to individual rights arrived at by ascertaining facts and applying some rule or principle of law to them.

Two questions have to be considered, therefore, in determining whether it is a condition precedent to the Minister's

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[1] *Board of Education v. Rice,* [1911] A.C. 179; *Local Government Board v. Arlidge,* [1915] A.C. 120; *Esquimalt and Nanaimo Railway Co. v. Wilson,* (B.C. C.A.), (1921) 59 D.L.R. 577, per Eberts, J.A., at page 590; (P.C. 61 D.L.R. 1; *Errington v. Minister of Health,* [1935] 1 K.B. 249; *Mantha v. The City of Montreal,* [1939] S.C.R. 458; *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.,* [1947] 1 D.L.R. 721, per Lord Greene at pages 732-3; *L'Alliance des Professeurs Catholiques de Montréal v. The Labour Relations Board,* [1953] 2 S.C.R. 140; *Ridge v. Baldwin* [1964] A.C. 40.

[2] *Rex v. Leman Street Police Station Inspector; Ex parte Venicoff,* [1920] 3 K.B. 72, per Earl of Reading, C.J., at pages 79-80; *The King v. Noxzema Chemical Company of Canada, Ltd.,* [1942] S.C.R. 178; *Franklin v. Minister of Town and Country Planning,* [1948] A.C. 87; *Nakkuda Ali v. Jayaratne,* [1951] A.C. 66; *Calgary Power Ltd. v. Capithorne,* [1959] S.C.R. 24; *Regina v. Governor of Brixton Prison; Ex parte Soblen,* [1963] 2 Q.B. 243.

power to make an order under section 7 that he shall have first given to the person affected an opportunity to be heard. They are

(*a*) Is the power conferred by section 7 of the class of statutory judicial or quasi-judicial powers the exercise of which is subject to a condition precedent that an opportunity to be heard has been given to the person affected unless the necessity for such an opportunity has been negatived by the statute?

(*b*) If the answer to that question is in the affirmative, does section 7 contain an indication that Parliament intended the power conferred by that section to be exercised without the Minister first having given to the person affected an opportunity to be heard?

To answer these two questions, it is necessary to consider all of section 7, which reads as follows:

7. (1) Whenever the Postmaster General believes on reasonable grounds that any person

(*a*) is, by means of the mails,

(i) committing or attempting to commit an offence, or

(ii) aiding, counselling or procuring any person to commit an offence, or

(*b*) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,

the Postmaster General may make an interim order (in this section called an "interim prohibitory order") prohibiting the delivery of all mail directed to that person (in this section called the "person affected") or deposited by that person in a post office.

(2) Within five days after the making of an interim prohibitory order the Postmaster General shall send to the person affected a registered letter at his last known address informing him of the order and the reasons therefor and notifying him that he may within ten days of the date the registered letter was sent, or such longer period as the Postmaster General may specify in the letter, request that the order be inquired into, and upon receipt within the said ten days or longer period of a written request by the person affected that the order be inquired into, the Postmaster General shall refer the matter, together with the material and evidence considered by him in making the order, to a Board of Review consisting of three persons nominated by the Postmaster General one of whom shall be a member of the legal profession.

(3) The Board of Review shall inquire into the facts and circumstances surrounding the interim prohibitory order and shall give the person affected a reasonable opportunity of appearing before the Board of Review, making representation to the Board and presenting evidence.

(4) The Board of Review has all the powers of a commissioner under Part I of the *Inquiries Act*, and, in addition to the material and evidence referred to the Board by the Postmaster General, may consider such further evidence, oral or written, as it deems advisable.

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(5) Any mail detained by the Postmaster General pursuant to subsection (8) may be delivered to the Board of Review, and, with the consent of the person affected, may be opened and examined by the Board.

(6) The Board of Review shall, after considering the matter referred to it, submit a report with its recommendation to the Postmaster General, together with all evidence and other material that was before the Board, and upon receipt of the report of the Board, the Postmaster General shall reconsider the interim prohibitory order and he may revoke it or declare it to be a final prohibitory order, as he sees fit.

(7) The Postmaster General may revoke an interim or final prohibitory order when he is satisfied that the person affected will not use the mails for any of the purposes described in subsection (1), and the Postmaster General may require an undertaking to that effect from the person affected before revoking the order.

(8) Upon the making of an interim or final prohibitory order and until it is revoked by the Postmaster General,

(*a*) no postal employee shall without the permission of the Postmaster General

(i) deliver any mail directed to the person affected, or

(ii) accept any mailable matter offered by the person affected for transmission by post,

(*b*) the Postmaster General may detain or return to the sender any mail directed to the person affected and anything deposited at a post office by the person affected, and

(*c*) the Postmaster General may declare any mail detained pursuant to paragraph (*b*) to be undeliverable mail, and any mail so declared to be undeliverable mail shall be dealt with under the regulations relating thereto.

(9) Where no request that an interim prohibitory order be inquired into is received by the Postmaster General within the period mentioned in subsection (2), the order shall, at the expiration of the said period, be deemed to be a final prohibitory order.

By the *Post Office Act*, Parliament provides for the operation, by a government department under the management and control of a Minister of the Crown known as the Postmaster General, of a public utility that is almost as important, if not as essential, to residents of Canada, in their business and domestic lives alike, as are the light, heat and water that are provided by public utilities at the local level. Whether or not any individual person has a right enforceable in the courts to the services provided by the Post Office Department may be subject to debate[1]. As a practical or political matter, however, every resident of Canada has a right to avail himself of such services except to the extent that such right is qualified by the provisions of the *Post Office Act*. One such qualification is found in section 7.

[1] Cf. *Triefus & Co. Ltd. v. Post Office*, [1957] 2 Q.B. 352.

The legislative policy is clear. Post Office services are intended to serve the lawful requirements of residents of Canada and are not provided to be used for the commission of crime. The problem was to devise a provision that would give practical effect to that legislative policy. In the ordinary course of events, Post Office officials see only the covers on letters and other mailable matter and the covers do not reveal whether the contents are innocent in character or are part of the implementation of a criminal scheme. It would be futile, therefore, merely to lay down a rule prohibiting the acceptance or delivery of mailable matter that is being used in the carrying out of a crime. Before the commission of a crime can be discovered and established in accordance with normal judicial procedures, the mail will have been used in the manner that it is sought to avoid.

What section 7 does, therefore, in order to effect the parliamentary purpose of diminishing the use of the mails for criminal purposes, is twofold. First, it adopts a rule that, when it has been ascertained that there are reasonable grounds to believe that a person is using the mails for criminal purposes, such person will forfeit the right to use the mails for any purpose, criminal or otherwise, until he abandons his purpose of using the mails for criminal purposes. Secondly, it makes the Postmaster General, who is the Minister of the Crown in immediate control of the postal service, the authority to determine whether circumstances have arisen in any particular case that give rise to the imposition of such a forfeiture of the right to use the mails.

It is to be noted that, from the point of view of the person affected, there are two consequences of such a determination, viz.,

(*a*) he cannot use the Post Office for the sending of any mailable matter, while that order is in effect, and

(*b*) mailable matter addressed to him, which is his property by virtue of section 38 of the *Post Office Act*, is withheld from him.

Such an order, therefore, not only deprives the person affected of the use of the postal service of Canada that is available to practically all other residents of Canada, but it

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operates to deprive him of the possession of mailable matter that belongs to him and that he would otherwise have in his possession—that is, it deprives him of the enjoyment of a part of his property.

Another comment that should be made on section 7 at this stage is that, unlike the criminal law, which goes on the principle that it is better that some guilty persons should go unpunished than that even one innocent person should be punished, the principle adopted by section 7 is not that it only operates against persons who have been or could be convicted of crime but it operates also against persons in respect of whom there are reasonable grounds for believing that they are engaged in criminal activities even though they may actually, in some cases, be innocent.

While it does not seem that the dividing line between a power to make an administrative or executive decision of such a character that there is no necessity to provide the person affected with an opportunity to be heard and a power to make judicial or quasi-judicial decisions of such a character that it is necessary to provide such an opportunity to be heard has been authoritatively defined with any precision, notwithstanding that the power here is vested in a Minister of the Crown who is primarily an authority with administrative and executive authority, having regard to the fact that the Minister is to apply a rule or principle enunciated by Parliament to the facts of each particular case, and having regard to the fact that the matter is not left to be determined in accordance with his views as to public policy or expediency[1], I am of opinion that the power with which I am concerned is of such a judicial or quasi-judicial character that it cannot validly be exercised until the person affected is afforded an opportunity to be heard unless, upon a fair reading of section 7, the necessity to afford such an opportunity is excluded.

I will, therefore, consider now whether section 7 excludes the necessity of affording the person affected an opportunity to be heard.

That question—that is, whether section 7 says impliedly, what it does not say expressly, that the Postmaster

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[1] See *B. Johnson & Co. (Builders), Ltd. v. Minister of Health,* [1947] 2 All E.R. 395, per Lord Greene, M.R., at page 399 and at page 405; *Robinson v. Minister of Town and Country Planning,* [1947] 1 K.B. 702.

General may make an interim prohibitory order without giving the person affected an opportunity to be heard—is difficult to answer.

To answer it, one must look at the scheme of the section as a whole. First, the section says that, when the Postmaster General believes certain things he may make an "interim prohibitory order", which order has the effect of stopping the delivery of mail to the person affected and of stopping him from sending any mail. Next, the Postmaster General is, within five days from making such an order, to send a registered letter to the person affected "at his last known address" (which might suggest that Parliament contemplates that the Postmaster General will not have been in recent communication with him) informing him of the order and the reasons therefor and notifying him that he may within 10 days request that the order be inquired into. Next, if the person affected requests it, there is an inquiry by a board nominated by the Postmaster General during which the person affected is to have a right to appear before the board, make representations and present evidence. If no such inquiry is requested, the interim order automatically becomes final but, if there is an inquiry, the Postmaster General must, upon receipt of the board's recommendations and the evidence, consider the interim order and revoke it or make it final "as he sees fit".

Even if it were clear that, if there were no provision for a hearing between the interim and final orders, the Postmaster General would have had to give a person affected an opportunity to be heard before the interim order could be validly made, a question does arise in my mind as to whether the fact that Parliament provided for quite an elaborate inquiry before the interim order becomes final, if the person affected requests it, is a parliamentary indication that the usual right to be heard before an order is made does not exist in relation to the making of the interim order under section 7.

Having regard to the apparent desire of Parliament to reduce to the minimum the use of the mail to commit criminal offences and to the provision for the creation of an inquiry tribunal immediately after the making of an interim order, one might well conclude that it seemed so

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obvious that there was not to be a right to be heard before that order was made that it did not require to be said expressly[1].

On the other hand, it is to be borne in mind that the right to be heard to which the person affected would automatically be entitled, if it is not impliedly excluded, is a much less formal and far reaching type of investigation than that for which section 7 provides. It would be sufficiently accorded to him if he were notified by the Minister what was alleged against him and what action was proposed and were given a reasonable time, which might be quite short in the circumstances, to answer what was said against him by any adequate means, which might be merely a statement in writing sent to the Postmaster General[2]. The importance attached to this quite simple right cannot be exaggerated because an innocent person might be able quite simply to convince the Minister of his innocence and thus avoid the ignominy of having an order made against him and also because, human nature being what it is, it may well be much easier to convince the Minister of the innocence of the person affected before he has made any order than after he has made an order by which he has taken a view against the person affected[3].

The power to make the interim order under section 7 is not a decision making power of such a character that the parliamentary objective might well be frustrated if it were conditioned on a prior opportunity to be heard. An obvious example of such a power is the power to detain persons who

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[1] But see *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* (P.C.), [1947] 1 D.L.R. 721, where the matter under consideration was the validity of a decision by the Minister in respect of which there was no express provision for a prior hearing but from which according to the Privy Council there was an appeal to the Court. (See per Lord Greene at page 730.) Nevertheless, the Privy Council were of the view that the taxpayers had a right to "a fair opportunity of meeting the case against them" when the matter was originally brought before the Minister (See page 733).

[2] *Rex v. Housing Appeal Tribunal,* [1920] 3 K.B. 334, per Earl of Reading, C.J., at page 340.

[3] In the past, it does not seem to have been found inexpedient to have given the person affected an opportunity to be heard. See *Literary Recreations Ltd. v. Sauvé,* (1932) 58 C.C.C. 385, per Martin J.A., at page 391.

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are a potential danger to the safety of the state in war time[1]. In war time, the possibility of innocent patriotic citizens being incarcerated is obviously one that must be accepted in order to avoid the substantially greater danger to the state involved in potential enemy spies and saboteurs being permitted to operate. An opportunity to be heard would probably avoid the unnecessary detention of some patriotic citizens but it would also completely frustrate the objective of incarcerating the really dangerous persons. In such circumstances, it is not difficult to infer that Parliament did not contemplate the giving of an opportunity to be heard *before* the detention orders are made.

There is no such compelling reason for deducing that Parliament did not contemplate an opportunity to be heard in connection with interim orders under section 7. An opportunity to be heard may, it is true, result in a delay in the imposition of the ban on the user of the mail but the delay need not be long and the ban, when the order is made, will be quite effective.

For the above reasons, I am of opinion that an interim prohibitory order cannot be made under section 7 of the *Post Office Act* without first affording the person affected an opportunity to be heard. As no such opportunity was afforded before the orders of Wednesday, April 28, were made against the suppliants, I am of opinion that such orders were nullities and that each suppliant is therefore entitled to judgment in respect of the mailable matter addressed to such suppliant that was not delivered by virtue of the orders prior to the commencement of these proceedings.

In view of the conclusion that I have reached with regard to the first ground of attack on the orders in question, I am relieved of the necessity of considering the several very difficult questions that arise in dealing with the other grounds of attack.

I have, for the above reasons, concluded that there shall be judgment in favour of each suppliant in respect of mail not delivered to such suppliant in due course of mail

[1] Cf *Rex v. Halliday*, [1917] A.C. 260, and *Liversidge v. Anderson*, [1942] A.C. 206.

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Jackett P

(*a*) in the case of the suppliant Randolph, during the period from the making of the abortive order on April 28, 1965 to the filing of the Petition of Right herein; and

(*b*) in the case of the corporate suppliant, during the period from the suspension of its postal service on April 22, 1965 to the filing of the Petition of Right herein;

and that that judgment should be, in each case, that the suppliant is entitled to have the mail in question delivered to him or to it, as the case may be, and is entitled to be paid damages, in respect of the detention thereof, in an amount which must, before the judgment is delivered, be determined upon a reference to the Registrar of this Court or one of the Deputy Registrars designated by him.

Upon application, after the amounts of the damages have been so determined (or upon the suppliants waiving their right to such damages), I shall deliver judgment accordingly.

Montreal 1965 May 20 Ottawa Sept. 28

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

ALLAN BRONFMAN ..... RESPONDENT.

Income tax—Indirect payments—Income Tax Act, s. 16(1)—Gifts by company to directors' relatives—Whether directors chargeable—Whether shareholders chargeable.

Four brothers and a brother-in-law were directors of a company which in the years 1950 to 1955 made gifts of $97,000 to their relatives and to retired employees or their dependents. The directors were substantial shareholders of the company but did not control a majority of the company's votes. For the said taxation years each of the directors was assessed to tax on one-fifth of the total of the gifts made.

Section 16(1) of the *Income Tax Act* provides:

> "A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him."

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Held, allowing the appeal in part, whilst s. 16(1) applied to render the gifts taxable, the tax was payable by all of the company's shareholders in accordance with their respective shareholdings.

APPEAL from decision of Tax Appeal Board allowing appeal from income tax assessment.

Paul Boivin, Q.C. and *Raymond G. Decary, Q.C.* for appellant.

Philip F. Vineberg, Q.C. for respondent.

DUMOULIN J.:—The case about to be decided was chosen, at the request of the litigants, as a test applicable in law and in facts to four other similar suits, respectively directed against three brothers and a brother-in-law of the respondent. The amounts in each of the five actions represent one-fifth of the aggregate corporate gifts made by a certain company to third parties, during the 1950-1955 period, divided in five parts imposed as taxable income on each of its directors equally.

This is an appeal from a decision of the Tax Appeal Board, dated February 18, 1958[1], allowing the appeal of Allan Bronfman in respect of the income tax assessments for the taxation years 1950, 1951, 1952, 1953, 1954 and 1955.

Notices of re-assessment, bearing date of December 14, 1956, increased the respondent's declared income by the amounts hereunder:

1950	$2,308.98
1951	2,901.25
1952	4,364.07
1953	2,587.61
1954	6,465.95
1955	868.30

The appellant, in para. 8 of his Notice of Appeal, submits that the additional income above ". . . represent his (i.e. Allan Bronfman's) share of the gifts made by Brintcan Holdings (Canada) Limited to certain persons, which gifts were effectively paid at the direction and with the concurrence of the respondent who was one of the five Directors of Brintcan Holdings (Canada) Limited."

Slight attention only was given at trial to the exact nature and aims of the company itself, and rightly so, since the problem awaiting solution is of a different order. Suffice

[1] 18 Can. Tax A B C 456

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it to say for our purposes that Brintcan Holdings (Canada) Limited was incorporated as a private company, September 9, 1949, under the *Companies Act* of Canada; its main business, supposedly at least, that of investment holdings and management, with a view to concentrating in one corporate organization various interests of the Bronfman family.

Brintcan's capital stock consists, according to the evidence, in 2026 common shares, plus 14,250 non-cumulative redeemable 3 per cent preferred shares, all with voting rights. Allan Bronfman, his three brothers and brother-in-law, Aaron Barnett, each owned 5 common shares, the surplus of these, 2,001, belonging, in the words of Mr. Philip Vineberg, Q.C., respondent's counsel, to "other family companies or trusts composed entirely of members closely or remotely related to the Bronfman clan." The respondent also held 2,707 preferred shares; his brothers, just mentioned, and Mr. Barnett, figure as important owners of the same class of shares, without, however, controlling a majority of company votes.

During the six material years, 1950 to 1955 inclusively, Brintcan Limited made certain gifts to third parties, who were not shareholders of the company, totalling $97,000. Out of these donations, $80,000 consisted in wedding gifts of $10,000 each to children, one of the latter a son of respondent, to grandchildren, nephews or nieces, of the five directors herein concerned. The surplus, $17,000, was doled out to retired employees or their dependents in dire need of financial assistance.

The gist of the matter is neatly outlined in the opening paragraph of the appellant's Notes, from which I quote:

> The issue before the Court is whether or not wedding gifts and other gifts made by Brintcan Holdings (Canada) Ltd. were in fact payments or transfers of money pursuant to the direction or with the concurrence of, the (respondent) as a benefit that the (respondent) desired to have conferred on the donee and, as such, whether or not those transfers of money are taxable in the hands of the (respondent) pursuant to the provisions of Section 16(1) of the Act.

To this allegation, the respondent opposes a categorical denial worded thus in para. 6 of his Reply to the Minister's Notice of Appeal:

> 6. No payment was made pursuant to the direction or with the concurrence of the taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person

Stated in so simple language, the issue narrows down to the interpretation of s. 16(1) of the *Income Tax Act*, R.S.C. 1952, c. 148.

Before delving into an examination of this none too clear provision of the law, I should say that I am quite indifferently impressed with the lame excuse, legally speaking, that Allan Bronfman would have ". . . exercised a very passive role in relationship to the company. He never received any salary or director's fees. He was not an officer of the company. He did not attend any meeting. He did not participate in the management . . . . He did not, in short, direct the company to do anything or not to do anything." These lines, in the second paragraph of the respondent's Notes, just tend to show that Bronfman, solicited by several other pursuits, took for granted, if in fact he did not ignore, the practically automatic functioning of this family gift distributing "machinery". Nonetheless, he had accepted, as a director, certain statutory duties, the persisting neglect of which does not extenuate but might rather aggravate his personal responsibility.

This point settled, the next step brings us to the crux of the difficulty: s. 16(1), enacting that:

> 16. (1) A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him.

The marginal note, introducing the section, consists in these two words, "Indirect Payments". If it is a truism to say the law must be sought in its text and not in the margins the bare fact remains of the object, correct or not, attributed by the draughtsman to s. 16(1).

I would not disagree with the opinion of many writers, who pondered over this text, that it could endure more clarity and state its aim and purpose with a neater degree of precision; yet, this affords but melancholy comfort and does not ease my task of trying to decipher the incipient riddle.

Fortunately, and properly so, all things duly weighed and considered, the parties at bar seem to have tacitly reached the understanding that the solution depends upon whether

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or not the taxpayer should be the owner of the money paid or the property transferred, pursuant to his direction or with his concurrence.

This view is contradictorily propounded in the Notes produced, at my request, on behalf of the appellant and respondent.

On pp. 4 and 6 of his memorandum, respondent's counsel argues that:

> Before an assessment can be levied against Mr. Allan Bronfman with respect to any diversion of income, it is necessary to find that this is income to which he was legally entitled. No one has suggested, or could possibly suggest, that he had any right to the income, or any rights to the moneys that were paid as gifts. If there had not been the alleged diversion, it wouldn't have been Allan Bronfman who would have received the moneys that were paid. Quite apart from everything else, the payment was a payment by Brintcan and not a payment from Allan Bronfman. The moneys paid were moneys of Brintcan and not the moneys of Allan Bronfman.

And on p. 6, this assertion is renewed with some elaboration:

> It is trite law that the assets of a company are separate and distinct from the assets of the shareholders . . . . Section 16, whether under sub-section (1) or sub-section (2), applies where the taxpayer diverts to a third party that which would have been his. It is first necessary, however, that it should have been his, and also that it should have been taxable income to him had he received it.

The appellant, on p. 5 of its own Notes, acknowledges Brintcan's ownership of the sums donated, but rejects the proposition that the taxpayer becomes assessable only if he is personally entitled to the money or property comprised in the gift or transfer. I quote the entire passage since it definitely joins the issue:

> During the course of his argument, my learned friend stressed the fact that in order that Section 16 be applicable, the taxpayer concerned must be the owner of the money, rights or things.
>
> We respectfully submit that such a construction would render Section 16(1) meaningless because the owner of the income does not need the concurrence nor the direction of anybody else in order to transfer such income. The cases of transfer of money owned by the taxpayer are provided for at sections 21, 22 and 23 of the Act and also at Section 111 dealing with gift tax.
>
> In the present instance, the money that has been transferred belonged to the company and it is through the concurrence and the direction of the appellant, who was and still is a director of the company that such transfers of money were made by the company to the different donees.

Before extending its corporate generosity to relatives of its five directors, the company had duly paid the full tax on

its yearly income, so that the gifts and gratuities came out of its residual capital, all taxes acquitted.

What should be construed as the more plausible meaning and intent of this none too limpid text of our fiscal law? After some hesitation, I take the view that a literal interpretation offers the truer course. Independently of its marginal note, s. 16(1) would operate as a prohibition of "indirect payments" of whatever form or shape. Otherwise, the inventive ingenuity of the tax evading incentive would ceaselessly devise means and ways of diverting a considerable proportion of the government's revenue. Accordingly, the legislator seeks to prevent this tax-evading attempt.

Scarcely tenable also is the respondent's contention that s. 16(1) contemplates assessing delegated payments as in the instance mentioned on p. 3 of respondent's Notes:

> If a payment is owing to me, . . . by virtue of a law fee, and I direct that it should be paid to another, then, of course, Section 16 would require that I be taxed thereon personally. If I recommend to my client that he pay my Ottawa correspondent a fee for the latter's services, and my client complies with my recommendation or request, it should be equally clear that . . . I should not be taxed thereon at all.

Certain things, as the two latter examples, are self-evident to a point that they defy the need of legal recognition. For that reason I cannot detect in the disputed section anything beyond the current, every day meaning of the words used.

Both parties agree that all the wedding gifts made and financial assistance extended came from Brintcan's residual capital. How then could those occasional withdrawals of money be effected in the material form of "a payment" to "some other person" if not "pursuant to the direction of, or with the concurrence of..." Allan Bronfman and his four co-directors?

The respondent testified that the family custom of paying wedding donations to close relatives out of Brintcan's of Canada and its predecessor company's funds dated back to 1930. This regular practice presupposes, at its start, an active concurrence of the directors, tacitly continued, possibly, throughout the years, else the paying officers of the companies concerned would have lacked authorization to issue the requisite cheques. It goes without saying that the motivation of such outlays foresaw "a benefit the taxpayer desired to have conferred on the other person...", one of

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whom was the respondent's son, also the recipient, at the time of his wedding, of an additional monetary present from his father.

So far, three or four conditions into which the relevant section can be subdivided have been met, namely:

1. A payment or transfer of money;
2. Pursuant to the direction or with the concurrence of the respondent, even though implicit;
3. As a benefit respondent desired to have conferred on some other persons, his own relatives or dependants of former employees.

One fourth and paramount requirement remains to be satisfied: does the inclusion of the payments so made "in computing the taxpayer's income to the extent that it would be if the payment . . . had been made to him", entail correlatively the personal ownership of the moneys thus paid out?

I would think not, because, firstly, the section's clear enough purpose is the taxation of indirect payments under circumstances such as the instant ones. If so, then, a norm or basis of assessment must be set, and this was done by Parliament assimilating the payer's funds, corporate body or third party of any other description, to the personal income of the taxpayer directing these payments or merely concurring in their performance, to the extent that they would have increased his income had they been made to him.

Secondly, the practical objective of the Legislature's foresight shows up at once in the words of the learned member of the Tax Appeal Board, whose conclusion, however, I cannot adopt. Mr. Fisher, Q.C., (appeal No. 494, *supra,* p. 464) writes:

> It is true that, by payments of the amounts in question herein, the amount of the distributable surplus of the company which might be on hand for some future distribution is thereby reduced, and to that extent the company may be "avoiding" ultimate taxation of a part of such surplus. However, that is quite permissible under the provisions of the taxation legislation, as "avoidance" of taxation is entirely legal, although "evasion" of taxation is not.

The simple reason of my dissenting opinion is that my interpretation of s. 16(1), mandatory in its intent, renders,

if disregarded, indirect payments a form of tax evasion and not a condoned method of tax avoidance.

In the matter of *C. A. Ansell Estate* v. *M.N.R.*[1], a precedent relied upon by the respondent, the facts, totally different, offer no useful analogy to the case at bar, as the suit was adjudged according to s. 63(2) of the Act, dealing with "Trusts, Estates and Income of Beneficiaries and Deceased Persons".

One final question now comes to the fore, as it did in the decision of Mr. Fisher, Q.C., with whom, this time, I agree. Why were the five Brintcan directors the sole parties taxed for the $97,000 paid during the material years, exclusive of the shareholders? The learned member of the Tax Appeal Board expressed his opinion as follows (at p. 462):

> And why the directors of X Company Limited (the case being heard *in camera*) should be singled out for taxation under the provisions of that subsection—as has been done in the present instance—when they are very minor shareholders in so far as the common shares of X Company Limited are concerned, (and indeed are only minority shareholders when all the common shares of the five directors and the non-cumulative preferred shares held by three of the directors hereinbefore set forth, both types of shares having full voting rights, are added together and taken into consideration), is a question which raises the further query as to why, since all of the shareholders eventually approved and concurred in the various gifts in question over the years at the annual meetings of X Company Limited, all of the shareholders should not have been taxed on their proportionate shares of the gifts.

Shareholders possessing voting rights could have, had they so wished, objected to and voted down at annual or specially convened meetings their directors' generosities. And, of course, they also might have resorted to the radical remedy of voting out of office the entire Board and elected a more thrifty slate of directors. Their abstention or indifference, unbrokenly maintained, becomes tantamount to an approval of their administrators' gift distributing policies, and they should, with the latter, have shared proportionately to their individual holdings, the burden of taxation decreed by s. 16(1). Since the shareholders were not impleaded no conclusion can affect them nor their eventual right of full defence. Whether or not due to lapse of time, the Minister of National Revenue would be estopped by s. 46(4)(*b*) of the Act from legal recourse against the shareholders is of no interest presently.

[1] 30 Tax A.B.C. 205.

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For the reasons above, this appeal is allowed as follows: The respondent will be assessed for a portion of the income tax attaching to the $97,000 donated, rateably with the number of shares he owned, during the material years, of the total capital stock of Brintcan Holdings (Canada) Limited. In consequence, the record will be referred to the Minister for revision accordingly.

The appeal being but partially successful, no costs are granted to either party.

Appeal allowed in part; no costs.

Victoria 1965

Apr. 12

Ottawa Aug. 4

BETWEEN:

PENDER ENTERPRISES LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....} RESPONDENT.

Income tax—Capital cost allowances—Non-arm's length transaction—Control of company—Sale of asset—Adequacy of consideration—Lease acquired at no cost—Sale at economic value—Close family and business relationship of purchaser to vendor—Onus of disproving assessment—Whether casting vote at shareholders' meetings gives control—Income Tax Act, secs. 20(6)(g), 139(5)(a) and (b); 139(5a).

Bruce Sung acquired at no cost a restaurant business in Whitehorse in August 1953 under a verbal commitment from the company which owned it for a two-year lease of the building and an option to renew for two further years. In December 1953 he agreed to sell the business to appellant company for approximately $48,000, of which $32,000 was allocated by the parties to a lease of the building. In February 1954 Sung obtained a lease of the building for two years from 1 January 1954 at a rent of $100 per month, with an option to renew for two further years at a rent of $125 per month. On 1 March 1954 he assigned the lease to appellant company. The price of $32,000 for the assignment of the lease was based on the economic value of the business. Appellant company had two equal shareholders, both of them being long-standing valued employees of Bruce Sung in the operation of his many companies, and they continued as such after the purchase of the restaurant. One of the two was Bruce Sung's brother-in-law, who was president of appellant company, under whose articles of association he had a casting vote at shareholders' meetings. The other was Sung's cousin. In 1955 Sung acquired all the shares of the company which owned the building and notwithstanding the provisions of the lease the rent was increased to $400 a month in 1956, $466 a month in 1957, and $500 a month in 1958. Appellant company claimed capital cost allowances in respect of the lease of the building for the years 1955 to 1958 on the basis of a capital cost of $32,000. The claim was disallowed by the Minister, whose decision was upheld by the Tax Appeal Board [34 Tax A.B.C. 26]. The company appealed to the Exchequer Court of Canada.

Held, appellant company was not entitled to any capital cost allowances in respect of the lease. The transaction between Sung and appellant company fell within the category of non-arm's length transactions by reason of the intimate business and family relationship of Sung with the two directors of appellant company; and the onus of disproving the assumption of the assessment that the transaction was not at arm's length (*Income Tax Act,* s. 139(5)(*b*)) had not been satisfied.

On the evidence the assignment of the lease was a disposition of depreciable property within the meaning of s. 20(6)(*g*) of the *Income Tax Act* and the consideration therefor was reasonable within the meaning of such enactment.

The fact that Sung's brother-in-law, holding 50 per cent of the issued shares of appellant company, had as president of the company a casting vote at shareholders' meetings under the company's articles of association did not give him control of the company within the meaning of s. 139(5a) of the *Income Tax Act* so as to make the transaction between Sung and the company a non-arm's length transaction. Control of a corporation requires at least a bare majority of shareholding.

[*Buckerfield's Ltd. v. M.N.R.* [1965] 1 Ex.C.R. 299 at p. 302; *Vancouver Towing Co. v. M.N.R.* [1946] Ex.C.R. 623 at p. 632, referred to.]

APPEAL from Tax Appeal Board dismissing appeal from income tax assessment.

Richard P. Anderson for appellant.

Kenneth E. Meredith and *T. E. Jackson* for respondent.

Noël J.:—This is an appeal from a decision of the Income Tax Appeal Board[1] dated October 30, 1963, dismissing the appellant's appeal from its income tax assessments whereby amounts of $6,400 for each of the years 1955, 1956 and 1957 and $6,933.37 for the year 1958, which had been deducted by the taxpayer as capital cost allowances in respect of the cost of a lease, were added to its income.

The appellant, sometime in the year 1954, purchased from one Bruce Sung a restaurant situated at Whitehorse, in the Yukon Territories, for $47,973.50 which in the bill of sale was broken down as follows:

Assignment of lease	$32,000.00
Goodwill	15,000.00
Stock	500.00
Equipment	473.50
	$47,973.50

[1] 34 Tax A.B.C. 26.

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Deduction of the leasehold interest at $32,000 was refused by the Minister for the following reasons:

1. There was in fact no disposition of a lease made from Sung to Pender Enterprises Ltd.
2. In any event, the sum of $32,000 attributed as the value of the lease by the appellant could not be reasonably regarded as being consideration for the disposition of the lease or as the consideration for depreciable property of a prescribed class and consequently the appellant is deemed by virtue of paragraph (*g*) of s.-s. (6) of s. 20 of the *Income Tax Act* to have acquired the depreciable property comprised in the sale to it by Bruce Sung at a capital cost equal to the sum of $473.50 only, i.e., the cost of the restaurant equipment.
3. If there was in fact a disposition or a sale made of the lease by Sung to Pender Enterprises Ltd., which is a disposition of depreciable property, then such disposition was not at arm's length within s. 139(5)(*a*) or alternatively 139(5)(*b*) and by virtue of s-s. 4 of s. 20 of the Act the capital cost to the appellant of the said leasehold interest is deemed to be the capital cost thereof to the original owner Bruce Sung and the capital cost thereof to him was nil.

The relevant provisions of the *Income Tax Act* are the following:

20. . . .

(4) Where depreciable property did, at any time after the commencement of 1949, belong to a person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arm's length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11:

(*a*) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner;

(*b*) where the capital cost of the property to the original owner exceeds the actual capital cost of the property to the taxpayer, the excess shall be deemed to have been allowed to the taxpayer in respect of the property under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for taxation years before the acquisition thereof by the taxpayer.

. . .

(6) . . .

(*g*) where an amount can reasonably be regarded as being in part the consideration for disposition of depreciable property of a taxpayer

of a prescribed class and as being in part consideration for something else, the part of the amount that can reasonably be regarded as being the consideration for such disposition shall be deemed to be the proceeds of disposition of depreciable property of that class irrespective of the form or legal effect of the contract or agreement; *and the person to whom the depreciable property was disposed of shall be deemed to have acquired the property at a capital cost to him equal to the same part of that amount;*

(the emphasis is mine).

139. . . .

(5) For the purposes of this Act,

(*a*) related persons shall be deemed not to deal with each other at arm's length; and

(*b*) it is a question of fact whether persons not related to each other were at a particular time dealing with each other at arm's length.

139(5a)—Relationship defined

(5a) For the purpose of subsection (5), (5c) and this subsection, "related persons", or persons related to each other, are

(*a*) individuals connected by blood relationship, marriage or adoption;

(*b*) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person related to a person described by subparagraph (i) or (ii);

In August 1953 one Bruce Sung acquired a restaurant business carried on at Whitehorse, Yukon Territories, known as the Tourists' Services Cafe, which was part of a complex consisting in a retail and wholesale food operation, a motel, a service station, a cocktail bar and a beer parlour. This business, according to counsel for the appellant, was acquired by Sung "for nothing, so to speak" and had been operated intermittently by previous operators to whom it had been leased and the owners, Tourists' Services Limited, had not, up until then, been satisfied with the manner in which it had been conducted. Sung states that his agreement with the owners at the time of his acquisition was that he would take over the lease of the restaurant premises for two years with a renewal option for another two years, but at this stage there was nothing in writing.

On November 16, 1953, Mr. Sung wrote a letter (Ex. A-3) to Tourists Services Limited, forwarding copies of an agreement for rental of the building in which he was operating this cafe and asking them to sign it. This agree-

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ment (Ex. A-2) is dated August 1953 and provides for a lease to commence on September 1, 1953, and to end on August 31, 1954, at a rental of $900, payable at the rate of $75 per month and contained a renewal clause which reads as follows:

> The lessor covenants with the lessee that if the lessee duly and regularly pays the said rent, and performs all and every the covenants, provisos and agreements herein, and on the part of the lessee to be paid and performed, the lessor will, at the expiration of the said term grant to the lessee a renewal lease of the said lands and premises for a further term of one, two or three years at the option of the lessee at the same rent and subject to the same covenants, provisos and agreement as are herein contained.

On November 21, 1953, Tourists Services Limited wrote to Mr. Sung (Ex. A-1) with regard to the above proposed agreement suggesting the following changes therein:

1. Page 2–Lessor has equipped the restaurant as fully as intended by them–Lessee to keep it so equipped or make additions thereto themselves, if desired.
2. Page 3–Rental rate and time element covering future rental agreements to be decided upon expiry of original agreement.
3. Also if the Cafe is not operated in a businesslike manner satisfactory to T S. Ltd. that the Lessor may have the privilege of terminating the agreement on 7 days notice.

The above agreement, however, was never signed and Mr. Sung continued operating the said restaurant on the basis of what he termed a verbal commitment that he had occupation of the restaurant premises for an initial period of two years with an option for him to renew for a further two or three years and he was then, prior to December 1953, paying the landlord a rental of $100 or $125 a month.

It is around December 16, 1953 that the appellant Pender Enterprises Ltd. entered the present picture if Ex. A-10 can be relied on. These are minutes of a meeting of directors of this company "held at the registered office of the Company, at 203-4 Holden Building, 16 East Hastings Street, in the City of Vancouver, in the Province of British Columbia, on Wednesday, the 16th. day of December, A.D. 1953" and contain a recital that Bruce Sung had offered to sell to the company and the latter had accepted to buy the restaurant business operated at Whitehorse, Y.T., for a price of $47,974.50 as well as the Keno Hill Steam Laundry, situated at Elsa, Y.T., for a price of $25,000.

Pender Enterprises Ltd. was incorporated on May 15, 1953, and the subscribers to the memorandum of association of the company were Mr. Richard Philip Anderson (one share) and Leslie Raymond Peterson (one share). Both of these gentlemen are the attorneys of the appellant as well as of Mr. Sung. On December 16, 1953, one share of the company was transferred to Sam Lee and one to James Wong and at the same date Sam Lee was appointed president and James Wong the secretary. Sam Lee is Bruce Sung's brother-in-law as the latter is married to the former's sister and James Wong is a cousin of Bruce Sung as the latter's mother and Wong's father are sister and brother.

On January 2, 1954, Mr. Sung wrote a letter (Ex. A-4) to Mr. J. Smith of Tourists Services Limited introducing his cousin, James Wong, an employee of one of his companies and one of his right-hand men, as follows:

> I have requested Mr. Wong to take up with your firm the matter of our lease on the restaurant which still remains to be completed. He has my full authority to negotiate the terms of the rental.

On February 4, 1954, James Wong, on the stationery of Columbia Caterers Ltd., one of Mr. Sung's companies, wrote to Tourists Services Limited forwarding three copies of the lease "for our tenancy in your cafe adjunct" and stating the following:

> Incorporated in the new agreement are the points which we discussed during the writer's recent trip to Whitehorse. We trust that you will find this satisfactory.
>
> You will note that the writer has affixed his signature for Mr. Bruce Sung. We would appreciate your letter accepting this signature, as per the instruction of Mr. Bruce Sung's letter of authorization to your Mr. Smith.
>
> Please return two copies of the lease to this office, properly affixed with your seal.

The lease, Ex. A-5, dated blank February 1954, was then entered and it provides for a rental of the restaurant premises in favour of Bruce Sung for a "term of 2 years commencing on January 1, 1954 and ending on the 31st day of December 1955" (sic) at a rental of $1,200 payable at the rate of $100 a month with a renewal lease for a further term of two years at the option of the lessee at a rental of $125 per month.

A conditional bill of sale dated February 1, 1954, (Ex. A-7), was produced which witnesses that Bruce Sung

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delivered to the appellant, Pender Enterprises Ltd., the following goods described as follows:

The business known as the Tourists' Services Cafe, situate at Whitehorse, Y.T., together with the said name and the good-will thereof and all the goods and chattels situate therein, including stock-in-trade, . . .

. . .

For the purpose of this agreement the business shall be valued as follows:

Assignment of lease—$32,000 00

Goodwill—$15,000.00

Stock—$500 00

Equipment—$474.50

On the same date, i.e., February 1, 1954, Pender Enterprises Ltd., by its president Sam Lee and its secretary, James Wong, signed a promisory note (Ex. A-8) in favour of Bruce Sung for the sum of $47,973.50 with interest thereon at the rate of 3%.

By an indenture of the 1st day of March 1954 (Ex. A-9) and "in consideration of the sum of one dollar and other good and valuable consideration" paid by Pender Enterprises to Bruce Sung, the latter assigned to the appellant "that portion of the premises commonly known as 'Whitehorse Auto Camp' in Whitehorse, in the Territory of Yukon, now used as a restaurant, and formerly operated by Tourists' Services Ltd. together with the furniture, fixtures and equipment situate therein together with the residue unexpired of the said term and the said lease and all the benefit and advantage to be derived therefrom".

This assignment also contained the following:

IT IS expressly agreed between the parties hereto that the responsibility of the Lessee herein for the premises herein and payment of rents and observance of Lessee's covenants shall be effective February 1st. 1954.

From February 1, 1954, to the end of December 1954, the appellant in fact paid a rental of $200 instead of $100 as set down in the lease, Ex. A-5. In the summer of 1954, J. Wong negotiated with the landlord whereby a rental of $200 was agreed to upon the landlord more than doubling the seating capacity of the restaurant.

In 1955 Mr. B. H. Sung acquired all of the shares of Tourists' Services Ltd. so that at that stage Sung was in control of the landlord and the appellant was the tenant. In 1956 Tourists' Services Ltd. increased the rent of the premises to $400 a month which Sung explains by saying at that time

there were further additions made to the place at a cost of $5,000 and also because, as he admits at p. 42 of the transcript:

> A. . . . The business itself was doing very well, and I think that was the reason that Mr. Rathie [his financial adviser and accountant] and I at that time, you know, decided that possibly they could stand to pay a little more rent.

In 1957 the rent was again increased to $466 a month and in 1958 to $500 a month. All these increases were made on a verbal basis without any change being made to the written lease.

In 1958 a portion of the shares (40) of Tourists's Services Ltd., i.e., 20% of the outstanding capital, was acquired by the appellant at a price of $82,645.02. These 40 shares are now worth in the neighbourhood of $250,000.

The sequence of the above mentioned facts are, however, somewhat confused due to the assertion by J. Wong that although Bruce Sung stated, at p. 31 of the transcript, that about the middle of December 1953 a decision was reached as to the purchase of the restaurant business and the price at which Sung would sell it to the appellant was decided upon and this, of course, is supported by the minutes of December 16, 1953, of the appellant, Ex. A-10, this would not be so as, according to Wong, the price of the business was fixed only in March or April of 1954 and instructions to make up these minutes were given in March or April also and then backdated to December 16, 1953. The explanation given by J. Wong for such an unusual procedure was that they wanted to record the transfer of shares from the original incorporators, Mr. Anderson and Mr. Peterson to Wong and Lee prior to the end of the year, which, however, does not explain why the minutes with regard to the restaurant deal could not have reflected the true nature of this transaction as well as the true date (cf. p. 65 of transcript, Wong).

Wong also states that the conditional sales agreement, Ex. A-9, dated March 1, 1954, was also made at a later date, i.e., some time in March or April 1954.

He finally submitted that all these events took place at the same time when at p. 66 of the transcript he stated in answer to the following:

> Q. Do you suggest that all these events took place together then, firstly that the lease was signed, and secondly that the assignment was

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given; thirdly that the price between you and Mr. Sungh was agreed upon. All those events were more or less contemporaneous, were they?

A. They jelled about that time.

Wong and Lee, in addition to being related to Mr. Sung, had been employed by two of the latter's companies for a long time (Wong since 1942 and Lee since 1950) and were both admittedly his right hand men. Mr. Sung had operations in British Columbia as well as in the Yukon and they both were his senior employees. Mr. Sung explained their functions at p. 26 of the transcript as follows:

THE COURT:

Q. Tell me, Mr. Lee and Mr. Wong, what would be their functions and responsibilities in that organization?

A. Like we had the contracts with Keno Hill and Consolidated Mining & Smelting, and they would go out and inspect these jobs or, if required, stay to manage these jobs at different times, and we were acting as—one of our main functions was purchasing and procurement of food stuffs.

Q. Are they experts in purchasing?

A. Yes, Mr. Wong is still the purchasing agent for our group of companies.

Q. Would you consider them your right-hand men?

A. Very much so.

Q. Both of them?

A. Yes.

Mr. Sung in 1954 through 1957 had a company called Columbia Caterers which carried out the management of his companies. It provided the whole administrative and operating functions for all his companies such as auditing and payroll services, hiring and firing of personnel and purchasing as well as paying the bills. It also provided the same services for the appellant Pender Enterprises Ltd.

In 1957 or 1958 those functions were taken over by Sung Management Ltd. another of Mr. Sung's companies.

These management companies charged a fee for such services and as put by Mr. Sung at p. 26 of the transcript:

A. ...the fees charged were enough to cover our overhead, because we maintained a staff of our own then about fourteen people in Vancouver, here, and people like Mr. Lee and myself, and Mr. Wong and various other employees were paid their salaries out of this management fee we charged.

It may be interesting to note that both Wong and Lee entered the employ of Columbia Caterers Ltd. in 1952 or 1953 and have been with that company until 1957 or 1958,

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when Sung Management Ltd. was formed and when they both became employed by the latter. Although the salary of both was paid by the above companies, Wong was called upon at times to render services to Mr. Sung, as the latter admitted he did when, for instance, he went up on behalf of Sung to supervise the operations of the cafe at Whitehorse in the initial stages.

The discussions between Lee, Wong and Sung with respect to the purchase by the appellant of the restaurant business started, according to Sung, two or three months after he had started operating the business and, as put by Sung at pp. 18 and 19 of the transcript:

> A. . . . as soon as I had some experience in the business and knew it was going to be a profitable business, then I had something to talk about.

Asked by the Court why he did not retain this business for himself, he answered at p. 19:

> A. I had other interests, my lord, and these kept me quite busy, and in business we have just got to zig and zag a little, I guess.

He later added that selling the business to Wong and Lee "is one way of getting them to remain with me" which, however, by making them independent would appear to me to be the best way to defeat his purpose.

He then stated that Wong and Lee were on a salary basis and not on a participation basis but later contradicted this assertion by saying that he was able to offer them a participation in his business. The evidence on this particular point, at p. 19 of the transcript, is rather interesting and worthy of reproduction:

THE COURT:

Q. Was that a problem, retaining your skilled men or good men?
A. It always had been and always will be.

Q. They were on a salary basis with you?
A. Yes, my lord.

Q. Not a participation basis on the profits or anything like that?
A. No. No, sir.

Q. How had you managed to retain them so long?
A. Well, now, I have been able to offer them participation by allowing them to buy stock in the companies that I do operate.

Sung stated that from the prices he charged, and the fact that Whitehorse was in an economic boom at the time

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because of the mining and construction activities in that area, he knew that he was able to make a very substantial profit, from the operation of this restaurant and, as expressed at p. 20 of the transcript:

> A. . . . I wanted to make sure that these two gentlemen were going to be there to help me run this thing; so I had felt this little deal on this restaurant was going to be a very good profitable deal; so I asked them if they wanted a chance to make some—something in this.

Wong and Lee discussed the price with Sung's auditor, accountant and adviser at the time, Mr. Andrew Rathie, of McDonald Currie, who helped them to arrive at the price of $47,973.50.

The price of $32,000 for the leasehold interest of the business was also established with the assistance of Mr. Rathie whom Sung admits advised him as well as Mr. Wong and Mr. Lee (cf. p. 43 of the transcript). Wong however states that he had estimated prior to the purchase of the business by the appellant that it could do a minimum of $10,000 of sales per month or $120,000 per year and, as he stated at p. 52 of the transcript "and using that as a basis we worked our figures back as to how much rent could be paid on that basis, and how much profit we should be able to earn."

According to Wong, the national norm of rental in relation to gross profit for a business of this sort would be 6½% and the rental here, therefore, should have been on a projected gross revenue of $120,000, $7,800 if Pender Enterprises Ltd. was paying the going rate. Sung, however, had a lease for a period of two years at $100 a month and a right to renew for a further two years at $125 a month. What was basically done, therefore, to arrive at the figure of $32,000 for the leasehold interest was to take the annual economic rent as calculated above, deduct therefrom the annual rent under the lease and multiply the difference by five to cover a five year period. Wong explained how the five year period was taken as a basis of calculation at p. 78 of the transcript as follows:

> A. Well, in our discussions with Andy Rathie he suggested five years, and I don't think we realized that it should have been four years, because actually that was the terms of the original lease, but

somehow we got talking about five years and that seemed to be the track we got on to.

Q. There was really a mistake in a sense?

A. Yes.

In December of 1953 the directors of Pender resolved to buy this business for $47,973.50. In the following January 1954, Wong ostensibly, on behalf of Sung, went to Whitehorse to negotiate the lease. Sometime after February 1, 1954, a lease was signed and as late as March 1, 1954, that lease was purported to be assigned by Sung to Pender Enterprises Ltd.

On the basis of the above facts, the respondent urges that as the essential decision by Pender Enterprises Ltd. to purchase was made before any lease existed there, therefore, (*a*) could be no assignment of depreciable property with regard to this lease and (*b*) Sung could only have held this lease, negotiated after the decision to purchase the business, as trustee or nominee of Pender Enterprises Ltd.

Now although the manner in which the lease and rentals were negotiated and the documents were set up are somewhat confusing and may have some bearing on the overall picture of the transactions which took place here with regard to the question as to whether this was in fact an arm's length transaction or not, I do not consider that they establish that (*a*) the decision to purchase was made before any lease existed nor (*b*) that the lease after December 16, 1953, could only be held by Sung as trustee or nominee of Pender Enterprises Ltd.

In my view a correct appraisal of what took place here is that long before December 16, 1953, Sung had possession of the restaurant premises, was operating a business there since the preceding August or September and held a commitment from the landlord that he had a lease for four years. This appears from the evidence adduced herein and particularly in Sung's cross-examination at p. 31 of the transcript:

Q. Now, then, is it not true, Mr. Sungh, that at the date, that is the middle of December 1953, no lease existed between yourself and Tourist Services Ltd?

A. No written lease, but I had a verbal commitment from these people, if I didn't have I would not have gone into the business.

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And at p. 32:

THE COURT:

Q. Had they committed themselves to renting the premises to you for a certain period of time?

A. Yes, my lord, they did.

Q. How long?

A. I believe the initial period was to be two years with an option for me to renew for a further two or three years.

Q. Who told you this?

A. At the time I was dealing with Mr. Smith and Mr. Barker—Not Mr. Barker—Barker and Mr. Elliott, they were the owners of the company. Mr. Smith was their general manager.

I now come to the second submission made by the respondent herein that the sum of $32,000 attributed as the value of the lease by the appellant could not be reasonably regarded as being the consideration for the disposition of the lease under section 20, subsection (6) (*g*) of the Act.

This submission, as I understand it, is that if $100 a month rental (which was obtained when Sung took the restaurant business over) is the best that Tourists Services could get, then that is the test of the economic rent so that within the first few months after the take over the economic rent and the actual rent would be identical and based on the above rental figure for a period of four years would total at the most an amount of $4,800 instead of $32,000. It is urged for the respondent that this leasehold interest could not have achieved, within a matter of months, a value far in excess of what the landlord held it was worth and that by hindsight the reasonable economic rent might well be said not in any event to exceed $500 a month.

The question as to whether this amount of $32,000 can "reasonably be regarded as being the consideration for such disposition" can be determined by the evidence which, on this matter, in my view, indicates that the amount of $32,000 is in fact something less than the true value of this leasehold at the time the transaction took place if consideration is given to the fact that when one of Mr. Sung's companies took over another restaurant, the Whitehorse cafe in 1957, in the same locality, a rental of $1,000 was paid on an annual volume of business of about $175,000, when the annual volume of the restaurant taken over by

the appellant or its gross sales were for the same year $161,000 (cf. p. 55 of the transcript).

It does not indeed appear to me that the value to be attributed to a lease is necessarily the value to the landlord particularly when such as here, several attempts had been made to rent the premises out to a successful operator and where it seems that the main interest of the owner was to insure that the premises would be taken over by a good tenant who would supply a satisfactory restaurant service to the users of the commercial complex of which this restaurant was a part. Mr. Sung, upon taking over the operation of the restaurant with the knowledge and facilities he had, was able, during a short period of operation, it is true, to instil new life into this business and by establishing its potential, gave it an increased market value.

In view of the above, it therefore follows that the amount of $32,000 does not appear to me to be an unreasonable consideration for the disposition of the leasehold interest herein.

I will now deal with the Minister's assumption that if in fact a valid disposition or a sale was made of the lease by Sung to the appellant, then such disposition was not at arm's length within the meaning of section 139(5)(*a*) or, alternatively, section 139(5)(*b*) of the Act. If, indeed, this transaction was not at arm's length, then by virtue of subsection (4) of section 20 of the Act, the capital cost to the appellant is deemed to be the capital cost thereof to the original owner and as Sung paid nothing for this lease, the capital cost to the appellant would be nil.

The Minister's assumption under this heading is that the present transaction would be not at arm's length because it took place between a related person by marriage, i.e., Sung's brother-in-law, Lee who held 50% of the shares of the appellant company but who, being its president under clause 38 in Table A of the articles of association of the appellant "presides as chairman at every general meeting of the company and under article 43 in the case of an equality of votes whether on a show of hands or on a poll, is entitled to a second or casting vote."

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The submission here is that as there are only two shareholders in the appellant corporation, Wong (one vote) and Lee (one vote), Lee by this preponderant vote would thereby control the appellant corporation and being a brother-in-law of Sung, and therefore related by marriage, would be covered by section 139 (5a) (*b*) (iii) of the Act, which would make any transaction between Sung and a corporation controlled by his brother-in-law a non-arm's length one thereby rendering under section 20(4) of the Act the capital cost of the acquisition of the leasehold to the appellant nil as Sung, the original owner, paid nothing for it. However, this would be so only if Lee had control of the appellant corporation and I must now enquire as to whether, under the above circumstances, Lee had such control. This matter of control of a corporation was dealt with by Jackett P. in *Buckerfield's Ltd, et al* v. *M.N.R.*[1] where he stated that:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that, in section 39 of the *Income Tax Act,* the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co.* v. *I.R.C.* ([1943] 1 A E.R. 13) where Viscount Simon L.C., at page 15, says:
>
> > "The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes."

Now although this interpretation was given in connection with section 39 of the *Income Tax Act,* I can see no reason why it should not apply as well to 139(5a) of the Act in which case Lee could not have control of the appellant corporation as he held only 50% of its shares and, therefore, could not be said to have a number of shares such that he carries with it the right to a majority of the

[1] [1965] 1 Ex. C R. 299 at 302.

votes in the election of the Board of Directors or that his shareholding in the company was such that "he was more powerful than all the other shareholders in the company put together in general meeting" as set down by Cameron J. in *Vancouver Towing Company Limited* v. *M.N.R.*[1] It indeed appears to be clearly settled that control of a corporation requires at least a bare majority in shareholding and as Lee here has not this majority, he cannot be considered as controlling the appellant and I say this notwithstanding the articles of association adopted by the appellant which gives its president a preponderant vote in the case of an equality of votes at every general meeting of the company. Indeed, such a power given to the president of the present corporation, in view of the particular circumstances of the instant case, could not, in my view, give Lee effective control over the appellant corporation which he would not otherwise have by virtue of his shareholdings because any control he would wish to exercise by virtue of his preponderant vote could not, in practice, be implemented. There being two shareholders only, Lee could not hold a general meeting of the appellant corporation without Wong's consent and as one director cannot constitute a meeting, he could not use his preponderant vote.

It therefore follows that Lee not having the effective control required, the transaction between Pender Enterprises and Sung cannot, under section 139(5)(*a*) and 139(5a)(iii) be deemed to be not at arm's length.

The only matter which now remains to be considered is whether the persons involved here were in fact dealing at arm's length under section 139(5)(*b*) of the Act.

The expression "to deal with each other at arm's length" is not defined in the Act. However in *M.N.R.* v. *Sheldon's Engineering Limited*[2] Locke J. clarified the term somewhat by stating at p. 643 thereof:

> The expression is one which is usually employed in cases in which transactions between trustees and *cestuis que trust* guardians and wards, principals and agents or solicitors and clients are called into question.

The intimate business and family relationships of both Lee and Wong with Sung and the various corporations

[1] [1946] Ex. C.R. 623 at 632. [2] [1955] S.C.R. 637 at 643.

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involved, as disclosed by the evidence, was of a nature such that the transaction involved would, in my view, have to be included in the above described categories.

Furthermore, the onus clearly lies on the appellant to show error on the part of the Minister in his assessment in holding that the transaction herein was not at arm's length and this onus, in my view, has not been satisfied by the appellant here. This, indeed, appears from the various relationships of the individuals and companies involved herein which I have already described and particularly from the following: Lee and Wong, the shareholders of the appellant, were in the employ of Sung and had been employed by him for a long time prior to the transaction involved herein and they still are; Wong negotiated the lease herein for Sung. In the first years of operation and afterwards, Pender Enterprises Ltd. paid substantial sums to Sung's companies, Columbia Caterers Ltd. and Sung Management Ltd.; the deal was set up and the price of sale as well as the leasehold was determined by Sung's accountant and financial adviser, Mr. Rathie. Sung, through his management companies, received statements from Pender Enterprises Ltd. every year, which enabled him to keep a tab on the appellant and raise the rent when desirable. The above alone might have been sufficient to establish that the deal was not of an independent nature and, therefore, not at arm's length. There is, however, more and this, in my view, confirms the non-arm's length nature of this transaction, in that in the course of the operation of the restaurant business, whatever lease Pender Enterprises Ltd. had, was never respected and although in 1954 the increase of the rent might have been justified by the increase of the size of the premises, there is no such reason for the subsequent increases in rent which took place particularly in 1957 and 1958, at a time of course when Sung was the owner of the landlord, Tourists' Services Ltd. The evidence of Wong at pp. 58 and 59 of the transcript is illuminating in this respect:

> MR. ANDERSON:
>
> Q. Mr. Wong, you will recall Mr. Meredith asking Mr. Sungh why the rental was increased to $400 a month and $500 a month. Can you tell the court why that was?

A. Well, those years we were doing a very substantial volume of business, and it was just agreed that it would be only fair for us to pay a higher rental.

THE COURT:

Q. Did you decide that on your own, together with Mr. Lee or did Mr. Sungh ask you to increase the rent? How was it arranged? How did you come to pay more rent than what you were paying before? When was this done?

A. Well, it was just like—it is very informal as is with all our meetings. We sit down and it is just a casual talk, and—I am going by memory now—but he probably says, "You fellows are doing pretty good, how about a little more rent?" So we probably bandied it back and forth and finally it was agreed, "All right, it is fair that we should pay a little more rent."

It is, in my view, a fair inference from the foregoing that in the dealings between Sung and Pender Enterprises Ltd., the parties were not acting independently but as highly interdependent parties and Sung, at the time of the transaction and throughout the period under review, was in a constant position of advantage or interest with regard to the appellant corporation to a point where in fact the parties involved here cannot be considered as dealing at arm's length.

The appeal, therefore, in respect of the assessments to income tax for the years 1955, 1956, 1957 and 1958 is dismissed with costs.

Appeal dismissed.

Edmonton 1964 Mar. 23 Ottawa 1965 Sept. 10

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

G. W. GOLDEN CONSTRUCTION LIMITED ..... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—No capital gain but taxable income—Purchase, exchange and sale of real estate—Series of real estate transactions—Adventure in the nature of trade—Appeal allowed.

The respondent was a contractor and builder, whose principal activity was building houses. Its normal house building operation consisted of building a house on land owned by it and then selling it. It had built apartments for at least one other company and more recently had made an unsuccessful bid to do so in another instance.

It was the receipt in 1958 of the sum of $38,000 which gave rise to the $28,384 net profit which the Minister added to the respondent's otherwise taxable income for the taxation year 1958. An appeal to the Tax Appeal Board was allowed and from that decision the Minister appealed to this Court.

Held, that the profit realized by the respondent is income and subject to tax.

2. That for its business operations the respondent required building sites and it had an account where it listed its "lands held for re-sale". It was part of a building site so selected that the respondent disposed of in the multiparty transaction, as a result of which it made the profit.

3. That the situation remains that the land conveyed to Imperial Oil was land acquired by the Company as part of the inventory of its business and was still being held as such inventory when it was disposed of at a profit.

4. That the instant land formed part of the respondent's stock-in-trade.

5. That the respondent was engaged in adventurous undertakings of a trading nature within the provisions of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*.

6. That respondent's dealings were profit-making transactions frequently repeated, highly speculative and could not be regarded as ordinary or normal investments.

7. That the appeal is allowed with costs.

APPEAL from a decision of the Tax Appeal Board.

D. D. Duncan and *George F. Jones* for appellant.

J. M. Hope for respondent.

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Kearney J.

KEARNEY J.:—This is an appeal by the Minister from that part of a decision of the Tax Appeal Board dated January 9, 1963,[1] which allowed the respondent's appeal from the income tax assessment dated February 16, 1960, for the respondent's taxation year 1958, whereby tax was levied on a net gain of $28,384 which was added to the respondent's otherwise taxable income for the said taxation year.

The Board held that the aforesaid net gain of $28,384, did not constitute taxable income to the respondent but was a capital accretion. The respondent submits that the property in question, together with other property totalling about ten acres described in the pleadings as "the property", had been acquired for the specific purpose of erecting thereon apartments it intended to retain and that the gain of $28,384 was a non-taxable unsolicited fortuitous realization of an investment. I should add that the Board, in the same decision, dismissed the respondent's appeal in respect of two other items in its re-assessment made by the Minister for the said year. No cross-appeal was taken and these two items are not now in issue.

At the opening of the hearing, in order to shorten the proceedings, counsel for the parties filed a copy of a summary of certain facts and exhibits which had been agreed upon. The exhibits which were so filed consist of:

Sketch of privacy screen — Exhibit 1.

Copies of letters dated November 22, 1957, and December 22, 1957, from G. W. Golden Construction Ltd. to Loblaws — Exhibit 2.

Plot plan — Exhibit 3.

Apartment building plans — Exhibit 4.

Certified copy of Memorandum of Association of G. W. Golden Construction Ltd. — Exhibit 5.

Instrument 5318 K. S. (dated November 5, 1958, showing effect of the replot plant bearing the same number and dated August 25, 1958)— Exhibit 6.

Replot plan 4014 dated July 9, 1952, and later replot plan No. 5318 dated August 25, 1958, which the parties agreed should be filed as a single exhibit (hereinafter sometimes referred to as the earlier and the later plans) — Exhibit 7.

Counsel for the respondent, during the hearing, produced as Exhibit 8 its notice of appeal filed with the Tax Appeal Board on February 16, 1960, to which is annexed a schedule

[1] 30 Tax A.B.C. 360.

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Kearney J.

of the operations of G. W. Golden Construction Company from October 1, 1952, until September 30, 1958.

In cross-examination, counsel for the respondent filed as Exhibit 9 a deed of sale or transfer dated August 13, 1959, whereby the respondent Company transferred to Cemp Edmonton Shopping Plaza Ltd. the balance of "the property" for a consideration of $210,214.08.

The following facts were agreed upon:

G. W. Golden Construction Ltd incorporated April 20, 1949.
The only shareholders of the Company are George W. Golden and his wife, Eleanor M. J. Golden.

On or about the 22nd day of April, 1955, the City of Edmonton transferred to G. W. Golden Construction Lot 42, Block 14, Plan 4014 H. W. Idylwylde (Title 196-R-153).

This property amongst others was transferred to G. W. Golden Construction Ltd. by the City of Edmonton in exchange for certain lands which G. W. Golden Construction Ltd. owned in the Parkview District in West Edmonton.

By replot arranged by the City of Edmonton certain lands including Lot 42, Block 14, Plan 4014 H. W. owned by G. W. Golden Construction Ltd. and Lots 32 to 36 inclusive, Block 4, Plan 7636 A. J. owned by Imperial Oil Limited were replotted. As a result of this replot the said Lot 42 owned by G. W. Golden Construction Ltd. was re-arranged and divided into Lots 43 and 46 in Block 14, Plan 5318 K. S. and the said Lots 32 to 36 inclusive owned by Imperial Oil Limited became Lot 48, Block 14, Plan 5318 K.S. As a result of replot 5318 K S.

(i) G. W. Golden Construction Ltd. retained title to Lots 43 and 46, Block 14, Plan 5318 K S. (Title 217-Y-171).

(ii) Imperial Oil obtained Title to Lot 44, Block 14, Plan 5318 K.S. (Title 218-Y-171).

(iii) G. W. Golden Construction Ltd. obtained title to Lot 48, Block 14, Plan 5318 K S. (formerly Lots 32 to 36 in Block 4, Plan 7636 A. J. owned by Imperial Oil (Title 217-Y-171)) and transferred the same to Prince of Peace Lutheran Church.

I will have occasion later to refer to some of the other exhibits, but for convenience and in order to clarify the agreed facts and the verbal evidence, I wish to immediately make mention of Exhibit 7 which consists of two large replot plans, numbered 4914 and 5318, dated respectively July 9, 1952, and August 25, 1958, partial reproductions of which I have caused to be prepared and hereto annexed and marked as Schedule 1 and Schedule 2 respectively. The schedules indicate that what after the 1958 replot, became Lot 44 prior to the replot, formed a small part of the northwest corner of what was then known as Lot 42. The later plan also serves to indicate the re-arrangement

effected on the neighbouring lots in which the parties referred to in the evidence were respectively interested.

Further evidence consisted of the testimony of the respondent's chief witness, Mr. G. W. Golden, who was its president and general manager. In so far as they had personal knowledge thereof, his evidence was corroborated by Mr. J. N. Stephens, a designer for the Company, and by Mr. T. Hauptman, who was formerly in the employ of the Company as a project manager.

The appellant did not call any witnesses.

The pertinent provisions of the *Income Tax Act* are sections 3 and 4 and 139(1)(*e*).

The respondent, whose fiscal period ends on the 30th of September each year, has since its incorporation continuously carried on business as a general contractor originally in the Province of Alberta but more recently in British Columbia as well.

Prior to 1953 the taxpayer purchased a number of parcels of land in the west-end of Edmonton. Later they were assembled into a block which—with the approval of the City—was subsequently subdivided into what became known as the "Parkview Subdivision" where the Company erected about 300 houses which were later sold.

One of the conditions of the aforesaid approval was that the respondent was required to provide the City with the necessary land for public services including schools.

It transpired that in order to provide for a large high school the Company was obliged to transfer about 100 small lots to the City. As a result of a much earlier land development boom in Edmonton, which later collapsed, the civic authorities had re-possessed, by reason of unpaid taxes, a great many lots in various parts of the city. In lieu of purchasing the aforesaid lots the City agreed to transfer to the Company an equivalent number of its available lots which the Company might select. It is admitted that this method of trading lots as between the City and building contractors was common practice. As a result, during the month of April 1955, the City transferred in all about 12 acres to the Company, including the corner property on 86th Avenue and 83rd Street, which was then described as

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Lot 42 (sometimes referred to as the Bonnie Doon property) and which consisted of 2.85 acres (See Schedule 1). The balance of the properties transferred, amounting to about nine acres, was located on the west side of 85th Street at points West and Northwest of Lot 42 and which, together with original lot 42 are the lands that have been referred to in the pleadings as "the property."

Included in the aforesaid balance was a parcel consisting of a little over two acres, the location of which is too far removed to be shown on the schedules but is roughly indicated on the later plan Exhibit 7 by the letter "X" marked in ink. (Hereinafter referred to as "Property X.")

In the summer of 1955 the Mormon Church of the Latter Day Saints approached the respondent for the purpose of acquiring sufficient acreage to build a church and as a result the respondent sold property "X" for $12,000.

Later the Prince of Peace Lutheran Church also desired to acquire land in order to build a new church and sometime during 1957 it had arranged for an undisclosed price to purchase from the City what was later described as lot 50. (See Schedule 2.)

The church found that the said lot was not large enough for the purpose but could be made so by the acquisition of a contiguous property (earlier known as lots 32 to 36 inclusive and later described as lot 48) which belonged to Imperial Oil Co. Ltd. As appears by the copy of the agreed facts and by the evidence of Mr. Golden, the respondent, the Lutheran Church, the City and Imperial Oil joined in the registration of a replot plan, dated August 25, 1958, (See Schedule 2) which gave effect to the following transactions:—

The respondent, while retaining lots 43 and 46, in consideration of the sum of $20,000 and the exchange of lot 48 sold lot 44, (which, with the consent of all interested parties, was re-zoned "commercial",) to Imperial Oil Co. Ltd. and immediately thereafter disposed of lot 48 to the Prince of Peace Lutheran Church for $18,000, thus receiving $38,000 in all. The Lutheran Church, at the same time, obtained for an undisclosed amount lot 50 which belonged to the City.

It was the receipt in 1958 of the aforesaid $38,000 which gave rise to the $28,384 net profit which the Minister added to the respondent's otherwise taxable income for its taxation year 1958.

Now with respect to the remainder of "the property" consisting of about nine acres, in the following year, on August 13, 1959, the respondent sold it to Cemp Edmonton Shopping Plaza for $211,605.95, as appears by Exhibit 9.

As appears by the conclusion of the Minister's notice of appeal, in adding $28,384 net profit to the respondent's otherwise taxable income for its taxation year 1959 the appellant acted upon the following assumptions:—

(*a*) that at all material times the respondent carried on the business of a general contractor;

(*b*) that the respondent acquired "the property" as part of and in the ordinary course of business as a general contractor;

(*c*) that "the property" was acquired by the respondent in exchange for lands forming part of its stock-in-trade and the property received formed part of its stock-in-trade;

(*d*) that during its 1958 taxation year the respondent sold to Imperial Oil lot 44 and lot 48 to the Prince of Peace Lutheran Church.

The respondent's defence rests on its contention that "the property", with the exception of what was earlier referred to as "Property X", was acquired for the sole purpose of erecting apartments thereon and retaining them as investments.

Before further discussing the merits of the appeal, I shall deal with a question of law concerning the admissibility of certain evidence.

As appears by paragraph 6 of the appellant's Notice of Appeal and Exhibit 9, in the Spring of 1959, the respondent sold the remainder of "the property" for over $211,000 to the Cemp Edmonton Shopping Plaza. The respondent, both in argument and in its reply, submitted that the

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allegations and proof, concerning the said sale, ought to be struck out and disregarded by the Court, because they deal with something that transpired subsequent to 1958—being the taxation year in question.

Counsel for the respondent, in support of his submissions, referred the Court to *Martin v. Minister of National Revenue*[1] where O'Connor J. stated:

> Evidence was tendered by the respondent as to what the appellant did after 1943. Counsel for the appellant objected to this and I reserved the question. I am of the opinion that it is not admissible and I reject it.

As pointed out by counsel for the appellant, the contrary was held by Judson J. speaking for the Supreme Court of Canada in *Osler, Hammon & Nanton Limited v. Minister of National Revenue*[2] wherein the learned judge stated:

> Counsel for the Minister on this appeal argued that there was error in a ruling on evidence made at the trial. The learned trial judge, against counsel's objection, rejected a tender of evidence and cross-examination on the following matters:
>
> (*a*) the financial statements of the appellant for its 1958, 1959 and 1960 taxation years;
>
> (*b*) purchases and sales of securities recorded in the investment account in the years subsequent to the years under appeal;
>
> (*c*) purchases and sales of securities recorded in the investment account in the 1956 and 1957 taxation years in the cases where the appellant at the end of the 1957 taxation year still held some of these securities.
>
> In my opinion, there was error in the rejection of this evidence. It was relevant to show a course of conduct in trading in securities recorded in the investment account, and to show that at all times the shares of Trans-Prairie Pipelines Limited sold in 1956 were part of the appellant's stock-in-trade and that the profit from the sale of these shares arose from the business carried on by the appellant.

See also *Ben Rosenblat v. Minister of National Revenue*[3] where Ritchie J. observed:

> I entertain no doubt as to the admissibility of evidence respecting subsequent transactions in order to establish that the particular transaction under consideration marked the commencement of a series of similar transactions or of a course of conduct in the nature of a trade or business.

See also to the same effect, *Minister of National Revenue v. Pawluk*[4] and *Sterling Trust Corporation v. Minister of National Revenue*[5].

[1] [1948] Ex. C.R. 529 at 531.
[2] [1963] S.C.R. 432 at 434.
[3] [1956] Ex. C.R. 4 at 12.
[4] [1956] Ex. C.R. 119, 123.
[5] [1962] Ex. C.R. 310, 320.

For the foregoing reasons I consider that evidence of the aforesaid subsequent sale was properly admitted.

In respect of its alleged sole intention of retaining the property as an investment, while admitting the property in question was disposed of as vacant land and that the net profit realized thereon amounted to $28,384, the respondent submitted that the Company only became a party to the transaction as an accommodation to the Lutheran Church, to Imperial Oil and to the City authorities, and that taking into account the Company's background the transaction should be regarded as a non-taxable unsolicited fortuitous realization of an investment.

In support of its submission that its sole intention in exchanging its Parkview Subdivision lots for what is termed "the property", was to construct thereon apartment houses to be retained as an investment, reference was made to evidence to the effect that at the time of the aforesaid exchange the respondent was assured by the City that about 10 acres of "the property" would be zoned as three-storey apartment dwellings and that, in fact, it was so zoned in November 1956, and remained so until lot 44 was re-zoned as commercial property in August 1958.

In respect of the sale in 1955 of "Property X" to the Mormon or Latter Day Saints Church, the president of the respondent, while admitting the said sale and that the Company had paid income tax on the profit realized thereon, testified that the aforesaid lot unlike the remainder of the property was not selected particularly to build apartments on it and that it was sold shortly after it had been acquired because it was not thought having regard to its shape and to the two main roads proposed on each side of it, that it would tie in too well with "our other property."

The respondent's president testified that, while the Company's main business consisted of buying and subdividing lots on which it built houses which were later sold, it had built two apartment projects for its own account, one in Edmonton and the other in Kitimat, B.C.

The project in Edmonton consisted of 13 duplexes for aged citizens which were constructed during the Company's

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fiscal period commencing on October 1, 1954, and ending September 30, 1958, at a cost of about $100,000. Any lessee desirous of renting one of these flats had to be an old-age pensioner and the rent only amounted to $27.50 a month. As the witness modestly stated, they were not built as an investment but as "a bit of philanthropy I guess."

The project in Kitimat consisted of 24 apartments, built during its fiscal period commencing October 1, 1955, and terminating on September 30, 1957, at a cost of about $1,000,000, which the witness considered to be "not a bad investment". The Company, at the date of trial, still remained owner of this project.

The respondent's president also stated that in 1949 he had personally constructed an apartment-house on Connors Hill, 91st St. and 95th Avenue, in Edmonton at a cost of about $225,000 and that he and his wife owned and still retained all the issued shares of Bel Air Apartments Limited which had caused to be built a large complex, between October 1, 1952, and September 30, 1955, consisting of 25 buildings containing 600 suites, which were constructed during the Company's fiscal years commencing October 1, 1952, and ending September 30, 1955. The respondent received about $515,000 in respect of the construction of the Bel Air project.

Mr. Golden also testified that at the end of 1956, or the beginning of 1957, he was contemplating building five apartments on lots 44, 43 and 46. He recalled Mr. Hauptman from Kitimat to prepare a suitable design. Both Mr. Golden and Mr. Hauptman testified that it was found that the sale of lot 44 would not adversely affect their apartment building project. Mr. Hauptman stated that he returned to Edmonton late in January 1956, and described how he made tentative inquiries concerning mortgage money and drew up plans. After being informed of the severance of the service station property, he redrew plans. By rearranging the location of the five intended apartment buildings, he still could build the same number of apartments. See Exhibit 3.

Mr. Hauptman also stated that he later prepared a complete set of plans for apartment buildings for the site.

It seems clear from his evidence, however, that the apartment house project was something less than a scheme that had been finally decided upon for immediate action. He said that Mr. Golden wanted him "to go ahead and design apartments to be built on the piece of property to keep one occupied if nothing else turned up." He also said:

Q. And as a matter of interest Mr. Hauptman, did you have any knowledge as to how this apartment project was going to be proceeded with? Was it all going to go up at once?

A. No, not at all. These apartments were being an investment for the firm Golden Construction Ltd., and I think that the main other item of this would be that we had a number of key personnel that during the wintertime when construction was very slack, to keep them on the payroll we had to have them doing something or it would cost too much money, and Mr. Golden decided on having these apartments built by our key personnel and keep them working during the winter, and also as an investment for the firm, and we were going to build one or two or three blocks, depending on the circumstances of them and the amount of other work we had each year until the apartment site was filled up.

This is confirmed by Mr. Golden's evidence as to why the respondent did not build apartments on the site.

Q. Mr. Golden, after this re-plot was completed you still had a fairly large area left in lots 43 and 46, and was there any reason why you didn't proceed with the construction of apartments on lots 43 and 46?

A. Yes. We went ahead with our plan to build there, made a plot plan, and made plans ready to build, and we subsequently got another offer to go back to Kitimat. They asked us to build some apartments there, and we submitted a bid, and they took a lower bid, and then they turned around and offered us 50 lots in Kitimat and we thought we could let the apartments go for the time being and build something that would bring in revenue in Kitimat where Alcan controlled the lots, and we were the only people in Kitimat that they gave lots to that year. So we were going to have the market to ourselves in Kitimat, and we decided—I sent the foreman that was working on the apartments, I sent him back to Kitimat so we didn't build them at that time. And then subsequently I sold this property.

Mr. Golden told how, in the Spring of 1957 or perhaps earlier, he suggested to Loblaws that in building a shopping centre across from "the property" they place a privacy-screen at the back of their property.

Q. Have you a Mr. Stephens in your office?

A. Yes. Mr. Stephens, I had him work on it too, but I had him working on the screen wall to tidy up or to overcome a situation where you

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have a shopping centre across the road from your apartments, you have the back of the shopping centre to contend with, and I had Mr. Stephens design a screen wall. How this came about, I made a trip to Toronto to see Mr. Metcalfe of Loblaws because when I heard that they were connected with the building of the shopping centre and I told him of my plans to build apartments on the property across the street from his shopping centre, and he suggested I give him a sketch of, or a plan of what I had in mind for them to do, and I turned it over to Mr. Stephens our designer, to design a privacy screen for the back of their shopping centre.

Q. Now, do you recall approximately when Mr. Hauptman was given the instructions and when Mr. Stephens did his work?

A. Mr. Hauptman started his work in, on the apartments in the Spring of 1957.

Q. Yes.

A. Mr. Stephens, I can't recall exactly when he started to work on it. It could be before that.

Q. You are just not sure on that point?

A. That is correct. It is about the same time.

The witness also stated that the respondent paid civic taxes on "the property" for three years and never advertized any part of it for sale, did not engage any real estate agent to sell it nor do anything to improve it.

This is a case in which there is no dispute in so far as the basic facts are concerned. The issue turns on the proper inferences to be drawn from the surrounding facts and circumstances.

The respondent was a contractor and builder. Its principal activity was building houses. It also built apartments and miscellaneous other buildings. Its normal house building operation consisted in building a house on land that it owned and then selling it. It had built apartments for at least one other company and, more recently, has made an unsuccessful bid to do so in another instance. In two instances it had built apartments and kept them for rental income.

For its business operations the respondent required building sites and it had an account where it listed its "lands held for re-sale." When it had built on such land some building that it intended to retain, the land was transferred to a fixed asset account.

In 1953 the respondent acquired and assembled into one block an inventory of building sites. In 1955 it transferred some of such building sites to the City of Edmonton to be used for building a school pursuant to an understanding that the City would transfer to the respondent other lands by way of exchange. In due course, the City did transfer to the respondent other lands which the respondent had selected from building sites belonging to the City. Some of those lands were lands that the respondent had selected as being suitable sites on which to build apartment buildings. It was part of a building site so selected that the respondent disposed of in the multiparty transaction as a result of which it made the profit the taxability of which is in dispute.

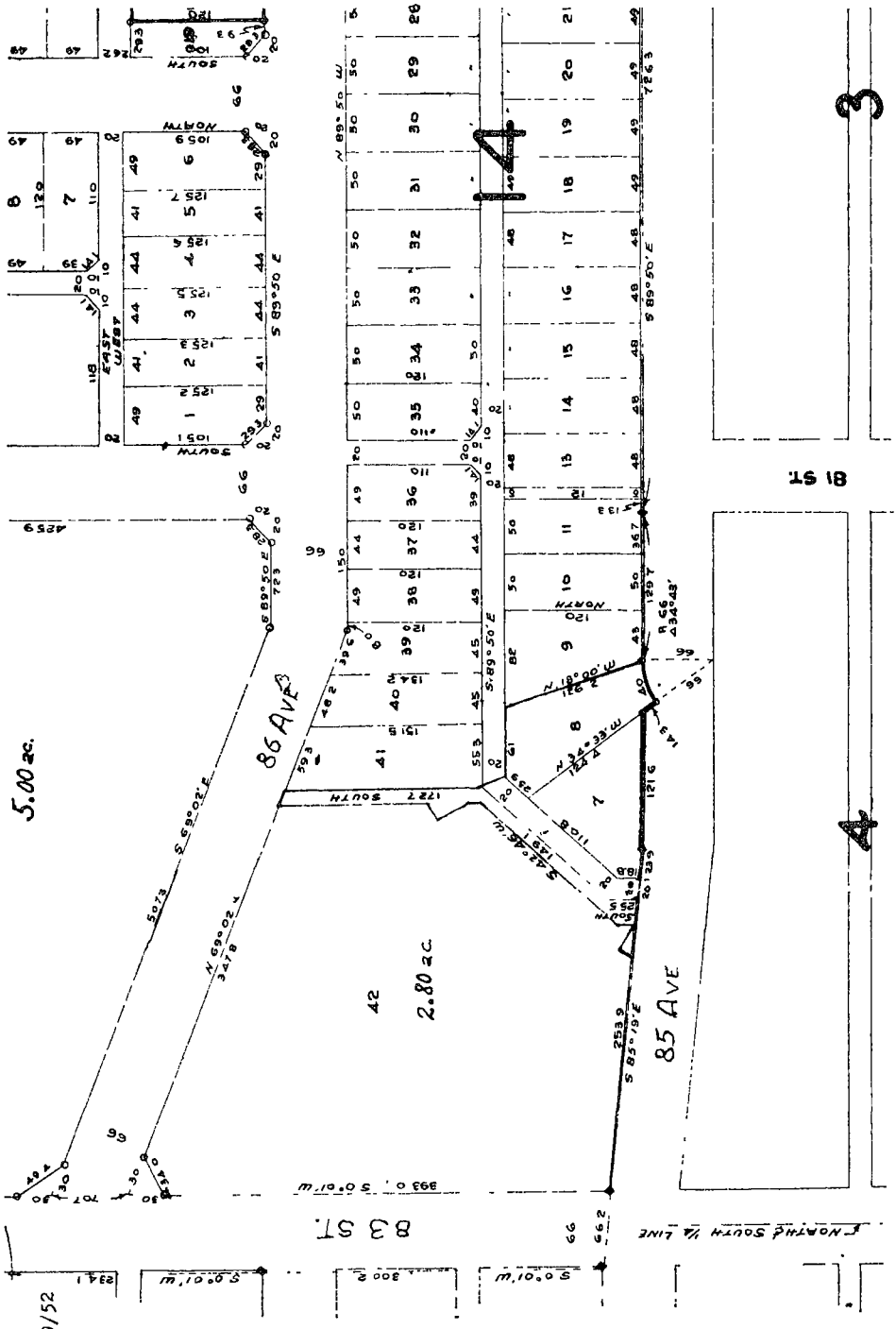
While there is no doubt on the evidence that the respondent gave serious consideration to using the building site in question for the construction of apartment houses as a rental project and embarked on preliminary preparations for such a project, the stage of actual commencement of any such project was never reached and the land in question was never dedicated to any such project to the exclusion of any other use for which the respondent might use building sites in the course of its business.[1]

The situation remains, therefore, that the land conveyed to Imperial Oil was land acquired by the Company as part of the inventory of its business, and was still being held as such inventory when it was disposed of at a profit. In my view, therefore, the profit is a profit from the respondent's business.

For the foregoing reasons, the appeal is allowed with costs.

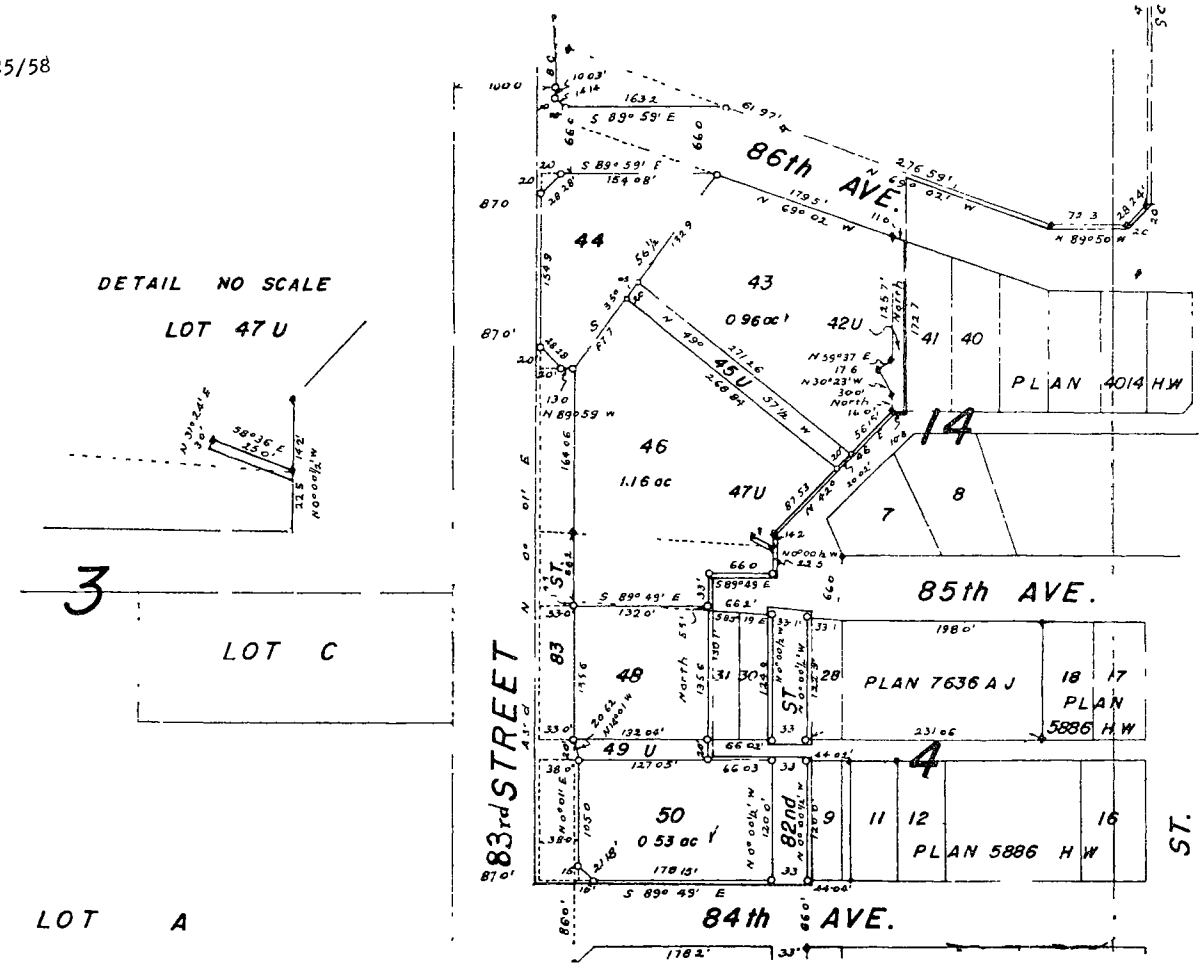
Appeal allowed.

[1] I might say that, in addition to being satisfied upon the uncontradicted evidence that the land conveyed to Imperial Oil had never ceased to be part of the inventory of the respondent's business, I am of the view in any event that the respondent has failed to satisfy the burden of disproving the assumption of the Minister that the instant land formed part of the respondent's stock-in-trade.



SCHEDULE 1
dated July 9/52

SCHEDULE 2
dated August 25/58



Montreal 1965 Mar. 15-17 Mar. 19

BETWEEN:

JOHNSON'S ASBESTOS CORPORATION..APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Income tax—Income from mining—Exemption of—"Exploration" and "development"—Deduction of expenditures after expiry of exemption period—Deduction confined to income derived from operation of mine—Whether exploration and development expenses included—Computation of income from one or more sources—Income Tax Act, ss. 3, 83A(3)(c)(ii), 83(5), 139(1a)(a).

Appellant company, whose principal business was mining asbestos, carried on testing and exploration work from 1947 to 1951 in an area known as the Megantic Mine in Quebec to ascertain if asbestos existed there in commercial quantities, and for that purpose it extracted considerable quantities of the mineral. In 1952 it erected a mill and in 1954 obtained a certificate under s. 83(5) of the *Income Tax Act* that it had been producing asbestos from the mine in reasonable commercial quantities since 1 March 1954, in consequence of which it was exempt from taxation for 1954, 1955 and 1956 on "income derived from the operation of the mine". In those three years it made substantial expenditures in removing waste rock to ascertain if asbestos existed in the Megantic Mine in commercial quantities and also in stripping and diamond drilling operations in that area and elsewhere. The company sought to deduct these expenses from its income for 1958 and following years under s. 83A(3) of the *Income Tax Act* which permits the deduction *inter alia* of (*c*)(ii) "exploration and development expenses incurred . . . in searching for minerals . . . after . . . 1952 . . . to the extent that they were not deductible in computing income for a previous taxation year".

Evidence was given with respect to the state in which asbestos is found in the ground, the meaning of the expressions "prospecting", "exploration" and "development" in the jargon of mining engineers and others in the mining industry, and the manner in which asbestos is mined or extracted.

Held, (1) the expenditures in question were exploration or development expenses incurred by the appellant in searching for minerals in Canada, within the meaning of s. 83A(3)(*c*)(ii).

(2) Some part of the expenses so incurred in the exempt period were also current expenses of operating the mine, and such part were eligible for deduction in subsequent years under s. 83A(3) since they were not deductible in computing income in the years in which they were incurred. The effect of the exemption of "income derived from the operation of a mine" in s. 83(5) was, by virtue of the rule in s. 139(1a)(*a*) relating to the computation of income from one or more sources, to exclude from the calculation of income for an exempt year all revenues from the operation of the mine and all deductions reasonably regarded as applicable to the operation of the mine.

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(3) Exploration or development expenses incurred by the appellant during the exempt years that were not current expenses of operating the mine were not eligible for deduction in subsequent years under section 83A(3)(*c*)(ii) to the extent that the appellant had, during the exempt years, income from sources other than the mine from which they could have been deducted, but, to the extent that there was, during the exempt years, no such other income from which they could have been deducted, such expenses are deductible under s. 83A(3)(*c*)(ii) in subsequent years.

APPEAL under the *Income Tax Act.*

H. Heward Stikeman, Q.C. and *Maurice Regnier* for appellant.

Paul Boivin, Q.C. and *Raymond G. Decary, Q.C.* for respondent.

JACKETT P. (Delivered orally at the conclusion of the trial):—This is an appeal from each of the appellant's assessments under Part I of the *Income Tax Act* for the 1958, 1959, 1960 and 1961 taxation years. Each appeal raises precisely the same question. That question is whether the appellant is entitled to a deduction in respect of certain expenditures made in the years 1954, 1955 and 1956 by virtue of subsection (3) of section 83A of the *Income Tax Act.*

What has been described as a predecessor company of the appellant carried on an operation of extracting the mineral known as asbestos from material taken from its Black Lake mine near Thetford Mines, P.Q., which operation came to an end in 1946.

In the period from 1947 to 1951, the appellant carried on certain operations on other property of the appellant in the same general area as a result of which it made a decision in 1951 to build a new mill for the purpose of processing asbestos from material taken from that property, which became known as the Megantic Mine, and a mill was built pursuant to that decision.

Substantial production was involved in the operations before the new mill was built as is shown by the fact that in the years 1947 to 1952, the company had, as a result of those operations, profits for certain years aggregating over $426,000 and losses for other years aggregating over $436,000.

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On October 26, 1954, the Deputy Minister of National Revenue came to the conclusion that the appellant had on March 1, 1954, achieved production in reasonable commercial quantities from the Megantic Mine and issued a certificate of exemption under subsection (5) of section 83 of the *Income Tax Act*, which provision reads as follows:

> (5) Subject to prescribed conditions, there shall not be included in computing the income of a corporation income derived from the operation of a mine during the period of 36 months commencing with the day on which the mine came into production.

Subsection (5) must be read with subsection (6) which reads as follows:

> (6) In subsection (5),
>
> (*a*) "mine" does not include an oil well, gas well, brine well, sand pit, gravel pit, clay pit, shale pit or stone quarry (other than a deposit of oil shale or bituminous sand); and
>
> (*b*) "production" means production in reasonable commercial quantities.

It is a matter of some importance in this appeal that the Megantic Mine in respect of which the certificate was issued is, according to the brief presented in support of the application for the certificate, the test pit then being operated on what is called Number 2 Pit area and the surrounding area.

During the period of 36 months commencing March 1, 1954, the following expenses, among others, were incurred by the appellant:

	Old Waste Rock Dump Removal	Diamond Drilling	Stripping
1954	$ 9,092.19	—	$ 172,436.50
1955	6,831.43	—	262,636.70
1956	80,027.45	$ 36,939.49	86,922.46
	$ 95,951.07	$ 36,939 49	$ 521,995.66

The sole question raised by these appeals is to what extent, if at all, those amounts qualify as deductions under subsection (3) of section 83A of the *Income Tax Act*, which reads in part as follows:

> (3) A corporation whose principal business is
>
> . . . .
>
> (*b*) mining or exploring for minerals,
>
> may deduct, in computing its income under this Part for a taxation year, the lesser of

(*c*) the aggregate of such of

. . . .

(ii) the prospecting, exploration and development expenses incurred by it in searching for minerals in Canada,

as were incurred after the calendar year 1952 and before the end of the taxation year, to the extent that they were not deductible in computing income for a previous taxation year, or

(*d*) of that aggregate, an amount equal to its income for the taxation year

(i) if no deduction were allowed under paragraph (*b*) of subsection (1) of section 11, and

(ii) if no deduction were allowed under this section,

minus the deductions allowed for the year by subsections (1), (2) and (8a) of this section and by section 28.

It is admitted that the principal business of the appellant for the 1954 to the 1961 taxation years, inclusive, was "mining" and it has been established that asbestos is a mineral.

The initial question to be considered is whether the expenses in question were "exploration and development expenses" incurred by the appellant in "searching for minerals" within those words in subparagraph (ii) of paragraph (*c*) of subsection (3) of section 83A. The appellant says that they were and the respondent says that they were not. If they were such expenses, it is conceded by counsel for the respondent that they were incurred in searching for minerals "in Canada".

If the appellant succeeds in the first issue, it is faced with the further contention of the respondent that the expenses were "current mining expenses to be taken into account in computing the income of the taxation year in which they were incurred". In other words, the respondent contends that the expenses in issue are excluded from subsection (3) of section 83A by the concluding words of paragraph (*c*) of that subsection, which permits the deduction of the described expenses only to the extent "that they were not deductible in computing income for a previous taxation year".

The Court has been assisted in coming to a conclusion on the first of these two questions by evidence tendered by the appellant as to

(*a*) the state in which asbestos is found in the ground,

(*b*) the meaning of the expressions "prospecting", "exploration" and "development" in the jargon of

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mining engineers and others in the mining industry and the manner in which such operations are carried on in connection with the mineral asbestos, and

(c) the manner in which asbestos in mined or extracted.

(In order to avoid confusion as to whether the word mining is used to refer to all of the operations commencing with prospecting and ending with removal of the mineral from the gound or is used to refer only to removal of the mineral from the ground, I shall use the word "extraction" to refer to the removal of the mineral from the ground.)

Asbestos is a mineral that is found in the form of relatively small veins in certain kinds of rocks. Such veins are not more than one inch thick and vary in length from a few inches to ten feet. Asbestos exists in the form of fibres. The veins are sometimes found close together and are sometimes separated by substantial quantities of barren rock. The quality of the fibres will vary substantially from one area to another and even as between veins found close to each other. The essential difficulty facing a person who proposes to extract asbestos from the earth appears to be the virtual impossibility of forecasting with any degree of precision what quality or quantity of asbestos will be found in any particular portion of the earth without undertaking major operations that enable more or less detailed examination of the mineral content of that portion of the earth. Appreciation of this fact, concerning which much persuasive evidence was led by the appellant, is essential to an appreciation of the appellant's case.

I need not set out the sense in which mining engineers use the word "prospecting". It does not seem to be relevant to the issue before me. It is sufficient to say that it is the initial stage of locating the site of a possible mining operation.

"Exploration", in general terms, is the operation of testing for the existence and the extent of an ore body and includes prospecting. In relation to asbestos, I take it that, for the purpose of this definition, "ore body" means an area of rock containing veins of asbestos in such quantity and of such quality as to make the removal of the rock containing the asbestos a commercially feasible proposition. In the case of asbestos, when the prospecting is finished, it is necessary to expose as much of the surface as possible—for

example, by stripping off the overburden, or by digging pits through the overburden. This may be followed by a process known as "core drilling", which is a process whereby a diamond drill is used to remove a pencil shaped sample from the ground ranging from $\frac{7}{8}$" to 2" in diameter. Shafts may be sunk. Tunnels may be driven. Various combinations of such methods are used to enable the explorer to obtain suitable samples of rock for examination. If preliminary results warrant it, bulk samples are taken for analysis. This involves extracting tens of thousands of tons of the asbestos-bearing rock. That rock is crushed over screens and the asbestos fibres are removed and examined to determine their quantity and quality. This bulk sampling is part of the process of trying to determine what is in the ground. Bulk sampling should be carried on at more than one place. It may be necessary to build a special mill for bulk sampling. It is all part of exploration because it is part of the search to determine the extent and quality of the mineral rock. Bulk sampling gives some idea of the quantity and quality of the asbestos rock in the general area where it takes place but there is never any real degree of certainty by reason of the irregular manner of its occurrence.

"Development" of a mine, in general terms, means to uncover the body or area which is to be the subject matter of the extraction process. Development is the preparation of the deposit or mining site for actual mining. In the case of asbestos, it involves the removal of the overburden and of waste rock. It is of particular importance, in considering the words of sub-paragraph (ii) of paragraph (*c*) of subsection (3) of section 83A to realize that this process also serves, in the case of asbestos, by exposing more fibre-bearing rock, to give more information as to the extent of the fibre-bearing rock. In other words, as the words of sub-paragraph (ii) imply, in the case of asbestos at least, you may be continuing the search for the asbestos right up to the actual extraction process.

The actual production or extraction process can be described simply as one of drilling the rock and breaking it up with explosives, the selection of the fibre-bearing portions and the transportation of them to the mill for the separation of the asbestos.

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I must now refer to what the evidence has established as to the character of the operations in respect of which the expenditures in issue were made.

The decision to build a new mill taken in 1951 was based largely, if not exclusively, on estimates that had been made as to the existence of economic asbestos ore in Number 2 Pit area, where a bulk test pit had been operated for some years. This test pit and the surrounding area was what, at that time, had become known as the Megantic Mine. As already indicated, this appears from the brief filed by the appellant with the respondent in support of its application for certification under subsection (5) of section 83, which brief was filed as an exhibit by the respondent. Number 2 Pit was approximately 2,000 feet to the northeast of the mine which was abandoned in 1946, which mine was known as Number 1 Pit.

In 1951, some exploration work had been done on two other areas known as "Pine Tree" and Number 3 Pit, respectively. These areas were quite separate from Number 2 Pit and Number 1 Pit. The exploration work done on Pine Tree and Number 3 Pit was, at that time, quite insufficient to form the basis for any plans for extraction of asbestos ore on a commercial basis.

The operation known as "Old Waste Rock Dump Removal" consisted of the removal of the waste rock which had been produced during the course of the operation of Number 1 Pit prior to cessation of its operation in 1946. It existed in the form of a hill of rock some distance from Number 1 Pit and not far distant from Number 2 Pit. Before it was removed, there was no real information as to whether asbestos ore was to be found beneath it in such quantity and quality as to warrant its commercial exploration and the appellant desired the removal of the dump in order to enable it to carry on exploration operations in connection with the area covered by it. There was, in addition, a further reason for removal of this dump. While it did not cover any part of the Number 2 Pit area for which mining plans had been made in 1951, nevertheless, the nature of the open pit type of mining operation that was being used—involving the cutting back of the rock surface at an angle of 45°—required the removal of this rock dump in order to fully exploit Number 2 Pit area. The evidence establishes that the removal of this rock dump

was just as much a part of the appellant's operations for exploring the area covered by it as it was a part of the operation of extracting ore from Number 2 Pit area, and I so hold.

The drilling operation in 1956, the expenses of which are in issue, consisted in the taking of test "cores" from 36 holes by way of diamond drilling. The purpose, in the case of each hole, was to ascertain information concerning the existence of asbestos ore when such information previously was not available or not available in sufficient detail to make it possible to decide what areas warranted extraction on a commercial basis. A few of these holes were sunk on Number 2 Pit area but most of them were outside that area.

The drilling programme, to a large extent, if not entirely, followed upon the stripping programme, most of which was carried out in 1954 and 1955. Part of the stripping programme was on or adjoining the perimeter of Number 2 Pit but the remainder of it was between Number 2 Pit and Number 3 Pit and on Number 3 Pit area. While stripping operations are a condition precedent to extraction of the ore, if, upon further exploration, it becomes reasonable to proceed with extraction, stripping is, on the evidence, a normal part of the exploration process and, on the evidence, it would seem that a substantial part of the stripping in issue, if not all of it, was carried out for exploration purposes, and I so find.

While the test of whether an operation is or is not an exploration operation is the purpose for which the operation was carried on, and not whether or not there was a resulting discovery, it is not without significance that, as a result of the combined operation of removal of the rock dump, the stripping of overburden and the drilling programme, the appellant was enabled to work out a project for its extraction operation that included Number 3 Pit, the Pine Tree area and the area between them and Number 2 Pit, as well as Number 2 Pit, whereas, prior to that exploration programme, the appellant's knowledge of the existence of asbestos ore in a state that warranted commercial operations was limited to that existing in the Number 2 Pit area.

The appeal was fought on the basis that the expenses *did* or *did not* qualify as being of the kind described in sub-

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paragraph (ii) of paragraph (*c*) of subsection (3) of section 83A. There was no attempt to show that, even if a substantial part of the stripping expenses were exploration or development expenses, some part of them were exclusively in relation to extraction of the mineral. In these circumstances, as I find that the evidence establishes that the stripping operations in issue were, in the main, exploration or development expenses incurred in searching for minerals, and that there is no evidence whereby I can exclude any part of such expenses from that finding, I apply that finding to all the stripping expenses in issue.

On the facts, as I have found them, all of the expenses in issue, *prima facie,* fall within the words in subparagraph (ii) of paragraph (*c*) of subsection (3) of section 83A, "exploration and development expenses incurred . . . in searching for minerals".

The respondent, however, contends that the appellant had discovered its mineral deposit before it decided in 1951 to build its mill, that once it had discovered the deposit, it could no longer be said to be searching for minerals and that, therefore, there could not, after that time, be any expenses incurred in searching for minerals. Reliance is placed by the respondent on the evidence of one of the witnesses for the appellant who, on cross-examination, said that no new "ore deposits" had been discovered as a result of the exploration programme. It must be noted, however, that the same witness added that they did find new "ore bodies". Counsel for the respondent put the contention slightly differently when he said that, once you make a discovery of a mineral field, you stop searching and you start digging or extracting.

This argument is one that strikes me as having great weight. My difficulty is in applying it to the facts as established by the evidence concerning this particular operation of searching for asbestos and extracting it, and also in the rather special wording of sub-paragraph (ii) of paragraph (*c*) of subsection (3) of section 83A.

If I assume the case of a mineral that is known to exist in a continuous mass of determinable limits beneath the earth's surface, I have no difficulty in holding that, upon an explorer having satisfied himself that he has discovered such a mass, even though he does not know its extent, he has discovered the whole of that mass of mineral.

Where, however, the situation is that asbestos exists in the form of veins in rocks, which veins are separated from each other in such an irregular and unforeseeable way that knowledge of their existence in ample quantity in one area is no basis for conluding that they will also exist in adjoining areas, I cannot find that discovery of the existence of the mineral in one defined area is the end of the search in respect of nearby areas when the situation is that the mineral may or may not exist in such nearby areas according to the evidence available as appraised in the light of existing scientific knowledge. It is to be remembered that the requirement of the statute is that the expenditures must have been incurred in searching for "minerals" and not in searching for mineral deposits, mineral bodies or mineral areas. In my view, it is a question of fact in the circumstances of each particular case as to whether expenses of the defined classes were incurred in searching for "minerals". In the case of some minerals, the search may be over when the ore deposit is found. In the case of asbestos, on the evidence in this case, the matter is not quite so simple and it is quite possible to have a case where one area has been developed and is being operated as a producing mine at the same time that exploration expenses are being incurred in the search for minerals in adjoining areas. I therefore find that, even though production of asbestos in reasonable commercial quantities from Number 2 Pit area was proceeding during the years in question, the appellant was carrying on an exploration programme in a search for asbestos in other areas during those same years.

I might add that I have difficulty in seeing any special significance, for the purpose of subsection (3) of section 83A, in the commencement of production in commercial quantities, which event is given significance by the statute for the purpose of subsection (5) of section 83. The appellant knew in 1947 that there was some asbestos in the Number 2 Pit area. From that year on he was extracting it for bulk testing purposes to determine whether asbestos existed in that area in such quantity and quality as to have significance for commercial or practical purposes. From 1947 to 1951, he carried on exploration work to determine the answer to that question. There is no doubt in my mind that that work carried on prior to being satisfied that there was enough asbestos ore to warrant a commercial operation

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was exploration. I did not understand the respondent to suggest that it was not. I cannot see any difference between work in that period and similar work carried on after the commencement of operation of Number 2 Pit to find the same answer with regard to areas outside Number 2 Pit area. If the respondent's submission is valid, however, it leads to the conclusion that there can be no exploration after the presence of the mineral on some part of the appellant's property is discovered. I cannot accept such an extreme and barren interpretation of the words of the section.

There is a further answer to the respondent's contention and that is that, even if the expenses in question are not exploration expenses, they are development expenses. While Number 2 Pit was developed for production before the extraction operation commenced, this was certainly not true of the much larger mining area, of which Number 2 Pit was only a part, which, if it was not being explored, was certainly being developed by the work the expenses of which are in question. While exploration in the search for minerals may be said to come to an end when the existence of minerals, or their existence in a state that warrants extraction on a commercial basis, is discovered, this cannot be said of development in searching for minerals. Development presupposes knowledge of the existence of the area to be exploited. "Searching for minerals" in subsection (3) of section 83A must have a meaning that gives some room for the inclusion of "development expenses" incurred in searching for minerals. It follows that the words "searching for minerals" must be given a sense that encompasses ascertainment of the extent and nature of the minerals that have been discovered in the way that such things are ascertained by development operations. If the provision is not so read, the words "development expenses" can have no effect and the rule of statutory interpretation, as I understand it, is that the statute must be so read, if at all possible, so as to give meaning to all the words employed. I hold that, if the expenses in question are not within the words "exploration . . . expenses incurred . . . in searching for minerals", they are within the words "development expenses incurred . . . in searching for minerals" when the latter words are understood in the manner that I have just indicated.

One other problem that has troubled me in attempting to interpret subsection (3) of section 83A arises out of the fact that some part of the expenses in issue would have qualified, if the appellant had been taxed on income from the operation of the mine for the years in which they were incurred, as ordinary current expenses because they were not only the expenses of part of the exploration programme but they were also the expenses of an operation necessary to remove the ore from Number 2 Pit. (Indeed, it may be that they would qualify as current expenses even though they were merely expenses incurred, when the company was operating a producing mine, in determining whether there was further asbestos ore available for its mill. I express no opinion as to that.) Subsection (3) of section 83A was obviously intended to permit the deduction of expenses that are not otherwise deductible and would not have been enacted if it were not for the fact that the described expenses are generally speaking incurred in such circumstances that they would not otherwise be deductible. This raises a question in my mind as to whether subsection (3) of section 83A should be interpreted as not applying to expenses that qualify as a current expense of a mining operation. However, the provision is so worded as to include all expenses of the described classes whenever or however occurring and any possibility of the same expense being deducted twice is avoided by the concluding words of paragraph (*c*) of subsection (3) of section 83A, by which the deduction of the described expenses is permitted only to the extent that they were not deductible in computing income for a previous year. That being so, I see no justification for implying any exclusion of current expenses from the expenses to which the provision applies.

Another contention on the part of the respondent that appealed to me, at first, as being of some significance was that the appellant is, in effect, attempting to get a double exemption. It paid no tax on its income from mining in the three year exemption period and it is claiming to deduct expenses incurred in that period in computing its income for later periods. I have, however, come to the conclusion that the appellant is not claiming anything twice and is claiming precisely what Parliament intended that it should have. In the first place, Parliament conferred on it a right to freedom from taxation on the profits of operating its new

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mine for three years. In the second place, Parliament conferred on it a right to deduct certain expenses of searching for minerals from its income from all sources until such time as the full amount is deducted. If the mine had been operated by one company and the exploration operations had been carried on by another company, there would have been no doubt as to their respective entitlements. The result is the same when both operations are carried on by the same company.

The final question to be considered is whether the expenses were "deductible in computing income for a previous taxation year" because, if they were, they are excluded from subsection (3) of section 83A by the concluding words of paragraph (*c*) of that subsection.

The difference between the positions taken by the parties in connection with this question has to do with the effect of subsection (5) of section 83 which provided, in effect, in respect of the years when the expenses in question were incurred, that there shall not be included in computing the income of the appellant "income derived from the operation" of the new mine. The appellant submits that this had the effect of excluding from the computation of the appellant's incomes for the years in question both the revenues of the mine and the expenses of operating the mine and that it follows that the expenses in issue were not deductible in computing its incomes for those years within the meaning of the concluding words of paragraph (*c*) of subsection (3) of section 83A. The respondent says that what is excluded by subsection (5) of section 83 from the appellant's incomes for the three year exempt period is the "income" from the operation of the mine, that to determine that income, the expenses of operation of the mine must be deducted from the revenues from the mine and that the expenses in question were therefore "deductible" in computing its incomes for the years in which they were incurred. I am of opinion that the effect of subsection (5) of section 83 is to exclude the income derived from the mine from the totality of income that is contemplated by section 3 of the Act and that, therefore, income must be computed from all sources other than the mine as if the income from the mine did not exist. This brings into play the rule in paragraph (*a*) of subsection (1a) of section 139 of the *Income Tax Act*, which reads as follows:

> (*a*) a taxpayer's income for a taxation year from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources, and was allowed no deductions in computing his income for the taxation year except such deductions as may reasonably be regarded as wholly applicable to that source or those sources and except such part of any other deductions as may reasonably be regarded as applicable to that source or those sources;

While paragraph (*a*) of subsection (1a) of section 139 is drafted in relation to a single source of income, by virtue of paragraph (*j*) of subsection (1) of section 31 of the *Interpretation Act*, R.S.C. 1952, chapter 158, it is equally applicable to determining a taxpayer's income for a year from several sources. The effect in my view is to exclude from the calculation of income for an exempt year all revenues from the operation of the new mine and all deductions reasonably regarded as applicable to the operation of that mine.

Unfortunately, this is not the end of the matter for, in my view, to the extent that the expenses in issue qualify for deduction only because they fall within the incentive deduction permitted by subsection (3) of section 83A, they cannot reasonably be regarded as applicable in whole or in part to the operation of the mine that was the subject matter of the exemption under subsection (5) of section 83 for the years in question. The deduction under subsection (3) of section 83A is a deduction permitted in computing income from any source in any year to the extent that there would otherwise be income in that year. An amount deductible by virtue of subsection (3) of section 83A is deductible in computing income even though the taxpayer's income in a particular year is all from sources other than mining. It is not deductible because it is regarded as a current cost of a mining operation. It is true that a similar deduction was regarded in *Home Oil Company, Limited v. Minister of National Revenue*[1] as attributable, for certain purposes, to particular oil wells. The reason for this was that the regulation being applied in that case specifically required the deduction of such expenses in "computing the profits reasonably attributable to the production of oil or gas". A similar regulation was applied in *Minister of National Revenue v. Imperial Oil, Limited*[2]. In the latter

[1] [1955] S.C.R. 733.

[2] [1960] S.C.R. 735.

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case, rules were provided to determine a special concept of profit as a base for a depletion allowance and the governing law required the deduction of this class of expense in determining that base. The question there was to what extent such expenses were so required to be deducted. Here, the question is which of the deductions permitted in the calculation of what would otherwise be the appellant's world income may reasonably be regarded as applicable to the appellant's sources of income other than the operation of the exempt mine for the purpose of determining its income for the purpose of Part I of the *Income Tax Act* having regard to the rule in subsection (5) of section 83, and, in particular, whether the deduction under subsection (3) of section 83A is reasonably regarded as applicable to the operation of the exempt mine or as applicable to all other sources of income. In this particular case, in any event, I am of opinion that the deduction of amounts that are deductible solely by reason of subsection (3) of section 83A cannot be reasonably regarded as applicable to the operation of the exempt mine. (It might be different if the amounts were expenses of exploration that resulted in discovery of the exempt mine.) I am of opinion, therefore, that the appellant was entitled to deduct such expenses —that is, expenses that were deductible solely by reason of subsection (3) of section 83A—in computing its income for the three year exemption period. It must not be forgotten, however, that the described expenses were deductible only to the extent, for each of those years, that the appellant would, if it were not for this and certain other deductions, have had income for the year. The rule in subsection (3) of section 83A is that the amount that can be deducted for any year is the lesser of the described expenses or the amount that the income would have been if the taxpayer had not been entitled to the deduction in question and certain other specified deductions. See paragraph (*d*) of subsection (3) of section 83A. To the extent that the appellant was entitled to deduct the expenses in question in computing its income for one of those years, solely by reason of subsection (3) of section 83A, they were "deductible in computing income" for a year prior to the years under appeal and are therefore not deductible by virtue of subsection (3) of section 83A in computing income for one of the years under appeal.

That leaves for consideration the part of the expenses in issue that would have been deductible for one of the three years in question, if it had not been for the exemption conferred by subsection (5) of section 83, under either one of two heads, that is

(*a*) as being current expenses of operating the exempt mine, or

(*b*) by virtue of subsection (3) of section 83A as being exploration or development expenses incurred in searching for minerals,

because they were at one and the same time incurred for both purposes. To what extent there were such double purpose expenses was not made an issue in these appeals. I have already held that the expenses for the removal of the old waste rock dump did fall into both classes of expense. In my view, when determining which of the deductions for the exempt years should be regarded as applicable to the operation of the exempt mine rather than to other sources of income, these double purpose expenses, by virtue of being part of the current costs of operating the mine, should be regarded as applicable thereto and thus, on the view that I have already adopted as to the effect of subsection (5) of section 83, as being excluded from the computation of the appellant's incomes for those years. Such double purpose expenses are not therefore expenses that were "deductible in computing income for a previous taxation year" within the meaning of those words at the end of paragraph (*c*) of subsection (3) of section 83A and they are not therefore excluded from the benefits of subsection (3) of section 83A by those words.

The appeal is allowed with costs. The assessments appealed from are referred back to the respondent for reassessment on the basis that the expenses referred to in paragraph 4 of the Notice of Appeal qualify for deduction under subsection (3) of section 83A of the *Income Tax Act* in computing the incomes of the appellant for the years under appeal to the extent that such expenses were

(*a*) in addition to being exploration or development expenses incurred by the appellant in searching for minerals, also current expenses of operating the mine that was the subject matter of the certificate under subsection (5) of section 83 of the *Income*

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Tax Act (whether or not there are any such double purpose expenses other than those for the removal of the old waste rock dump is a matter to be determined by the respondent in the course of the reassessment), or

(*b*) not of the kind referred to in paragraph (*a*) *supra* and not deductible in computing the appellant's incomes for one of the three years in which they were incurred, by virtue of subsection (3) of section 83A, having regard to what would otherwise have been the appellant's incomes for those years from sources other than the operation of the mine that was the subject matter of the aforesaid certificate.

Ottawa 1965

Nov. 18, 19

Nov. 19

BETWEEN:

DWORKIN FURS (PEMBROKE) LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Associated companies—Control—What constitutes—Necessity of ownership of majority of votes—Income Tax Act, s. 39(4)(a).

The appellant, Dworkin Furs (Pembroke) Ltd, an Ontario company, had outstanding 100 shares, of which 50 were held by Sadie Harris, 48 by Dworkin Furs Ltd and the remaining two by Helen and Roy Saipe in trust for Dworkin Furs Ltd, a company controlled by Helen and Roy Saipe. The three named individuals were directors of appellant, and Roy Saipe was its president. The Minister, applying s. 39(4)(*a*) of the *Income Tax Act*, assessed appellant at the full rate of tax on its income for 1961, 1962 and 1963 on the ground that it was controlled by Dworkin Furs Ltd within the meaning of s. 39(4)(*a*).

Held, the assessment could not stand. The word "control" in s. 39 of the *Income Tax Act* contemplates the right of control that rests in ownership of such a number of shares as carries with it a right to sufficient votes to elect the board of directors.

The fact that Dworkin Furs Ltd could, by virtue of having control of one-half the votes in a general meeting of the appellant company, prevent the other shareholders from electing new directors, and could thereby cause the current directors to be continued in office indefinitely, did not give Dworkin Furs Ltd control of the appellant within the aforesaid meaning of the word "control".

[*Buckerfield's Ltd v. M.N.R.*, [1965] 1 Ex. C.R. 299 followed.]

APPEAL under the *Income Tax Act*.

C. S. Bergh for appellant.

G. W. Ainslie and *S. A. Hynes* for respondent.

JACKETT P.:—This has been a hearing of appeals by a company incorporated under the laws of Ontario from its assessments under the *Income Tax Act* for the 1961, 1962 and 1963 taxation years.

The sole question involved in each of the appeals is whether the appellant is "associated" with another company known as Dworkin Furs Limited (hereinafter referred to as "Dworkin") within the meaning of the word "associated" as used in section 39 of the *Income Tax Act* so as to authorize the Minister of National Revenue to take action that has effect to deprive the appellant of the lower income tax rate on its first $35,000 of income in each of the years in question.

It is common ground that the question whether the appellant was associated with Dworkin depends upon the application of paragraph (*a*) of subsection (4) of section 39 to the relevant facts. The relevant part of subsection (4) of section 39 reads as follows:

> (4) For the purpose of this section, one corporation is associated with another in a taxation year if, at any time in the year,
>
> (*a*) one of the corporations controlled the other,
>
> . . . .

If counsel for the respondent has not succeeded in showing that the facts fall within paragraph (*a*) of subsection (4) of section 39, he concedes that he cannot bring them within any of the other paragraphs of that subsection. If he has succeeded in bringing them within paragraph (*a*), it does not matter whether they also fall within some of the other paragraphs. The only question to be decided, therefore, is whether the facts fall within paragraph (*a*) of subsection (4) of section 39 of the *Income Tax Act*.

The only basis upon which counsel for the Minister has attempted to bring the case within paragraph (*a*) of subsection (4) of section 39 is that Dworkin "controlled" the appellant during the taxation years in question.

According to paragraph 3 of the Reply to the Notice of Appeal, the Minister says that in assessing the appellant for the years in question, he assumed "that Dworkin Furs

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Limited had vested in it the power of controlling by votes the decisions which would bind the Appellant in the shape of resolutions passed by the shareholders at its annual and general meetings, and therefore, controlled the appellant within the meaning of para. (*a*) of s.s. (1) [sic] of sec. 39 of the Income Tax Act". If this assumption were correct, I should have no doubt that the assessments appealed from were correct. It remains to examine the admitted facts for the purpose of ascertaining whether this assumption was correct.

As I understand the facts, all the shares in Dworkin belonged to Helen Saipe, who owned 1,500, her husband Roy Saipe, who owned one, and Roysay Investments. Roysay Investments was controlled by Roy Saipe and owned the remaining 999 shares in Dworkin.

As far as the appellant is concerned, the situation is that there were 100 shares, 50 of which belonged to Sadie Harris, who was unrelated to any of the other persons that I have mentioned. The other 50 belonged to Dworkin, 48 were held in Dworkin's name and the other two were held in trust for Dworkin by Helen Saipe and Roy Saipe, respectively.

The situation is therefore that Dworkin owned 50 per cent of the shares in the appellant company. It had therefore 50 per cent of the votes at shareholders' meetings but did not have a majority of such votes.

Counsel for the Minister could not therefore rest his case solely on Dworkin's shareholdings in the appellant. As I understand him, his position is that control is established, on the facts of this case, by the 50 per cent holding by Dworkin of the appellant's shares taken with the following circumstances:

> FIRST, Roy Saipe, Helen Saipe and Sadie Harris were all the directors of the appellant company,
>
> SECOND, as Roy Saipe and Helen Saipe held their qualifying shares as trustees for Dworkin, they were "nominees" of Dworkin and, in their capacity as directors of the appellant, were subject to the direction of Dworkin,
>
> THIRD, Dworkin could keep Roy Saipe and Helen Saipe, as such nominees of Dworkin, in office as a majority of the appellant's directors indefinitely be-

cause, under the relevant corporation law and the appellant's constitution, the appellant's directors continue in office until new directors are elected and, with its 50 per cent of the appellant's shares, Dworkin could prevent new directors being elected. (Alternatively, counsel for the Minister says that such indefinite continuation of the Saipes as directors of the appellant could be achieved by Dworkin by a combination of ownership of 50 per cent of the shares and the fact that Roy Saipe had a casting vote at general meetings of the appellant company as President of the appellant company.)

I make no finding as to the correctness of the various propositions on which this contention is constructed. I doubt that a director or officer of a company can, as such, be regarded as an *alter ego,* nominee, or representative of some other person, merely because he holds the share that qualifies him for such office as a bare trustee for that other person.

Even assuming the correctness of all such propositions, I doubt that the holding of a veto over the replacement of a particular Board of Directors constitutes control in any of the possible senses in which that word may have been used. One corporation cannot, in my view, be said to be "controlled" by another in any possible sense of that word unless that other can, over the long run, determine the conduct of its affairs. The mere fact that one corporation can prevent a change in some or all of the directors of another is not a power of positive control. It is a mere veto over change in management.

After giving careful attention to the argument of counsel for the Minister, I have come to the conclusion that I adhere to a view that I expressed in *Buckerfield's Limited v. M.N.R.*[1] in the course of setting out the point that I had to decide in that case. I cannot do better than repeat that view here and adopt it for the decision of this case.

Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39

[1] [1965] 1 Ex. C.R. 299.

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when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that, in section 39 of the *Income Tax Act,* the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co. v. I. R. C.,* [1943] 1 A.E.R. 13, where Viscount Simon L. C., at page 15, says:

> "The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes."

See also *Minister of National Revenue v. Wrights' Canadian Ropes Ld.* [1947] A.C. 109, per Lord Greene M. R. at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within section 6 of the *Income War Tax Act.*

The appeals are allowed and the assessments are referred back to the Minister for re-assessment on the basis that the appellant was not, at any time in its 1961, 1962 and 1963 taxation years associated with any other corporation. The appellant is entitled to be paid by the respondent the costs of the appeals to be taxed.

Appeals allowed.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1962

Feb. 27, 28, May 15, June 1

1965

Nov. 5

BETWEEN:

NORTHERN SALES LIMITED .....PLAINTIFF;

AND

THE SHIP *GIANCARLO ZETA* .....DEFENDANT.

Shipping—Freight contract—Loading limit "at owner's option"—Meaning of—Variation of written contract—Admissibility of parol evidence.

A lump sum freight contract arranged by a ship's broker between plaintiff and the owners of defendant ship for the carriage of barley stated:

> "10,000 tons..., 10% more or less quantity at owners' option... Vessel has 611,000 cft. bale..."

The ship stopped loading at 10,430 tons and plaintiff sued for breach of contract, alleging that the ship's broker as agent for the ship's owners had verbally assured plaintiff that the reference in the contract to 611,000 cubic feet bale capacity meant that plaintiff could load to 11,000 tons, i.e. 10% more than 10,000 tons.

The Court found that the ship's broker was agent for both parties in arranging the contract and that the defendant did not authorize him to amend the written contract.

Held, dismissing the action, the words in the contract "at owners' option" authorized the ship's owners to limit loading as they had done, and parol evidence of the alleged variation of the written contract was inadmissible. *Louis Dreyfus & cie v. Parnaso Cia Naviera* [1960] 1 All E.R. 750, p. 763 applied; *Behn v. Burness* (1863) 3 B. & S. 751, per Williams J. at p. 757 (22 E.R. at 283); *Oppenheim v. Fraser* (1876) 3 Asp. M L C. 146, per Mellor J. at 147; *Jacobs v. Batavia & General Plantations Trust* [1924] 1 Ch. 287, per Lawrence J. at p. 295; *Henderson v. Arthur* [1907] 1 K B. 10, per Collins M.R. at p. 12 referred to. There was no basis for rectification of the contract since it did not misstate the agreement. *Frederick E. Rose (London), Ltd. v. William H. Pim & Co. Ltd.* [1953] 2 Q.B. 450, per Denning L J. at 461 referred to, and there was no evidence of a collateral contract or warranty. *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30, per Haldane L.C. at pp. 36-37 and Lord Moulton at p. 47 referred to.

ACTION for damages for breach of contract.

D. E. Jabour for plaintiff.

J. R. Cunningham and *B. A. Kelly* for defendant.

NORRIS D.J.A.:—This is an action by the plaintiff, a Manitoba corporation carrying on business in British Columbia as a grain exporter, against the defendant ship in respect of a contract between the plaintiff and the disponent owners of the defendant vessel contained in a freight contract bearing date of April 24, 1960. Although the

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freight contract was dated April 24, 1960, it was not executed by the owners until some time shortly before May 19, 1960.

The booking was confirmed by a letter dated April 25, 1960. The plaintiff, because of the absence of the president, Maxwell M. Nusgart, from his office in Winnipeg, did not execute the freight contract but had acted upon it and proceeded to load grain on defendant's ship upon receipt of written notice of readiness to load, dated May 24, 1960.

The relevant history of the transaction is that on March 26, 1960, the plaintiff confirmed the sale to the Government of Kuwait of 10,000 long tons "10% more or less at sellers' option" of Canadian No. 1 barley packed in bags, each 150 lbs. gross, to be shipped from a Canadian port not later than May 31, 1960. The price basis was C.I.F. Kuwait, the ton basis "ship weight final".

Apparently this was the first time there had been any large quantity of bagged barley shipped from Canada.

The negotiations between the parties in connection with this cargo were handled by Ocean Freighting and Brokerage Corporation, a firm of New York brokers whose chief business generally was to find ships for shippers of various commodities and also to act for ship-owners in obtaining freight for them. The plaintiff had, since 1946, employed this firm as chartering brokers and the charterers of the defendant vessel, Scimiter Shipping Corporation and Sabre Shipping Corporation, agents for Scimiter, had previously to 1960 had dealings with these brokers in obtaining cargoes for their vessels. One of the grounds of dispute between the parties in this action is as to whether in respect of the negotiations in obtaining the vessel and in settling the terms of the sale as set out in the letter of April 25th, 1960, and the consequent freight contract, the brokers were agents for the plaintiff or for the defendant vessel.

The letter dated April 25th, which was on the letterhead of the brokers, was addressed to the plaintiff for the attention of Nusgart and contained the following terms, (*inter alia*):

re: m s. "GIANCARLO ZETA"
Bkng. dated April 24th, 1960 No. 7231

In accordance with your authority we are pleased to confirm having booked the above vessel on the following terms and conditions:

Quantity: 10,000 tons of 2240 lbs., 10% more or less quantity at owners' option

Cargo:	BARLEY in bags Vessel has 611,000 cft bale including deeptanks available under deck
Loading:	One (1) safe berth Vancouver, always afloat
Discharging:	One (1) safe berth Kuwait, always afloat
Laydays:	May 10th, 1960/cancelling May 31st, 1960
Freight Rate:	A lumpsum $130,000 U.S. Currency fully prepaid upon surrender of signed bills of lading, discountless and non-returnable vessel and/or cargo lost or not lost, freight deemed earned as cargo loaded on board Cargo to be loaded, stowed and discharged free of risk and expense to the vessel
Commission:	1¼% to Northern Sales, Ltd. and 1¼% to Ocean Freighting and Brokerage Corporation. Otherwise booking note to apply

It was signed, "Ocean Freighting and Brokerage Corporation as Brokers, J. Bingham, Chartering Department".

The freight contract dated April 24, was executed on behalf of the disponent owners some considerable time after the April 25th letter, on letterheads of Ocean Freighting and Brokerage Corporation, as follows:

No. 7231

April 24th, 1960

FREIGHT CONTRACT

By and between SCIMITER SHIPPING CORPORATION
As Owners or Disponent Owners of the M.S. "GIANCARLO ZETA" hereinafter referred to as Owners and NORTHERN SALES LTD., Winnipeg, Canada, hereinafter referred to as Shippers.

Quantity:	10,000 tons of 2240 lbs., 10% more or less quantity at owners' option BARLEY in bags Vessel has 611,000 cft. bale including deeptanks available under deck
Loading:	One (1) safe berth Vancouver, always afloat
Discharging:	One (1) safe berth Kuwait always afloat
Laydays:	May 10th, 1960/cancelling May 31st, 1960
Freight Rate:	A lumpsum $130,000 U.S. Currency fully prepaid upon surrender of signed bills of lading, discountless and non-returnable vessel and/or cargo lost or not lost, freight deemed earned as cargo loaded on board. Cargo to be loaded, stowed and discharged free of risk and expense to the vessel

It was signed "For and on Behalf of Disponent Owners By Telephonic Authority SABRE SHIPPING CORPORATION As Agents Only: Keith David".

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On May 5, 1960, the brokers forwarded to the plaintiff a plan of the vessel for the use of the stevedores in the loading of the barley in bags.

The freight contract was forwarded by the brokers to the plaintiff with a letter dated May 19, 1960, reading as follows:

May 19th, 1960

AIRMAIL
Northern Sales, Limited
Northern House
Lombard Avenue
Winnipeg 2, Canada

Attn: Mr. M. M. Nusgart

Gentlemen:

Re: FREIGHT CONTRACT
M/S "GIANCARLO ZETA"
Dated April 24th, 1960
no. 7231

Enclosed herewith please find original and two copies of the above captioned contract which has been duly signed by Owners.
If same meets with your approval, kindly sign and return to us advising at the same time the number of copies you will require.

Yours very truly,

OCEAN FREIGHTING & BROKERAGE CORPORATION
As Brokers

"J. Bingham"
Chartering Department

Jb:bc
Enc. 3

The notice of readiness of the ship was contained in a letter signed by the Master as follows:

MS. "Giancarlo Zeta"
Vancouver, B.C.
May 24, 1960
Time: 0800 Hours

Northern Sales (B.C.) Ltd.,
(As Charterers' Agents)
355 Burrard Street,
Vancouver 1, B.C.

Dear Sirs:

This is to advise that the above vessel under my command is entered at Customs, passed by the Port Warden and Department of Agriculture and is in all respects ready to load cargo in accordance with all terms, conditions and exceptions of the existing Booking Note dated April 24th, 1960, No. 7231.

My vessel is being tendered to you to load approximately 10,000 long tons Barley in bags.

Yours very truly,

"Colombo Renzo"
MASTER
MS. "GIANCARLO ZETA"

Accepted:
Date: May 24 1960
Time: 0800 hours
NORTHERN SALES (B.C.) LTD.
(As Charterers' Agents)
By T.W.B. London

It is of importance to note that it was on May 24, 1960, that this notice was accepted by Northern Sales (B.C.) Ltd., a wholly owned subsidiary of the plaintiff.

The matters at issue in this action involve, in the main, questions of fact and of interpretation of the words "10,000 tons of 2240 lbs., 10% more or less quantity at owners' option BARLEY in bags" and the effect of the provision that the contract was a lump sum contract and of the statement "Vessel has 611,000 cft. bale including deeptanks available under deck". It will be noted that the words as to which controversy has arisen appear both in the April 25th letter and in the freight contract or booking note. The plaintiff was notified on June 9th by the Master and by the solicitors for the owners that the owners elected to exercise their option under the contract option provision to cease loading after 10,430 long tons had been loaded. The plaintiff claims damages for breach of contract because of the fact that the vessel ceased loading the barley after 10,430.036 long tons of barley had been loaded, the plaintiff's position being that it was entitled to load the full 611,000 cubic feet bale space in the vessel, and that it was entitled to load another 570 long tons bagged barley over the quantity loaded, and as a result lost profit accordingly.

The vessel was arrested but after providing bail was released and sailed from Vancouver on June 13, 1960.

The defendant claims that no Admiralty jurisdiction *in rem* exists in respect to the circumstances of the claim because the owners of the defendant vessel were not a party to the freight contract and the shipping corporation was not a charterer by demise of the defendant ship and the action should be dismissed for lack of jurisdiction. However, on the 13th day of June, 1960, a motion was

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made by the defendant that the vessel be released from arrest and the action against the defendant be dismissed on substantially this ground. On the hearing of the motion my predecessor, the late Mr. Justice Sidney Smith, dismissed the motion, which dismissal was not appealed.

It is my opinion, therefore, that this matter is *res judicata* and in any event I am of the opinion that this Court has jurisdiction to hear this case.

The plaintiff in its Statement of Claim and particulars thereof delivered pursuant to demand, sets up certain telephone conversations between Nusgart, representing the plaintiff, and Jules Bingham, of the Ocean Freighting and Brokerage Corporation, alleged to represent the defendant, prior to April 24, 1960, and subsequently on or about April 27, and that it was stated by Bingham that as the term to the contract with the government of Kuwait was for 10,000 long tons "10% more or less" the plaintiff was assured that it could load the capacity of the vessel up to the maximum of the tolerance permitted by the term "10% more or less".

In his evidence Nusgart testified that on April 27 Bingham said in effect, with reference to the owners' option provision:

> Your sale to Kuwait is 10,000 long tons—10,000 more or less at your option—therefore, the inclusion of this clause means that you are certain that the owner will load a minimum of 9,000 tons and the owner is certain that you will load a maximum of 11,000 tons but you have the complete use of 611,000 cubic feet bale. . .10,000, 10 per cent more or less at Northern Sales option, . . .

Nusgart testified that he, as representing the plaintiff, definitely queried the words "10% more or less at Northern Sales option" and that the plaintiff relied on the statement of Bingham, as representing the owners of the defendant ship, in the clarification of this statement. All this evidence was admitted subject to objection.

The following questions arise with reference to this evidence:

1. Whether the Ocean Freighting and Brokerage Corporation was at material times the agent for the plaintiff or for the defendant;
2. Whether the plaintiff's story is credible and whether the plaintiff in the light of the circumstances and its actions may be heard to say that the words in the

written contract, "Quantity: 10,000 tons of 2240 lbs., 10% more or less quantity at owner's option BARLEY in bags" are not to be interpreted as they read;

3. Whether there being a written contract, the evidence is admissible.

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What I will say about the first two questions is subject to my conclusions on the third.

1. As to whether the Ocean Freighting and Brokerage Corporation was at material times the agent for the plaintiff or for the defendant:—

I am satisfied on all the evidence that the broker was engaged by both the plaintiff and the defendant—by the plaintiff to find it a ship, by the defendant to find a cargo for his ship. It is to be noted that on their letterhead the brokers are designated Freight and Steamship Brokers and Agents. I am equally satisfied that there is no evidence that the broker was engaged or authorized on behalf of the defendant to amend the written contract. Similarly, I am satisfied that the broker prepared the contract, including the words in controversy, on the instructions of the plaintiff. See *Fowler v. Hollins*[1], Brett J. at p. 623.

The letter of April 25th on its face reads: "*In accordance with your authority* we are pleased to confirm having booked the above vessel on the following terms and conditions:" Here follow the words in question with the other conditions. The words italicized indicate that in making the booking and settling the terms, the broker considered that he was acting for the plaintiff and the plaintiff on receipt of the letter of April 25th did not disavow the authority of the broker. Nusgart for the plaintiff in March or April 1960, asked Bingham to quote a freight rate based on his opinion of the market, and after the Kuwait contract was entered into, instructed Bingham to obtain a vessel for the plaintiff. There is no specific allegation in the Statement of Claim or the particulars, nor was there specific evidence from the plaintiff's witness, that as a fact Bingham was the agent for the defendants. Bingham testified as to instructions from Nusgart:

Q. What did he tell you to do about the quantity in your, in the contract he wanted you to prepare?

A. In this particular contract?

[1] (1872) L.R. 7 Q.B. 616.

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Q. Yes.

A. I was instructed to put in the contract—

THE COURT: Who instructed you?

A. Mr. Nusgart of Northern Sales.

THE COURT: All right. Told you to put?

A. In the contract—

THE COURT: In the contract, yes.

A. —ten thousand tons, ten percent more or less quantity at owners' option.

* * *

Q. Now you have already identified Exhibit 3, which is the April 25th letter, which was sent to Mr., to Northern Sales attention Mr. Nusgart by yourself, confirming the terms. After that letter was mailed to Mr. Nusgart what was the next occasion you spoke to him in connection with this contract as to the terms of the contract.

A. As to the terms?

Q. Yes.

THE COURT: Well, did you ever speak to him again about the terms, first of all?

A. The terms were only brought up after the vessel loaded, your Lordship.

THE COURT: Just a minute. The next occasion you spoke to him about the terms of the contract was after the vessel had loaded?

A. The vessel had started loading, I should have said.

MR. CUNNINGHAM:

Q. And that would be after the Notice of Readiness in this case?

A. Oh yes, indeed, after.

Q. Would you have had occasion to speak to Mr. Nusgart about matters in connection with this vessel during the period—

THE COURT: Did you speak to him about the vessel in that period at all?

A. Yes. We sent a plan of the vessel, and also we tried to ascertain the readiness, the expected arrival of the vessel at Vancouver.

* * *

Q. Now it is claimed in this action, Mr. Bingham, that, by Northern Sales, that there were certain oral parts to the contract, certain oral agreements were entered into which provided that Northern Sales had the right to use the full 611 cubic feet bale of the "Giancarlo Zeta". What have you to say about that?

A. There was no oral agreement except the agreement as confirmed by my letter of April 25th.

THE COURT: There was no oral agreement, that's what you said?

A. No, my Lord.

Q. You say it was all in writing?

A. No, excuse me, your Lordship. On April 25th I confirmed an agreement which had been made, your Lordship, on April 24th between Mr. Nusgart, myself as broker, and Scimiter Shipping Corporation.

MR. CUNNINGHAM:

Q. Which was reduced into writing by yourself?

THE COURT: On what date did you confirm it?

A. On April 25th, your Lordship.

THE COURT: You confirmed an oral agreement?

A. Which was made on April 24th.

THE COURT: Yes.

A. I confirmed that on April 25th.

THE COURT: Yes.

MR. CUNNINGHAM: And it was reduced into writing by this witness on April 24th, and, which is Exhibit 6.

* * *

THE COURT: All right, April 24th. This contract, which is dated April 24th, might have been really drawn by you at some other time and dated forward from that time, is that right?

A. The contract was drawn later. I confirmed the contract on April 24th.

THE COURT: Yes, but the document which—show him the document, and ask the question.

MR. CUNNINGHAM:

Q. When was the document, dated April 24th, which is Exhibit 6, prepared by you?

THE COURT: Look at that particular document. Now that is dated what, April 24th?

A. Yes, your Lordship.

THE COURT: All right. Was that actually drawn on April 24th?

A. No. It was drawn a few days later.

THE COURT: It was drawn a few days later and dated back, is that right?

A. Indeed, that is customary in the shipping—

* * *

THE COURT: Put it to him—"was anything said as to a reservation to the Northern Sales to use the full 611 cubic feet bale?"

A. No reservation was made, as such, your Lordship. It was only said that the vessel had 611,000 cubic feet bale under deck.

MR. JABOUR:

Q. And when was that?

A. And that the railroad ties were going to be loaded on deck; the 611,000 cubic feet bale space was mentioned for information purposes.

Q. But this was mentioned at the time you were discussing lump sum freight, is that correct?

A. Yes, I would imagine so.

* * *

THE COURT: It was impossible to obtain a ship because the owners were not sure that they would get 9300 tons in their ships.

A. I can explain that more and say it was impossible to obtain a ship at a rate acceptable for Northern Sales.

* * *

A. At a certain point Scimiter Shipping would have been willing to guarantee ten thousand tons available for cargo, ten thousand tons available for cargo.

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Q. I see.

A. That was rejected by Northern Sales, the reason being that again they had no protection against the minimum of nine thousand tons. They wanted to be sure that nine thousand tons would be lifted. I might add that on a lump sum basis it's up to the charterers—if you guarantee ten thousand tons and the charterer ships only five thousand tons, he still has to pay the same amount

Q. Yes, and in this contract, whether or not the owner cut Northern Sales off at nine-thousand, or ten, or ten five, Northern Sales would be liable to pay full lump sum?

A. Northern Sales had the safety of knowing that their calculations were so based that the worst that could happen was nine thousand tons at the lump sum of, I think it was $130,000.00

* * *

Q. April 25th letter?

A. It is Exhibit 3.

THE COURT: Exhibit 3

MR. JABOUR: Yes, thank you.

Q. Now didn't you receive a telephone conversation from Mr. Nusgart with regard to that letter?

A. No, I did not.

Q. Do you deny there was ever any telephone conversation about that letter?

A. About this letter?

Q. Yes.

A. At no time.

Q. Have you checked your notes, if you have any notes, concerning this?

A. There was no telephone conversation on this matter until, as I told you, it was brought up in June when the ship started loading.

* * *

Q. Now you mentioned, Mr. Bingham, that the freight contract, the contract, the document headed "Freight Contract" of April 24th, the date, was drawn up shortly after that date, is that right?

A. Somewhat after; I don't know how many days after.

Q. Do you have an explanation of why it wasn't sent to Mr. Nusgart until May 19th, mailed from your office on May 19th?

A. It's customary in the shipping business first to have the owners sign the booking note, charter party, or contract, or booking note; first it is signed on behalf of the owners, then by the charterers. As such it was signed by Scimiter or Sabre, agents for Scimiter, and signed by them.

Q. Isn't that an unusually long time?

A. No.

Q. Between the 24th and May 19th?

A. It may be I was lax because of many things and couldn't do it for some time later, because it had all the same terms as the form; so it may have been sent early May to Mr. David for signature.

Having seen and heard Nusgart and Bingham giving their evidence, and considering the nature of that evidence, where there is any conflict in testimony between the two I

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accept the evidence of Bingham as that of an honest witness in preference to the evidence of Nusgart. I do not believe that the telephone conversations testified to by Nusgart and which Bingham denies did take place. It is my opinion that Nusgart's story in this connection is quite untrue. Some attempt was made on cross-examination of Bingham to show that as he was friendly with a senior official of the agent for the charterers and had done work for them, he was not a credible witness, but in my opinion he answered the questions frankly and stood the test well.

2. On the second issue, as to whether the plaintiff's story is credible and whether the plaintiff in the light of the circumstances and the actions of its representative, Nusgart may be heard to say that the words in the written contract, "Quantity: 10,000 tons of 2240 lbs., 10% more or less quantity at owners' option BARLEY in Bags" are not to be interpreted as they read:—

The matter of credibility as between Nusgart and Bingham has been dealt with.

The words referred to are to be read in context with the other terms of the freight contract: *Behn v. Burness*[1] Williams, J. at p. 757 (E.R. p. 283):

> It is plain that the Court must be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which and the purposes for which, the charter party was entered into.

Also *Oppenheim v. Fraser*[2] Mellor J. at p. 147:

> In this case *Behn v. Burness* is in point. Evidence is not admissible to show that the parties meant something not expressed, but the circumstances under which the contract was made must be known. We do not admit the evidence to show what the parties intended, but to show what the words mean in reference to the circumstances.

The plaintiff submits that as the freight contract was a lump sum contract and as the freight contract sets out the fact that "Vessel has 611,000 cft. bale including deeptanks available under deck" the plaintiff was entitled to load the total 611,000 cft. subject to the maximum limit of 11,000 tons. To accept this construction is to ignore the effect of the words "at owners' option". It is a well-known rule of

[1] (1863) 3 B. & S. 751 (22 E.R. 281).
[2] (1876) 3 Asp. M.C.L. 146.

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interpretation that words introduced into a deed are not to be rejected or rendered inoperative if it can be avoided: *Nind v. Marshall*[1] Park J. at p. 335 (E.R. 752).

It has been argued that the words as to the total capacity of the vessel were inserted by way of assurance to the plaintiff that other cargo would not be loaded on top of the barley. The agreement as to deck cargo was reached at about the time the agreement of April 24th was settled. Bingham was cross-examined as follows:

Q. Didn't you tell Mr. Nusgart you had to bring the contract for barley together with the contract for ties and present that to the chartering owners, or parties rather, to see if they would take the ship?

A. In fact they were not meeting at the same time together; they were discussed—

Q. They were discussed?

A. They were discussed.

THE COURT: You will have to get dates if this is to be of any value.

MR. JABOUR:

Q. This is in your early contacts with Mr. Nusgart, when he asked you to obtain a ship.

A. Yes.

Q. It was discussed at that time orally that the people who would be chartering the ship were requesting permission to take a deck cargo?

A. Are you referring specifically to the "Giancarlo Zeta", or a ship?

Q. The "Giancarlo Zeta".

A. It may have come up later. I don't know whether in the beginning, or not. It came up prior to the conclusion of the contract, yes.

Q. Yes. And in what regard did this come up?

A. In what regard?

Q. Yes.

A. Because otherwise the Scimiter Shipping would not have been able probably to do the whole contract of the barley if they did not have the option to take more cargo.

THE COURT: This is the matter of the deck load?

A. Yes, my Lord.

MR. JABOUR:

Q. So Scimiter Shipping would not have taken barley if they would not have been allowed to take the deck load?

A. If they would not have the privilege, it was discussed that they may not have, that they possibly could, would not take the barley. As it is at the time they took the barley they were not sure they could take the railroad ties. It wasn't confirmed on the same day.

The plaintiff was concerned as to the amount of the freight charge which was conditioned by the fact that the owners were able to obtain remuneration for the deck load.

[1] (1819) 1 B. & B. 319 (129 E.R. 746).

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The stowage factor in relation to space was uncertain at the time the contract was completed as was also the question as to whether or not the cargo was going to stow more heavily than was contemplated. Under these circumstances the inclusion of the reference by way of information to the capacity was an assurance to the plaintiff, and the provision as to owners' option provided protection to the owners in the event of the barley being exceptionally heavy.

The situation here was similar to that under review in *Louis Dreyfus et cie v. Parnaso Cia Naviera*[1]. In that case it was provided that the vessel should go to La Pallice:—

> ... and there load a full and complete cargo of not more than 10,450 tons and not less than 8,550 tons wheat in bulk, quantity in owners' option, to be declared by the master in writing on commencement of loading...which the charterers bind themselves to ship, and being so loaded the vessel shall proceed to Karachi...

The reference in that case was stronger against the owner than in the case at Bar because of the provision that the vessel should load a "full and complete cargo" and yet the provision as to owners' option was construed as a governing phrase in favour of the owner. At p. 763, Harman, L. J. said:

> The meaning of the words preceding the reference to the option is not in doubt, having regard to the authorities, *Carleton S. S. Co. v. Castle Mail Packets Co.* ((1896) 2 Com. Cas. 173) and *Jardine, Matheson & Co. v. Clyde Shipping Co.* ([1910] 1 K. B. 627), cited by my Lord. They are a warranty by the shipowners that not less than 8,550 tons shall be carried. They give the charterers the right to load up to the higher figure, if the vessel will take so much, but no more, even though she could carry more. Thus an inroad is made on the primary meaning of "full and complete cargo". The option that follows is an option to the shipowners by their agent, the master, to put a further limit on this same right by declaring the quantity. This declaration need not, in my judgment, be made. It is truly an option. If, however, the option be exercised within the limits set by the document, then the figure declared by the master must be read into the contract, and, as between the parties, will constitute, a full and complete cargo.

Similarly here the figure of 10,430.036 tons fixed by the owners on June 9th as the quantity is to be read into the contract.

It is not credible that the plaintiff would not be alive to the force and meaning of the phrase "quantity at owners' option", particularly in view of the fact that in its contract with the government at Kuwait (Ex. 1) under the heading

[1] [1960] 1 All E.R. 759.

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"Quantity" there appear the words "10,000 long tons 10% more or less at sellers option", and yet Nusgart said as to this:

> Yes; when I received this letter (the letter of April 25th confirming the verbal contract) and read through the terms I immediately pounced upon the fact that there was a clause in there, "10 per cent more or less at owner's option" and put a bracket around it and wrote in one word "clarification". I then contacted Mr. Bingham either on the 27th or the 28th April—I cannot recall which date.

I have already referred to the fact that Bingham denies that he had any conversation with Nusgart such as the latter alleges, and that I accept Bingham's denial as the truth. Nusgart testified that he made no note of his alleged conversations with Bingham and when he received the formal contract under cover of Bingham's letter of May 19th, he did nothing to have the contract altered to set out the provision which he said Bingham, about a month earlier, indicated to him was the correct provision. As to this he testified:

> MR. JABOUR:
>
> Q. Now, the letter of May 19th, is that before you?
> A. Yes.
> Q. It states there:
>
> "If same meets with your approval, kindly sign and return to us advising at the same time the number of copies you will require."
>
> Did you sign and return that contract?
> A. No, I did not.
> Q. Will you explain to his lordship why you did not?
>
> MR. CUNNINGHAM: Well—
>
> THE COURT: Do you object to it?
>
> Mr. CUNNINGHAM: Yes, my lord. No, I will not object to that question.
>
> MR. JABOUR:
>
> Q. Will you explain to his lordship why?
> A. I received this, I believe, on May 24th and the terms in this letter of contract still contained the clause "10 per cent more or less quantity, at owner's option, barley in bags." There was no explanation in the letter pertaining to this along the lines of my conversation with Mr. Bingham and I just felt that maybe I had better hold on to this. I don't know, there was not any real reason after I had received Mr. Bingham's explanation. I just did not feel quite right about it, my lord, and I was leaving for Vancouver on May 25th, and the result is I just left it on my desk, went out to Vancouver and never did sign the contract because that clause in there was still nagging and bothering me. It was not part of our contract for the charter of this ship.

Nusgart went to Vancouver on May 25th, the loading having commenced on May 23rd, and spent four or five

days there during which time the vessel continued to load. He did nothing further about having the contract changed. On his own version of events he did nothing at all about the contract until June 6th when he heard from his Vancouver office that the owners were threatening to stop loading at 10,200 tons and that he then telephoned Bingham who said that the owners could not do so and were just bluffing. Bingham's evidence, which I accept, is that Nusgart had said at this time that the owners intended to stop loading at 10,000 tons and that he, Bingham, had said that he didn't believe it and that the owners would probably load more although they did not have to.

As a result of a communication with his Vancouver office Nusgart went to Vancouver on June 9th. The vessel stopped loading on June 10th at 11.15 P.M. after it had taken on a little over 10,430 long tons of bagged barley. At the end of 1960, Nusgart called on Bingham in New York but Bingham refused to discuss the matter with him.

Nusgart testified that he kept no notes of the alleged telephone calls with Bingham, he did not take up the matter of rectification or clarification of the contract with the owners, and he wrote no letters to Bingham confirming the telephone calls. He did not write to the owners on the subject. His testimony on cross-examination as to this matter is as follows:

Q. Now you had a contract in your office all this weekend, or about the 24th, yet you didn't write or telephone at that time?
A. No, I didn't call at that time.
THE COURT: On what date?
MR. CUNNINGHAM: Week of May 23rd, or—
A. The explanation had already been given to me by Mr. Bingham.
Q. Well, if this explanation had been given to you, did you not expect that the contract would show that in its final form, or in some change in the contract?
A. Quite true. I didn't give it a further thought.
Q. No. In fact you didn't give it any thought until it turned out, during the course of loading, that the barley was going to stow heavy.
THE COURT: All right, go ahead, you've got only one answer to that.
A. Mr. Cunningham, I must answer emphatically no.

Even accepting Nusgart's evidence as to the conversations with Bingham, the effect of it does not support a submission that they constituted oral parts of a contract, part written and part oral, as alleged in the particulars. At the very best for the plaintiff, on Nusgart's own version, they

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amount only to assurances by Bingham as to the meaning of the written contract. As to this Nusgart testified:

MR. CUNNINGHAM:

Q. I put it to you, Mr. Nusgart, that prior to the ten thousand, ten per cent more or less, being fixed, as the contract states, the contract that we are dealing with in this action, there was, it was submitted to you through Mr. Bingham that a contract was available from a ship owner at 9500 tons, ten percent more or less, for your consideration.

A. It's possible, I don't recall. If it was given to me by Mr. Bingham it would have been mentioned on a per ton basis, Mr. Cunningham, and it would have been turned down by us because if the ship had then loaded ten percent under 9500 tons it would not come within the minimum requirements of our contract.

Q. Now when you were cut off, as your counsel stated in opening, at ten thousand, ten percent more or less that would be the quantity set in the booking—ten thousand four hundred and thirty would be within the terms of the booking note.

THE COURT: As it reads—

A. Depends on how you interpret the booking note.

THE COURT: As it reads—ten thousand tons of 2,240 pounds, ten percent more or less quantity at owner's option barley in bags —would the cut-off that was actually made comply with that, interpreting that literally as it reads?

A. Yes, my Lord.

Rectification is not asked for and indeed it could not very well be asked for because there is no certain evidence to show that the contract was other than as contained in the writing—the freight contract. The evidence does not meet the four requirements for rectification referred to in Cheshire and Fifoot on Contracts (6th Ed.) at pp. 201-202, and particularly the requirement referred to in *Frederick E. Rose (London), Ltd. v. William H. Pim & Co., Ltd.*[1] by Denning L.J. at p. 461 as follows:

> In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice.

There is no case here, on the evidence, of warranty or collateral contract within the terms of the judgments in

[1] [1953] 2 Q.B. 451.

Heilbut, Symons & Co. v. Buckleton[1] where Viscount Haldane, L.C. said at pp. 36-37:

The words of Mr. Johnston in the conversation proved by the respondent were words which appear to me to have been words not of contract but of representation of fact. No doubt this representation formed part of the inducement to enter into the contract to take the shares which was made immediately afterwards, and was embodied in two letters dated the next day, April 15 But neither in these letters nor in the conversation itself are there words either expressing or, in my opinion, implying a special contract of warranty collateral to the main contract, which was one to procure allotment.

It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it, and I think that the learned judge who tried the case ought to have informed the jury that on the issue of warranty there was no case to go to it, and that on this issue he and the Court of Appeal ought to have given judgment for the appellants.

and Lord Moulton at p. 47 of the same report:

He must show a warranty, ie, a contract collateral to the main contract to take the shares, whereby the defendants in consideration of the plaintiff taking the shares promised that the company itself was a rubber company. The question in issue is whether there was any evidence that such a contract was made between the parties.

It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds." is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are, therefore, viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

The owners' option provision is inconsistent with any conclusion that there was a warranty or collateral contract for the use by the plaintiff, if desired, of the total capacity of the vessel. Such would entail provision for a *shipper's* option condition. See *Louis Dreyfus et cie v. Parnaso Cia Naviera, supra.*

[1] [1913] A.C. 30.

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3. On the third issue, as to whether there being a written contract, the evidence is admissible:—

The evidence by Nusgart as to the telephone conversations was not evidence of the meaning of ambiguous terms. It was merely evidence in an attempt to vary a written contract the admissibility of which will be dealt with now.

To the extent that Nusgart's evidence, objected to, deals with circumstances surrounding the making of the contract, it is admissible. See *Oppenheim v. Fraser, supra,* Mellor J. at p. 147. I rule as inadmissible the evidence objected to as attempting to add to, vary or contradict the freight contract. The authorities are clear on the matter and are well known. See Cheshire and Fifoot on Contracts (6th Ed.) p. 101:

> If the contract is wholly in writing, the discovery of what was written normally presents no difficulty, and its interpretation is a matter exclusively within the jurisdiction of the judge. But on this hypothesis the courts have long insisted that the parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement. Neither of them may adduce evidence to show that his intention has been mis-stated in the document or that some essential feature of the transaction has been omitted.
>
> "It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly it has been held that ... parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties."
>
> (*Jacobs v. Batavia & General Plantations Trust* [1924] 1 Ch. 287, per Lawrence, J. at p. 295.)

See also *Henderson v. Arthur*[1], Collins M.R. at p. 12:

> It seems to me that to admit evidence of such an agreement as being so available would be to violate one of the first principles of the law of evidence; because, in my opinion, it would be to substitute the terms of an antecedent parol agreement for the terms of a subsequent formal contract under seal dealing with the same subject-matter. I do not see how, in this case, the covenant in the lease and the antecedent parol agreement can co-exist, and the subsequent deed has the effect of wiping out any previous agreement dealing with the same subject-matter. It was somewhat faintly suggested that the agreement relied upon was a collateral agreement in the nature of a condition upon which the lease was entered into by the defendant. But it appears to me, when the terms of the agreement are looked at, that it is not a merely collateral agreement, but provides in another and contradictory manner for doing what was subsequently provided for by the lease.

And also *Galt v. Frank Waterhouse & Company of Canada Limited*[2], Robertson, J.A. at p. 109 *et seq.*

[1] [1907] 1 K.B. 10.

[2] (1943) 60 B.C.R. 81.

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In my opinion the freight contract of April 25th between the parties contains the whole contract covering the shipment of the barley, and, for the reasons given, the action must be dismissed with costs.

It is regrettable that judgment on this case as on two others has been delayed for so long due to the fact that I was engaged for over a year on the Inquiry into labour troubles on the Great Lakes, my subsequent illness as a result thereof, and the fact that the number of Judges available to sit on the Court of Appeal has been restricted due to illness and other causes. Fortunately, however, my notes on all these cases were complete and I have now had the opportunity to give them the consideration which is warranted.

BETWEEN:

KLONDIKE HELICOPTERS LIMITED ..APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

CONNELLY-DAWSON AIRWAYS LIMITED ..... RESPONDENT.

New Westminster 1965 Sep. 20-22

Ottawa Oct. 6

Income tax—Capital cost allowances—Sale of business—Allocation of price to depreciable and non-depreciable assets—Amount which can reasonably be regarded as consideration therefor—Income Tax Act, s. 20(6)(g).

In January 1958 Klondike Helicopters Ltd sold its fixed-wing flying business to Connelly-Dawson Airways Ltd for $100,000 and together with its principal shareholder covenanted not to compete with the purchaser for ten years. The contract of sale apportioned the price equally between physical assets and goodwill, a provision insisted upon by the vendor in order to minimize the recapture of capital cost allowances in its hands under the *Income Tax Act*. The physical assets had originally cost $75,500 but at the time of sale had been written down by capital cost allowances to $14,000 for income tax purposes. Their market value at that time was $71,300. In its income tax return

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for 1958 the purchaser claimed capital cost allowances in respect of the physical assets on the basis of a capital cost of $71,300, whilst the vendor claimed capital cost allowances thereon on the basis set out in the contract of sale. The Minister assessed the purchaser on the latter basis, and the purchaser appealed to the Tax Appeal Board, which allowed the appeal. The Minister thereupon re-assessed the vendor on the same basis.

Appeals from the decision of the Tax Appeal Board in favour of the purchaser and from the Minister's re-assessment of the vendor were taken to the Exchequer Court. Both appeals were heard together on common evidence.

Section 20(6)(*g*) of the *Income Tax Act* provides that

> "where an amount can reasonably be regarded as being in part the consideration for disposition of depreciable property of a taxpayer of a prescribed class and as being in part consideration for something else, the part of the amount that can reasonably be regarded as being the consideration for such disposition shall be deemed to be the proceeds of disposition of depreciable property of that class . . . and the person to whom the depreciable property was disposed of shall be deemed to have acquired the property at a capital cost to him equal to the same part of that amount;".

The Court found on the evidence that while the value of the goodwill of the vendor's business was doubtful (though put at $57,000 by one expert witness), the covenants of the vendor and its principal shareholder not to compete with the purchaser for ten years were of substantial value to the purchaser, and that the sum of $50,000 was not unreasonably high therefor.

Held, both appeals should be allowed. In the circumstances the part of the price which could reasonably be regarded as the consideration for the goodwill and the restrictive covenants was not less than $50,000 and the part of the price which could reasonably be regarded as the consideration for the physical assets did not exceed $50,000.

[*Herb Payne Transport Ltd. v. M.N.R.* [1964] Ex. C.R. 1 at p. 8, referred to.]

APPEALS from a decision of the Tax Appeal Board and from a re-assessment of income tax.

Jacques Barbeau for appellant Klondike Helicopters Limited.

R. M. Hayman and *A. E. Harvey* for respondent Connelly-Dawson Airways Limited.

T. E. Jackson for Minister of National Revenue.

THURLOW J.:—These two appeals arise from the same transaction and, pursuant to an order of the Court made on the application of the Minister, they were heard together. By the same order it was directed that the evidence adduced by the Minister and by each of the taxpayers should

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be applicable to both appeals. The first is an appeal by Klondike Helicopters Limited from re-assessments of income tax for the years 1958 and 1961 both made on the basis of $71,300 being the amount which could reasonably be regarded as having been the consideration for assets of its fixed wing flying operation falling within class 16 of Schedule "B" of the Income Tax Regulations on the sale of that business with its goodwill and other assets to Connelly-Dawson Airways Limited on or about January 2, 1958. The other is an appeal by the Minister from a judgment of the Tax Appeal Board[1] allowing an appeal by Connelly-Dawson Airways Limited from a re-assessment of income tax for the year 1958 and holding that the assessment and the taxpayer's right to capital cost allowance should be based on the taxpayer having acquired the class 16 assets in question from Klondike Helicopters Limited at a capital cost of $71,300 rather than the $42,050 upon which the re-assessment was based. While the Minister's position as pleaded is thus different in the two appeals both raise the same question as to what part of an amount of $100,000 realized by Klondike Helicopters Limited on the disposition of its fixed wing flying business can reasonably be regarded, for the purposes of s. 20(6)(*g*) of the *Income Tax Act*,[2] as the consideration for the class 16 assets disposed of in the transaction. Both the extent of the liability of Klondike Helicopters Limited, in computing its income for tax purposes, to account for recaptured capital cost allowance taken in respect of these assets in earlier years and the extent of the right of Connelly-Dawson Airways Limited to capital cost allowance in respect of the cost to it of these assets turn on the answer to this question.

The statutory provision under which the matter arises reads as follows:

> 20. (6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:
>
> (*g*) where an amount can reasonably be regarded as being in part the consideration for disposition of depreciable property of a taxpayer of a prescribed class and as being in part consideration for something else, the part of the amount that can reasonably be regarded as being the consideration for such disposition shall be deemed to be the proceeds of disposition of depreciable property

[1] 31 Tax A.B.C. 286.

[2] R.S.C. 1952, c. 148.

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> of that class, irrespective of the form or legal effect of the contract or agreement; and the person to whom the depreciable property was disposed of shall be deemed to have acquired the property at a capital cost to him equal to the same part of that amount;

In applying this rule the matter for determination is not simply one of interpreting the contract or agreement or of giving effect to its provisions. Rather, when the rule applies the problem is to decide, having regard to all the circumstances of the transaction, what part of an amount representing the consideration for disposition of depreciable assets of a prescribed class and for something else can reasonably be regarded as having been the consideration for the disposition of the assets of the prescribed class and for the purposes of the rule the amount so determined is to be regarded as the proceeds of disposition of such assets regardless of the form or legal effect of the contract or agreement. As pointed out by Noël J., in *Herb Payne Transport Limited v. M.N.R.*[1], in determining this question evidence will be admissible which would be excluded if the contract or agreement alone governed the rights of the taxpayer and the Minister as parties to the proceeding. The making of a contract or agreement in the form in which it exists is, however, one of the circumstances to be taken into account in the overall enquiry and if the contract purports to determine what amount is being paid for the depreciable property and is not a mere sham or subterfuge its weight may well be decisive.

It is to be observed as well that the statutory rule applies only "where an amount can reasonably be regarded as being in part consideration for disposition of depreciable property of a taxpayer of a prescribed class and as being in part consideration for something else". An initial question may thus arise as to whether a particular situation falls within the ambit of the provision as so defined. In the present cases, however, no question was raised by either taxpayer as to the application of the provision and, in view of both the form and the indivisible nature of the contract to be described, it seems clear that the sum of $100,000 referred to in it can reasonably be regarded as being in part the consideration for disposition of depreciable property of Klondike Helicopters Limited of prescribed class 16 and as

[1] [1964] Ex. C.R. 1 at p. 8.

being in part consideration for something else. The problem is thus purely one of determining on the facts as disclosed by the evidence what part of that amount can reasonably be regarded as having been the consideration for the depreciable property of class 16 included in the transaction.

In 1957 when the negotiations for the sale in question took place, the name of the appellant, Klondike Helicopters Limited was Callison Services Limited and its president and principal shareholder was Edward Patrick Callison, a commercial aircraft pilot and engineer who had been engaged in commercial aviation for some twenty or more years. From 1947 to the end of 1955 he had carried on, under the name of Callison's Flying Service, a charter and mail flying service based at Dawson City in the Yukon Territory. In 1955 he had purchased the shares of McCormick Transportation Company Limited, one of his customers, and had had the company name changed to Callison Services Limited. Thereafter in 1956 and 1957 the company had carried on its ground transportation operation and the flying service formerly operated by Callison as well.

Both in 1956 and again in 1957 there had been a considerable increase in the flying service operation over what it had amounted to in 1955. When the events giving rise to the transaction in question began the appellant company was operating three aircraft of its own and was making use of two other aircraft supplied by other companies on a rental basis. At the same time Callison was planning to acquire several helicopters and to operate a service with them in addition to the fixed wing flying and ground transportation services already in operation. The flying service was operated under licence from the Air Transport Board and was the only flying service based at Dawson City.

Early in the fall of 1957 Callison negotiated with Ronald Fred Connelly, who was the pilot of one of the leased aircraft and an employee of its owner, a proposed arrangement under which the fixed wing flying operation together with the assets pertaining thereto would be transferred to a new corporation and Connelly, for $50,000, would become owner of approximately one-half of the shares of that company but with Callison holding the controlling interest.

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This proposal proceeded to the point where Callison had consulted an accounting firm with respect to the taxation implications of the proposed transaction, he being aware of the fact that the depreciable assets had been substantially written down for tax purposes, and solicitors for him and for Connelly had been instructed to incorporate the new company, originally named Callison Services (No. 2) Limited and later re-named Connelly-Dawson Airways Limited, and to prepare the documents required to give effect to the transaction. However, these instructions had not yet been carried out when a new proposal was made on behalf of Connelly, his wife, and her father, Mr. Crae Dawson, for the purchase outright of the fixed wing flying operation and assets in question for $100,000.

Callison realized that such a sale might give rise to liability for tax and he did not accept the proposal. Through his accountant or his solicitor he countered with an offer to sell for $125,000 and when later informed that $100,000 was the limit to which the Connellys and Mr. Dawson would go he was prepared to accept $100,000 only if he would be able to get that amount without reduction because of liability for tax. His accountant, Mr. Farley, then suggested that the sale be made on the basis of 50 per cent. of the proposed price being paid for the physical assets of the operation and the other 50 per cent. for the goodwill. The evidence of both Mr. Callison and Mr. Farley indicates that Farley went to some pains to explain this feature of the proposed transaction and its tax implications to Mr. and Mrs. Connelly in the presence of the solicitor acting for them and for Mr. Dawson. Mrs. Connelly does not deny that an explanation was given but says that if one was given she did not fully understand the implications, that her concern was with the price of $100,000 and that it didn't matter to her how it was broken down. Neither Mr. Connelly nor Mr. Dawson nor the solicitor was called as a witness.

When the transaction took place Mrs. Connelly was twenty-five years of age. She had had a high school education and had become an aircraft pilot and had had some seven years experience as a flying instructor and commercial pilot but had had no business experience. I see no reason to doubt that an explanation of the tax implications of the proposed transaction was given and that she

appeared to Mr. Farley to understand the consequences but I am not satisfied that she did fully understand what these implications were for the purchasing company. At the same time I see no reason to think that her solicitor did not fully and clearly understand the tax implications for the purchaser in such a transaction or that the imperfection of her personal understanding of such implications can have any bearing on the transaction or its results.

The contract as eventually executed was a three party transaction made between Klondike Helicopters Limited, then Callison Services Limited, as vendor and Connelly-Dawson Airways Limited, then Callison Services (No. 2) Limited as purchaser, with Callison personally joining in some of the covenants given by the vendor. After reciting that the vendor had agreed to sell to the purchaser and that the purchaser had agreed to buy "the buildings, appurtenances, equipment, stock-in-trade and the benefit of all agreements and good will hereinafter mentioned in respect of that portion of the vendor's business known as the 'Fixed-Wing Flying' business on the terms and conditions" therein contained and that Callison was the principal shareholder of the vendor the document witnessed that in pursuance of the said agreement and in consideration of the amounts thereinafter enumerated to be paid by the purchaser the vendor sold and assigned to the purchaser the several physical and other assets then described. It then proceeded:

THE PURCHASE PRICE for the said buildings, equipment, stock-in-trade and the benefit of all agreements and good will shall be as follows:

(*a*) The Aeroplanes, buildings, equipment and stock-in-trade described in Schedule "A" to this Agreement, the sum of $50,000.00

(*b*) For the benefits of all contracts and engagements as of the 2nd day of January, 1957 (sic) and for the good will, the sum of $50,000.00

THE PARTIES HERETO COVENANT AND AGREE that the total sale price in consideration of the sale of the said Aeroplanes, buildings, stock-in-trade, equipment and the benefit of all Agreements and good will as aforesaid shall be the sum of One Hundred Thousand ($100,000 00) Dollars, payment whereof shall be as follows:

The contract went on to provide for a down payment of $40,000 and for the securing of the remaining $60,000 by a mortgage on most of the physical assets included in the transaction. Only two of the remaining provisions need be

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mentioned. By one of these the vendor agreed that it would, at the expense of the purchaser, do all such acts as might be necessary for transferring to the purchaser *inter alia* all licences held by the vendor relating to the carriage by air of passengers and freight and it was provided that if for any reason any of such licences should not be transferable or issuable to the purchaser the agreement should be void. By the other Callison joined with the vendor in covenanting that they would not engage directly or indirectly in any fixed wing flying business in the Yukon Territory for ten years.

As some delay was experienced in obtaining the decision of the Air Transport Board on the application for transfer of its licences two further amending agreements were executed to provide for the interim operation of the business but these in my view have no effect on the material provisions of the contract. In the latter part of May 1958 the purchaser's solicitors received a letter stating that the Air Transport Board regarded as excessive the valuation of the goodwill of the business at $50,000 and requesting the provision of a *pro forma* balance sheet of the new company showing the value of goodwill at an amount not exceeding $25,000. The letter went on to say that "In this connection it should be noted that the $25,000 eliminated from the goodwill valuation may be shown in a 'Property Acquisition Adjustment' account."

On this letter being brought to his attention Callison's view was that the contract could not be carried out and was therefore to be treated as at an end. On May 30, 1958, he wrote and sent the following on the letterhead of his company:

Mr. Connelly & Dawson
Dawson City. Yukon.

Re sale of Callison Services Ltd. fixed wing flying business.

From what we have been advised and the letter from the A.T.B. dated May 20th. 1958. rejecting the agreement presented to them. It is now necessary if we go ahead with the sale to have a new agreement drawn up and signed by all parties concerned.

Before we will agree to the new agreement the following will have to (be) included in the new agreement.

No. 1. Connelly & Dawson pay us now 47 per cent of the $25,000.00 increase value of equipment as requested by the A.T.B.

No. 2. Connelly & Dawson pay us now for inventory taken over April 1st. for gas. Oil. and all insurance to June 18th.

No. 3. That Connelly & Dawson agree to pay 6 per cent interest on all money owing by them instead of 3 per cent.

No. 4 New agreement will read that we will be required to stay out of the fixed wing flying business for a period of five years not ten years in the Yukon.

No. 5. New agreement will read that they Connelly & Dawson will be required to stay out of the helicopter flying business in the Yukon for a period of five years.

However, no agreement was reached on these terms. Instead Callison was advised by his solicitor that the requirement of a balance sheet on the lines stipulated by the Board's letter was a matter between the purchaser and the Board with which the vendor was not concerned and thereafter the transaction was completed on the terms of the original contract.

Besides the class 16 assets, which consisted mainly of three aeroplanes, the sale included certain depreciable assets of other classes, such as a building and a truck, and a quantity of expendable supplies, such as gas and oil. In its income tax return for the year 1958 Klondike Helicopters Limited allotted an amount of $7,950 as the consideration for these other depreciable and expendable assets and computed its income on the basis of $42,050 having been the consideration for disposition of the class 16 assets. Connelly-Dawson Airways Limited, however, computed its income on the basis of $75,000 having been the consideration for the corporeal assets acquired in the transaction and of this amount treated $71,300 as having been the capital cost to it of the class 16 assets. Thereafter the Minister assessed both taxpayers on the basis of $42,050 having been the consideration for the class 16 assets whereupon Connelly-Dawson Airways Limited appealed to the Tax Appeal Board. The appeal having subsequently been allowed the Minister launched his present appeal to this Court but also re-assessed Klondike Helicopters Limited for the years 1958 and 1961 on the basis of $71,300 having been the consideration for the class 16 assets in question and following notice of objection by the taxpayer confirmed the re-assessments. Klondike Helicopters Limited then launched its appeal to this Court. No issue is raised in either appeal as to the amount to be attributed either to the depreciable assets other than those falling within class 16 or to the expendable assets included in the sale and it was stated by counsel

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at the hearing that the only matter requiring consideration is whether $71,300 or $42,050 is the right amount to regard as the consideration for the class 16 assets.

It is agreed that the fair market value of the class 16 assets of the business at the time of the sale was $71,300. These assets had been acquired by Klondike Helicopters Limited at a total capital cost of $75,543 but for income tax purposes they had been depreciated to $14,088. On their sale at any price higher than the latter amount the vendor in computing its income for tax purposes would be obliged under the provisions of the *Income Tax Act* to account for any sum in excess of that amount up to the original capital cost.

What the true value of the goodwill of the business was is not very clear. There is evidence given by Callison that he valued it at $75,000. James Grant Halpin, a chartered accountant who has had experience over many years in matters involving the valuation of goodwill expressed the view, based on an arithmetical calculation and information respecting the growth of the business that the goodwill was worth $57,000 to $58,000. Charles Allison Johnson, also a chartered accountant, while acknowledging Mr. Halpin's experience and reputation expressed the view that the latter's opinion of the value of the goodwill in question was unrealistic and that on the information available to him, which was substantially that available to the Court, he would be unwilling to venture any opinion as to the value. Assuming that goodwill is to be taken as having the meaning attributed to the expression by Thorson P., in *Losey v. M.N.R.*[1] that is to say, the advantage of the reputation and connection of the person who had built up the business, that its value is what a purchaser would be willing to pay for the chance of being able to keep the connection of which it consists and that it includes neither a covenant by the vendor not to compete nor a right to the personal services or the business ability of the former proprietor of the business I find it difficult to conceive of anyone being prepared to pay as much as $57,000 for the opportunity which this business as described presented. Moreover in my opinion no great value is to be attributed to the two mail

[1] (1957) C.T.C. 146 at 150-152.

contracts which the vendor had at the time of the sale and which were the only firm contracts which it had with customers.

However, the total price of $100,000 referred to in the contract in my opinion must be regarded as the consideration for all the advantages accruing to the purchaser under it and these included the covenant not to compete given not only by the vendor but by Callison personally as well. There is evidence that without a licence to operate a commercial service the corporeal assets included in the sale would have been useless and there is also evidence that with the work available it would not have been financially feasible for two competing services to be operated from Dawson City. It is plain, therefore, that apart from what might have been in fact capable of transfer to the purchaser as the goodwill of this business the covenant of the vendor and of Callison, with his experience in the business, not to operate a fixed wing flying service anywhere in the Yukon Territory for ten years must have been of substantial importance to the consummation of the transaction. Without it there would have been no sale of the business just as there was in fact no sale of the physical assets without the goodwill or of the goodwill without the physical assets. In these circumstances the exact value of the goodwill by itself does not appear to me to be of importance to the determination of the question involved in these appeals. What appears to me to be important is (1) that the goodwill had a considerable value which a person of Mr. Halpin's standing and experience did not shrink from putting at $57,000; (2) that the chance of retaining the business of the former owner, which was quite substantial and in effect almost a monopoly, was enhanced by its covenant and that of its chief shareholder not to compete; (3) that with his knowledge of how to operate the business and considering the success he had had in doing so the giving up of his right to operate such a business was a substantial consideration in itself; and (4) that the parties to the contract, who were bargaining at arm's length, agreed upon $50,000 as the amount to be paid for the benefit of the existing contracts and goodwill. These features of the situation persuade me that the amount of $50,000 so set by the contract cannot be regarded as an unreasonably or outrageously high figure to stipulate as the

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price of the opportunity which the vendor and Callison were giving to the purchaser to operate the business without competition from either of them.

Moreover whether $50,000 bore any close relationship to the market value of the goodwill or not it is I think manifest on the facts that the vendor and Callison were not prepared to part with the goodwill and give the covenant not to compete except on the condition that half of the total consideration of $100,000 would be paid for the goodwill. Callison's reaction to any other terms was made clear by his desire to nullify the transaction entirely when it seemed to him that the distribution of the purchase price might be affected by the requirements of the Air Transport Board and by his terms requiring an immediate additional payment of $11,750 if the price of the physical assets was to be raised to $75,000, a reduction of the term of the covenant not to compete to five years and a covenant by the purchaser not to compete with the vendor's helicopter service.

In my opinion in the circumstances described the part of the total purchase price of $100,000 which can reasonably be regarded as having been the consideration for such goodwill and opportunity is not less than the $50,000 stipulated therefor in the contract and the part of the price which can reasonably be regarded as having been the consideration for the physical assets included in the sale does not exceed the $50,000 stipulated therefor in the agreement. For the purpose of s. 20(6)(*g*) of the *Income Tax Act* the part of the $100,000 purchase price which can reasonably be regarded as having been the consideration for the class 16 assets is thus, notwithstanding their much higher fair market value, $42,050.

The appeal of Klondike Helicopters Limited will be allowed and the re-assessments will be referred back to the Minister to be varied so as to give effect to this finding. The appeal of the Minister from the judgment of the Tax Appeal Board in the case of Connelly-Dawson Airways Limited will also be allowed and the re-assessment will be restored.

The parties to both appeals having so agreed at the conclusion of the argument there will be no award of costs in either appeal.

IN THE MATTER OF JAMES S. SMITH, SUCCESSOR—BERNARD E. SMITH ESTATE ..... APPLICANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Ottawa 1965
Dec. 2
Dec. 16

Estate tax—Federal—Estate Tax Act, S.C. 1958, c. 29, ss. 12, 13, 14, 41(1) —Liability of successor for estate tax—Whether issuance of certificate and service of writ of extent against successor valid when not preceded by assessment addressed to him in respect of his liability for tax.

The estate of Bernard E. Smith (domiciled in the United States) had been assessed by the Minister in the amount of $64,481 in respect of property situated in Canada and the Minister was attempting to recover part of that tax from the applicant, as successor, on whom liability would rest under s. 14, whether or not any notice of assessment had been sent to him.

In the instant case the only assessment issued was that sent to the executors in respect of the estate tax payable.

Nevertheless a certificate was issued against the applicant and pursuant thereto a writ of extent was obtained.

This process was challenged on the grounds that the applicant was not a successor within the meaning of s. 14 and that the Minister could not issue a certificate against the applicant on the strength of an assessment made against someone else.

Held, only the second issue needed to be considered and s. 14 did not contemplate the issuance of a certificate against "A" predicated on an assessment made and addressed against "B".

The writ of extent should be vacated and the certificate set aside.

MOTION for an order requesting that a writ of extent be vacated and the relevant certificate set aside.

Terence Sheard, Q.C. for applicant.

G. W. Ainslie for respondent.

GIBSON J.:—This is a motion for an order requesting that a writ of extent issued September 29, 1965 under Part III of the *Estate Tax Act* be vacated and that the certificate also dated September 29, 1965 as to the amount of tax alleged to be due and payable, (upon the validity of which the issuing of the said writ of extent depends) be set aside.

The Applicant, James S. Smith, resides in New York and is one of the executors of the estate of Bernard E. Smith, an American citizen who died domiciled in the United States leaving certain assets having a situs in Canada

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within the meaning of s. 38 of the *Estate Tax Act*. The Applicant is also a residuary beneficiary of the said estate to the extent of $\frac{1}{8}$th when such residue has been ascertained. The estate has not been fully administered as yet by the executors and therefore as of now there is no clear residue.

A notice of assessment under s. 12 of the *Estate Tax Act* was prepared, is dated February 27, 1964 and was addressed and sent to "Executors, Est. of Bernard E. Smith, % Messrs. Netter, Netter, Dowd and Fox, 660 Madison Ave., New York 21, N.Y., U.S.A." and reads as follows:

Tax Assessed	Interest Assessed	Credited	Balance Unpaid	Refund
$64,481 57	$7,640.58		$72,122.15	

Although the said certificate and writ of extent were issued against the Applicant as a "successor" under s. 14 of the *Estate Tax Act*, no notice of assessment was prepared, addressed to or sent to the Applicant in his capacity as a "successor" to part of the estate of Bernard E. Smith.

The said certificate against the Applicant under Part III of the *Estate Tax Act* purportedly pursuant to s. 41(1) was issued by Thomas E. Weldon, Supervisor of Collections, Taxation Division, Department of National Revenue dated September 29, 1965 certifying that pursuant to an assessment dated February 27, 1965 (i.e. the assessment against the executors referred to above) that the Applicant owed the sums for estate tax which are set out in such certificate as follows:

That under the Estate Tax Act there is now due, owing and unpaid by the said JAMES S. SMITH, Successor-Estate of BERNARD E. SMITH the following arrears of Estate Tax

Assessment Date	Tax	Penalty	Interest	Interest Computed to
27 Feb/64	$7,890.30	—	$1,517.52	15 Sept/65

Constituting a total amount of $9,407.82 together with additional interest at the rate of 5 per cent per annum on the sum of $7,890.30 from 16th day of September 1965, to date of payment.

2. That 90 days have expired since the day of mailing of the notice of assessment herein.

A writ of extent then was obtained on the praecipe of a solicitor for the Taxation Division, Department of National Revenue pursuant to the said certificate and the relevant parts of it read as follows:

Seal a Writ of Extent directed to the Sheriff of the County of York, Ontario to levy of the lands, goods and chattels of JAMES S. SMITH,

Successor-Estate of BERNARD E. SMITH in the sum of the following arrears of 41 (1) of the Estate Tax Act 1958 c. 29

Year or Date of Assessment	Tax	Penalty	Interest	Interest Computed to
27 Feb/64	$7,890 30	—	$1,517.52	15 Sept/65

together with additional interest at the rate of five per centum per annum on the sum of $7,890.30 from the 16th day of September 1965 to date of payment: (and $11 00 Costs as provided for by the general rules and Orders of this Honourable Court).

This writ of extent was served upon the Toronto firm of Peat, Marwick, Mitchel & Co., Certified Public Accountants, Prudential Building, King and Yonge Streets, Toronto 1, Ontario which the Applicant by affidavit alleges is associated with the New York firm of Peat, Marwick, Mitchel & Co. of which the Applicant is a partner but which is a separate and distinct firm from the Toronto firm.

The said certificate above referred to alleging that the Applicant as a successor owes the said amount of estate tax and the said writ of extent obtained pursuant to this certificate were based on the assessment dated February 27, 1964 which as stated was made against, addressed to and sent to the executors of the estate of Bernard E. Smith pursuant to the liability of such executors for the payment of such estate taxes under s. 13 of the *Estate Tax Act*. But as stated no assessment was sent to the Applicant as a "successor" pursuant to his liability to pay his proportionate share of the estate tax in his capacity *qua* "successor" under s. 14 of the *Estate Tax Act*.

The issues on this motion are firstly, whether or not the Applicant is a "successor" within the meaning of s. 14 of the *Estate Tax Act* at the date of this application; and secondly, whether under s. 41 of the *Estate Tax Act* the Minister has the right to levy by way of writ of extent against the Applicant, which writ issued on the basis of a certificate which depends for its validity on an assessment made, addressed and sent to someone else namely, the executors of the estate of Bernard E. Smith.

On this application it is only necessary to consider the second issue.

As to the second issue I am of opinion that any certificate alleging any amount of tax due or payable under the Act must be based on an assessment made under s. 12 of

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the Act directed against the particular person in respect to whom such certificate is issued. Section 41 (1) (*b*) reads as follows:

> 41. (1) Any amount due and payable under this Act that has not been paid or such part of any amount due and payable under this Act as has not been paid may be certified by the Minister
>
> ...
>
> (*b*) otherwise, upon the expiration of ninety days after the day of mailing of any notice of assessment sent by the Minister pursuant to section 12.

This section does not contemplate the issuance of a certificate against A predicated on an assessment under s. 12 made and addressed against B.

This is precisely what was done in this case. An assessment was issued against the executors of the estate of Bernard E. Smith under s. 12 pursuant to the charging section against executors under s. 13. Then a certificate was issued against the Applicant in his personal capacity *qua* a successor of the said estate pursuant to the liability of a successor under s. 14. In my view the said certificate so issued in this matter is a nullity and the writ of extent upon which its validity depends is also a nullity.

In the result therefore, an order will go vacating the said writ of extent issued September 29, 1965 and setting aside the said certificate of Thomas E. Weldon also dated September 29, 1965.

The Applicant is entitled to his costs.

Victoria 1965

Apr. 22, 23

July 19

BETWEEN:

SEABOARD ADVERTISING CO. LTD. ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Income tax—Federal—Income Tax Act, R.S.C., 1952, c. 148, s. 12(1)(a), (b)—Capital outlay—Purchase of business of competitor—Consideration attributed to uncompleted contracts deductible as expense or non-deductible as capital expenditure.

By an agreement made in 1959 the appellant, an outdoor advertising display company, purchased the business and goodwill of a competitor for $230,000, of which $100,000 was allocated to service contracts then in force with customers.

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In 1960 and 1961 appellant company sought to deduct amortized portions of the $100,000 paid for the customer contracts. The portions so amortized were disallowed by the Minister as being in the nature of capital expenditures within the meaning of s. 12(1)(*b*) of the *Income Tax Act*. The Tax Appeal Board upheld the assessments.

On appeal to this Court the company argued that the $100,000 was a deductible expense under the Act.

Held, that the $100,000 was a capital outlay, the deduction of which was prohibited by s. 12(1)(*b*).

1. That although a price tag was placed on the various assets acquired the agreement clearly stated that the aggregate amount was the consideration for the transaction. It was the intent of appellant to purchase the business of the vendor as a going concern.

2. That the transaction was the purchase of a business, an enduring asset and not the purchase of severable disparate parts.

3. That the $100,000 paid by appellant for the customer contracts was not part of the cost of carrying on a business but part of the cost of acquiring a business.

4. That the appeal was dismissed subject to the assessment for 1960 being varied in accordance with the agreement arrived at between counsel regarding legal and audit fees.

APPEAL from a decision of the Tax Appeal Board.

C. W. Brazier, Q.C. and *J. G. Watson* for appellant.

John G. Gould and *T. E. Jackson* for respondent.

NOËL J.:—This is an appeal from the decision of the Income Tax Appeal Board[1] dated December 16, 1963, dismissing the appellant's appeals from its income tax assessments for 1960 and 1961 whereby amounts of $12,274.36 and $21,041.66 for the respective years which had been deducted by the taxpayer, were added to its income.

The appellant, a Vancouver, B.C. corporation, was then, and still is, engaged in the business of outdoor advertising by means of poster panels (10 by 2 feet in size, where the copy of advertising material is produced on paper and then pasted on the surface of the panel) and bulletins (10 by 50 feet in size where the advertising message is hand-painted on panels which are then installed in the location) and gets its business by dealing either directly with advertisers or through advertising agencies. The land or the sites upon

[1] 34 Tax A.B.C. 182.

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which these boards or posters are erected are rented from their owners for varying amounts and periods of time, a matter of negotiation in each case by the appellant's sales agents. Footings are then installed on back braces and then panels are set up with mouldings and electric fixtures. The contract entered into with the advertisers states the length of time the contract is to run, the size and number of panels involved, whether or not it is through an agency, whether or not the panels are illuminated. The normal services rendered during the term of the contract are to insure that proper lighting and structures are maintained and that the bulletins are repainted whenever necessary.

The appellant, in 1959, purchased the assets and the business of a competitor, a corporation called Signkraft Advertising Limited, the second largest in the area after the appellant, because according to the appellant's president, Mr. Don Norris Finlayson, it was difficult to obtain sites at the time. Amongst the assets purchased was a class related to uncompleted bulletin advertising contracts. The appellant submitted that the payment for the acquisition of this class should be deductible under section 12(1) (*a*) of the Act as an expenditure incurred "for the purpose of gaining profit". The respondent, on the other hand, refused deduction on the ground that the payment was a capital expenditure under section 12(1) (*b*) of the Act. The appellant also objects to a net amount of $1,724.35 added to its taxable income for the year 1960 which the taxpayer had deducted, and which represented audit and legal fees, regarding acquisition of business from Signkraft Advertising Limited ($2,000) less *pro rata* portion attributed to inventories and accounts receivable, i.e., $275.65 to which amount the parties agreed at the hearing should be added the sum of $869.60, thus forming a total of $1,145.25 instead of $1,724.35. I assume that this amount was disallowed as an expense on the basis that it related to the capital used in the business.

By an agreement (Ex. A-2) dated September 28, 1959, but effective as of July 31, 1959, the appellant purchased from Signkraft Advertising Limited, as indicated in the preamble of the deed "the business and goodwill of the vendor and the property and assets of the vendor hereinafter set forth..." for the sum of $230,000 (which, accord-

ing to clause 9 of the agreement was "the aggregate consideration for the assets sold hereunder" [herein called the "total price"]):

Machinery, equipment and for billboards leased under location leases	$31,500
Inventory	2,700
Work in progress	2,200
Customer contracts	100,000
Location leases	10,000
Investment	1,800
Trade accounts	26,800
Goodwill	55,000
	$230,000

As a matter of fact, the only items the appellant did not purchase were an oil burner, certain amounts due from employees, prepaid expenses, an advance to a director and the real estate consisting of an office factory building which, however, the appellant took over by lease for five years for the purpose of using it but which was not used and was subsequently sublet by the appellant.

With regard to the factory building, the appellant's managing director was asked if the premises had been leased for the appellant's own activities and answered:

> A. Well, at the start we thought that we possibly may run Signkraft as a division but after a short time it became evident that this was not justified so we brought the equipment and everything out back into our own factory and then sublet Signkraft...

The transaction, however, as appears in the above listed items, comprised the goodwill of the Signkraft business as well as a prohibition for the latter to operate in Canada an advertising business for a period of ten years, as set down in clause 7 of the agreement and an undertaking by the vendor that a similar prohibition shall be obtained from its president, Mr. H. V. Hartree, as set down in clause 18 of the agreement. Clauses 7 and 18 read as follows:

> 7. The Vendor doth hereby bargain, sell, assign, transfer and set over unto the Purchaser all of the goodwill attaching to and forming part of its business as a going concern not hereinbefore sold to the Purchaser, including all the Vendor's right in and to the trade name "SignKraft", with the full and exclusive use and benefits and advantages thereof (herein called the "goodwill and name" to hold the unto the Purchaser, its successors and assigns, to and for its and their sole and only use forever, for the consideration of Fifty-five thousand dollars ($55,000), and the Vendor covenants and agrees with the Purchaser that within one month after the execution of these presents it will cause its corporate name to be changed to some name dissimilar to "Signkraft Advertising Limited" and that it will not either by itself or in partnership or in conjunction with any other

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person or persons, or as agent for any other person, firm or company, for a period of ten (10) years from the date of the execution of these presents, either directly carry on or engage in or be concerned in, in Canada, the business of outdoor advertising.

18. Forthwith upon the execution hereof the Vendor shall cause H. V. Hartree to execute an agreement with the Purchaser whereby he covenants that he will not either by himself or in partnership or in conjunction with any other person or persons or as agent for or employee of any other person, firm or company, for a period of Ten (10) years from the date of execution hereof either directly or indirectly carry on or engage in or be concerned in, in Canada, the business of outdoor advertising.

I might point out here that although, as hereinabove indicated, the appellant had the right to the name "SignKraft" it neglected to properly protect it and eventually lost it to a competitor.

The assets purchased were all incorporated with the appellant's. The equipment was used by the latter until it no longer was useful although there may still be one piece of equipment in operation. The investment of $1,800 was sold. Upon the acquisition by the appellant of the assets of SignKraft, a SignKraft division was created within the appellant's corporation and an attempt was made to account for revenue and expenses of that division as a separate one dealing not only with the uncompleted SignKraft contracts but also with others negotiated by Seaboard under the name "SignKraft Division". This division, however, did not run to the end of the appellant's fiscal period but only from the period August 1, 1959, to February 29, 1960, i.e., seven months after which, as put by the appellant's secretary Mr. Guy James Lewall, (cf. p. 91 of the transcript) "we dumped everything back into the Seaboard accounts and carried on".

Exhibit A-4 comprises a list of the 53 customer contracts purchased by the appellant for the sum of $100,000 and indicates that these contracts, as of July 31, 1959, had a total unearned contract value of $230,709 although the appellant received over the period covered by the unexpired contracts, an amount of $205,764 only due to the fact that some of these contracts did not actually mature such as, for instance, the Blackwall Ferries contract, where the structure blew down and could not be re-erected and one other firm which went into bankruptcy and where a loss was sustained. The difference, however, between the $100,000 expended for these contracts and the $205,764 received

was not clear profit as the appellant, as appears from Ex. A-5, was required to pay the rent on the locations as well as power and other expenditures in a total amount of $77,-649.19 during the unexpired terms of the contracts and the profit on these contracts would be further reduced if a proper allocation of overhead was applied to them. The commencement date of these 53 contracts vary but some started in 1956, 1957, 1958 and 1959 and some expired in 1959, 1960, 1961, 1962, 1963 and even 1964. As a matter of fact, these 53 contracts by their terms expired as follows:

(1) 26 within one year; value $28,252.50

(2) 12 within from one to two years; value $75,354.50

(3) 9 within from two to three years; value $29,673

(4) the remaining 6 within four to five years; value $97,429.

There are in addition 17 renewal contracts (cf. Ex. R-1) of a value of $83,325.19 which with the 53 contracts total $314,034.19. It may also be of some interest to note that of the 53 advertisers, three only had remained with the appellant at the time this appeal was heard (April 1965), the others, according to the president of the appellant, having elected to use other media (cf. p. 69 of the transcript).

The vendor guaranteed the value of the above contracts to be not less than $200,000 and the contract provided for adjustment of the sale price in the event that the total failed to amount to the figure guaranteed.

The two amounts of $12,274.36 for 1960 and $21,040.66 for 1961 which the respondent refused to deduct were the amortized portion of the amounts paid to SignKraft Advertising Limited for these customer bulletin advertising contracts, which portion had been determined by an arbitrary allocation obtained by spreading evenly the income obtained from these contracts over a period of five years at the rate of 1/60 per month.

It appears from the above that although a price tag was placed on the various items purchased by the appellant to make up the aggregate amount, the agreement document clearly states that such aggregate amount is the consideration for the assets sold and further indicates that the intent of the purchaser was clearly to purchase the business of the vendor.

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Should I have any doubts in this regard, the evidence of the appellant's president, Mr. Don Norrison Finlayson at pp. 67, 80 and 81 of the transcript would dispel them:

p. 67:

Q. Would it be that you were buying the whole business except those personal matters such as loans from employees to the former SignKraft Company, the title to the real estate, other than that you took them over lock, stock and barrel, to use an informal phrase?

A. We bought the assets of the company.

pp. 80-81:

Q. I made a suggestion to you there and I am going to make the same suggestion to you here that you acquired virtually all that was required for a complete signboard business from SignKraft. I use the word "virtually" because we know you did not acquire some things. Let's look at the list now, which is on page 2 of the notice of appeal. You got everything, even the good will for $55,000 00?

A. Yes.

Q. Now, would you agree with me that you did acquire virtually a total operating business from SignKraft?

A. Yes, but we didn't purchase the actual plant, the visible factory.

MR. GOULD: That is covered in the contract.

Q. You also in the acquisition contract made a contract that you would keep secure the employment of every employee except Hartree himself. Perhaps I should show you that.

A. Yes, we did.

...

Q. At any rate you took over in toto the personnel as well except Hartree?

A. Yes.

It is also of some importance to note that the appellant company in purchasing the business and the goodwill of SignKraft and by prohibiting this company, and its president Mr. Hartree, from operating as an advertising firm in Canada for a period of ten years obtained a near complete domination of the market with the exception of the David Hall firm. This appears also from the transcript at p. 69 where the president of the appellant corporation, in cross-examination, stated as follows:

Q. Now, in 1959 when you acquired this business you achieved an overwhelming domination of the market all except for David Hall?

A. Yes.

Q. And would that put you in—I am groping for a figure, 90 to 10, your old complex of the old Seabord and SignKraft, put you in ratio with David Hall?

A. Possibly, yes.

Q. How long did that situation prevail or do you still have an overwhelming share of that particular market?

A. Yes, we do.

Q. Still roughly about the same, 90 to 10?
A. Yes.

The appeal, as already mentioned, involves consideration of section 12(1) (*a*) and (*b*) of the *Income Tax Act* which reads as follows:

12. (1) In computing income, no deduction shall be made in respect of

(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,

The issue here is whether the payment of $100,000 made by the appellant to SignKraft Advertising Limited, in the above described circumstances, is deductible under the above section. There are in effect two questions which arise here: (1) was the expenditure of $100,000 (subsequently amortized for the years 1960 and 1961) made for the purpose of gaining or producing income and (2) if it was so made, was such payment an allowable income expense or was it a capital outlay?

Turning to the facts of the present case it is clear that the payment of $100,000 and its amortized portions made by the appellant was for the purpose of gaining or producing income from its business as the income of the appellant is derived from renting sites, obtaining advertisers, erecting thereon advertising boards and to earn this income it must obtain the sites, the advertisers and erect the signs. The appellant in purchasing these unexpired contracts was obtaining thereby the means by which it earned its income and carrying on the object of its business as set down in its memorandum of association (Ex. A-1) in paragraphs (*a*) (1) and (*b*) thereof which read as follows:

(*a*) (1) To carry on a general advertising and commercial display business in all its branches, both as principals and agents;

. . .

(*b*) To purchase or otherwise acquire, manufacture, sell, lease or otherwise deal in, erect, construct, equip, maintain, and operate advertising and other signs illuminated by electricity...

Indeed, whether its means of earning its income was obtained by sending out sales agents to advertisers or dealing with the latter directly at its office, or by purchasing a number of unexpired advertising contracts in bulk, it, in all of these cases, was expending money for the purpose of gaining or producing income from its business.

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The only point, therefore, remaining is whether the sum so expended is a capital outlay which would be prohibited from deduction within the meaning of section 12 (1) (*b*) of the Act.

The appellant takes the position that the true reason for the purchase made herein was the acquisition of the location leases and that for such purpose it was willing to purchase, in addition to the sites, that portion of the business and goodwill of SignKraft which would readily or conveniently be amalgamated with its own business. Its counsel admitting that although, in fact, the appellant acquired substantially all the business of SignKraft with the exception of a few assets, urged that what must be considered here is what was intended by the agreement, perusal of which he says will show that the real intention was to sell certain assets only upon which prices were placed and that although mention of an aggregate consideration is made in section 9 of the agreement, this merely means that a total of a number of individual items was arrived at for each of which, however, a separate consideration was intended by the parties. This, according to the appellant, is supported by the fact that this is the way the respondent has treated this transaction in allowing the appellant to depreciate the machinery equipment and billboards valued at $31,500, to charge off the inventory at $2,700 and the work in progress at $2,200 and by allowing capital cost allowance for the location leases or the sites at $10,000 whereby the appellant was allowed to write this amount off over the length of the unexpired term of the leases.

The appellant further submitted that whatever was acquired in the nature of acquiring the whole business of SignKraft and for getting rid of a competitor, were paid by the payment for the goodwill in the amount of $55,000 which, of course, was treated as a capital payment.

The argument advanced by the appellant that the true reason for the purchase was the obtention of the sites covered by the 53 contracts, can, however, hardly be accepted in view of the fact that a total of $230,000 was paid and the value attached to the sites by the appellant itself was only in the amount of $10,000. Mr. Don Norrison

Finlayson, president of the appellant, was examined on this point at pp. 79-80 of the transcript:

> Q. That was your motivation. Have you any explanation or do you think it necessary to have paid $230,000 for a group of assets when all you really wanted was one valued at ten.
> A. I don't know the reason.

In effect, the appellant achieved far more than the acquisition of sites in this transaction, it indeed obtained the elimination of its main competitor thereby gaining a virtual monopoly of the market as well as a number of unexpired contracts, half of which cover more than one accounting period with renewals of same and even possible renewals of renewals, as appears from the evidence of the appellant's president at p. 74 of the transcript:

> Q. Of course that doesn't mean the end, what I have in my hand (mind) that doesn't mean the end of these contracts because there would be renewals of renewals in some instances.
> A. M'hm.
> Q. And there are still three running?
> A. Yes.

The appellant here cannot therefore take the position that these contracts were of a limited duration as all these things are, in my view, of a very enduring nature and constitute something which was well worth paying $230,000 for.

Indeed, the object and effect of the payment of this large sum was clarly to obtain for the appellant a substantial and lasting advantage of being in a position through its business life to insure and retain its virtual monopoly of the market as well as an endurable (which does not mean perpetual) advantage or benefit in the long term contracts obtained.

It therefore appears to me that a correct appraisal of the agreement entered into by the appellant with SignKraft, is that by this transaction a business as a going concern was bought as an enduring asset rather than a purchase of severable disparate parts.

There can in effect be no doubt in this regard if proper consideration is given to the following: the agreement recites that the purchaser has agreed to purchase a business and its goodwill as well as the right to the trade name SignKraft; from July to September 1959 the vendor carried on the business as the agent of the purchaser; the vendor

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as well as its president undertook not to carry on in Canada the business of outdoor advertising for a period of ten years; the purchaser leased the vendor's real property for five years; the purchaser undertook to employ in its service all the present officers and employees of the vendor with the exception of its president, Mr. H. V. Hartree.

The appellant finally took the position that there is essentially no difference between sending out salesmen to acquire contracts, charging the costs thereof to operations or going to an agency such as SignKraft which had accumulated contracts and purchasing them in block for a price and that these 53 contracts purchased are similar to the 1,200 existing contracts of the appellant corporation which, of course, cannot be considered as a capital asset.

It is indeed difficult to see why work in progress in an amount of $2,200 which is simply customer contracts before the display is actually put on the bulletin board or the preliminary work done in order to erect the necessary advertising pursuant to the contract, was allowed by the Minister as a deductible expense and customer contracts disallowed as both deal with the same situation, the work in progress being merely one step back in the same operation. In the work in progress stage, the contract has been obtained but the sign has not been painted nor erected, but it still forms part of the customer's contract which will come into being and from which revenue will be derived at some date in the future.

The difficulty here is that because the contracts so purchased represent the services the appellant renders and sells as a business and the expenditure of $100,000 paid for these contracts bears a fair comparison with a monetary charge on the business production of a given year in view of the definite accounting periods during which these contracts respectively mature and produced income, they could, therefore, be treated as analogous to stock in trade. However, it would seem that it is not possible to treat them as such, where they are acquired by an expenditure made in the process of purchasing a business with the consequent procurement of endurable benefits such as we have here. Such an expenditure must be considered not as part of the cost of carrying on a business, but as part of the cost in

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acquiring a business. In *City of London Contract Corporation Limited* v. *Styles*[1], which decision was rendered in 1887 and which was referred to in *John Smith & Son* v. *Moore*[2] by Lord Sumner as never having been questioned, and where a company acquired a business including unexpired income producing construction contracts, that part of the purchase price being allocated to the cost of these contracts was not permitted to be deducted from profits on the basis that it was not deductible as it was part of the capital invested in the business.

It therefore follows that unfortunately for the appellant herein, and until such time that either the general prohibition on the deduction of capital expenditures in section 12(1)(*b*) of the Act is repealed or that deduction of an expenditure such as here is allowed under the capital cost allowance regulations of the Act, deduction of same shall have to be refused.

Subject to the assessment being varied in accordance with the agreement arrived at between counsel regarding audit and legal fees in the amount of $1,145.25 instead of $1,724.35 being added to the appellant's income for the year 1960, the appeal is therefore dismissed with costs.

Calgary 1965

April 8

Ottawa May 5

BETWEEN:

MANDREL INDUSTRIES, INC. .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Income tax—Federal—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(a), 12(1)(a) and (b)—Income Tax Regulations, s. 1100(1)(c)—Schedule B, Class 14—Payment made to terminate sales agency agreement—Deduction of amounts paid—Capital cost allowance—Whether re-acquired sales right depreciable as a "franchise", "concession" or "licence".

In May 1956 appellant company, a manufacturer of geophysical equipment granted an exclusive right to a subsisting company to sell its products in Canada for a period of five years.

Two years later appellant decided upon a policy of marketing its products on its own account throughout the world. In 1958 appellant paid $150,000 for the assignment of the exclusive Canadian sales contract which had three years to run until expiry. The appellant, at the same

[1] 2 R.T.C. 239. [2] 12 R.T.C. 266 at 296.

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time, took over virtually all of the staff and sales organization of the former distributor. The amount of $150,000 was deducted by appellant from its income, which deduction was disallowed by the Minister.

Appellant contended that the payment of $150,000 was a proper deduction as an expense made for the purpose of earning income within the meaning of s. 12(1)(*a*) or, in the alternative, that if the payment was a capital outlay within the meaning of s. 12(1)(*b*) then it was entitled to a capital cost allowance on the basis that in accordance with Regulation 1100 and Claim 14 in Schedule B, the payment was made to acquire a depreciable franchise, concession or licence.

Held,—That the payment made by appellant to reacquire the right to sell its own products and to launch its own selling organization in Canada was made to secure an advantage for the enduring benefit of appellant's trade and was a capital expenditure. That although the 1956 agreement could properly be designated as conferring a "concession", "franchise" or "licence" on the erstwhile distributor, the appellant being in the position of principal, could not itself be said to have acquired property of any kind.

The appeals are dismissed with costs.

APPEALS under the *Income Tax Act*.

R. A. F. Montgomery for appellant.

R. L. Fenerty, Q.C. and *T. E. Jackson* for respondent.

CATTANACH J.:—These are appeals from assessments under the *Income Tax Act*, R.S.C. 1952, c. 148 of Mandrel Industries, Inc. for its 1958 and 1959 taxation years.

The parties filed an "Agreed Statement of Facts" dated April 8, 1965 with appendixes. In addition, the parties agreed that either party might supplement the agreed statement of facts by oral evidence, which the appellant did by calling one witness, David Doyle Mize, who has been president of the appellant company since its inception in 1956.

The "Agreed Statement of Facts" reads as follows:

1. Electro-Technical Labs, Inc., (whose successor is the Appellant Mandrel Industries, Inc.) on May 15th, 1956, entered into an Agreement in writing with Electro-Technical Labs. Canada, Ltd., herein called "the Trading Agreement" whereby Electro-Technical Labs. Canada, Ltd. acquired an exclusive right or dealership in distributing and marketing the products of Electro-Technical Labs, Inc. in Canada for a period of 5 years as more particularly set out in the Trading Agreement (Appendix "A").

2. The Appellant Mandrel Industries, Inc., is hereinafter sometimes referred to as "Mandrel" or "the Appellant".

3. Mandrel's predecessor Electro-Technical Labs, Inc. had also granted an exclusive Sales Contract to Electro-Tech International Inc., a U.S. corporation, by Agreement dated January 3rd, 1956 (Appendix "C") with respect to sales in areas other than Canada and the United States.

4. Electro-Technical Labs, Inc., a company incorporated in the United States, but now extinct, had, prior to July, 1956, carried on the business of manufacturing certain specialized geophysical and seismic instruments and equipment. The equipment the company manufactured was used in exploratory work in the oil and gas industry and was marketed throughout the world.

5. In July, 1956, Electro-Technical Labs, Inc. was dissolved into its parent company Mandrel Industries, Inc. (a United States corporation which at the time was Electric Sorting Machine Company and which changed its name to Mandrel Industries, Inc. in the same month of July, 1956). As a result the Appellant Mandrel Industries, Inc. acquired all the rights of Electro-Technical Labs, Inc. and assumed its various liabilities and obligations, including all rights, liabilities and obligations of Electro-Technicals Labs, Inc. under the Trading Agreement (Appendix "A").

6. Electro-Tech International Inc. a company incorporated in the United States, Electro-Technical Labs (Alberta) Ltd. a company incorporated in Canada, and Electro-Technical Labs. Canada, Ltd., a company incorporated in Canada, were all at all material times controlled by Mr. H. A. Sears, a resident of Harris County, Texas, who owned beneficially all of the shares of each of the said companies.

7. At all material times Electro-Technical Labs (Alberta) Ltd., by arrangement with Electro-Technical Labs. Canada, Ltd. constituted the sales organization in Canada by which sales were made in Canada pursuant to the rights granted to Electro-Technical Labs. Canada, Ltd. under the Trading Agreement (Appendix "A").

8. At all material times neither the said H. A. Sears nor Electro-Tech International Inc., nor Electro-Technical Labs (Alberta) Ltd., nor Electro-Technical Labs. Canada, Ltd. had any share interest or control in Mandrel or in any predecessor in interest of Mandrel.

9. In July of 1957 the Appellant held discussions with Mr. H. A. Sears relating to acquisition of the shares or assets of Electro-Tech International Inc., Electro-Technical Labs (Alberta) Ltd. and Electro-Technical Labs. Canada, Ltd. These negotiations broke down.

10. By letter of August 10th, 1957, (Appendix "B") the Appellant purported to terminate the exclusive sales contract with Electro-Tech International Inc., dated January 3rd, 1956 (Appendix "C"). In September 1957, the Appellant sued Electro-Tech International Inc. and H. A. Sears in the United States District Court for the Southern District of Texas, Houston Division (Appellant's Original Complaint is Appendix "D"). In October, 1957, Electro-Tech International Inc. and H. A. Sears defended the action and filed a Counterclaim and Cross Action is (Appendix "E"). The Appellant then filed an Answer to the Cross Action (Appendix "F").

11. Towards the end of April, 1958, negotiations between Mandrel, Electro-Tech International Inc., Electro-Technical Labs. Canada, Ltd., Electro-Technical Labs (Alberta) Ltd. and H. A. Sears were commenced resulting in settlement of the said lawsuit and other matters as evidenced by written Agreement dated the 27th day of June, 1958 (Agreement with Exhibits "A" to "J" attached, is Appendix "G").

12. The amount of $490,853.18 U.S. Funds was the balance of the account owing by Electro-Tech International Inc. to the Appellant as at June 27th, 1958 for goods sold and services rendered by the Appellant to Electro-Tech International Inc. to such date.

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13. Executed copies of Appendix "G" were delivered to all parties on June 27th, 1958. The closing took place on July 15th, 1958 at Houston, Texas.

14. That a Resolution of the Directors of Electro-Technical Labs (Alberta) Ltd. was passed effective as at July 15th, 1958 (Appendix "H"), approving the agreement marked as Appendix "G" between Electro-Technical Labs (Alberta) Ltd. and the Appellant.

15. A Special Resolution of the Shareholders of Electro-Technical Labs (Alberta) Ltd. was passed effective as at July 15th, 1958 (Appendix "I"), approving the Resolution of the Board of Directors of Electro-Technical Labs (Alberta) Ltd.

16. Attached hereto is a Certificate executed by Electro-Technical Labs (Alberta) Ltd. dated July 15th, 1958 (Appendix "J"), certifying that the said Resolutions set forth in Appendixes "H" and "I" are in full force and effect.

17. At the closing on July 15th, 1958, Electro-Technical Labs (Alberta) Ltd. delivered to the Appellant an Agreement in writing dated July 15th, 1958 between Electro-Technical Labs (Alberta) Ltd. and the Appellant (Appendix "K").

18. On July 7th, 1958, Electro-Technical Labs. Canada, Ltd. passed a Resolution (Appendix "L"), authorizing the Directors to assign to the Appellant the Trading Agreement (Appendix "A"), a true copy of which Resolution is attached to a Certificate executed by Electro-Technical Labs. Canada, Ltd., dated July 7th, 1958 (Appendix "M").

19. At the closing on July 15th, 1958, Electro-Technical Labs. Canada, Ltd delivered to the Appellant an Assignment Agreement dated July 15th, 1958 (Appendix "N") with respect to the Trading Agreement (Appendix "A").

20. At the closing on July 15th, 1958 two Promissory Notes for $154,853 18 and $150,000 00 in U.S. Funds made by Electro-Tech International Inc. in favour of the Appellant were delivered by Electro-Tech International Inc. to the Appellant. An unexecuted copy of each of the said Notes is attached hereto and marked respectively as Appendixes "O" and "P". The originals or executed copies of such Notes are not in the hands of the Appellant. The originals of such Notes were forwarded to the President of the Appellant in California on July 15th, 1958 for endorsement, assignment and/or execution by the Appellant to Electro-Technical Labs (Alberta) Ltd. and Electro-Technical Labs. Canada, Ltd. respectively, as provided for in the form contained on Appendixes "O" and "P". Such Notes were so endorsed, assigned and/or executed by the Appellant and were returned to the Attorneys for the Appellant on July 18th, 1958 and were delivered immediately to the respective Assignees, Electro-Technical Labs (Alberta) Ltd. and Electro-Technical Labs. Canada, Ltd.

21. The Appellant first registered as a corporation in Alberta on July 2nd, 1958. On July 15th, 1958, it took over all the personnel of Electro-Technical Labs (Alberta) Ltd. and Electro-Technical Labs. Canada, Ltd. with the exception of Mr. Donald Barton who did not choose to join the Appellant's organization. The Appellant did not participate in any sales or carry on business in Canada prior to July 15th, 1958.

Mr. Mize testified that upon the expiry of the exclusive right or dealership with Electro-Technical Labs. Canada, Ltd. there was no intention whatsoever of renewing it

because the policy of the appellant had been changed so that it would market its products on its own account throughout the world by means of branch sales and service offices to be established. There were no such branches established in 1957 but subsequent thereto between 21 and 30 branches were set up in strategic areas.

In furtherance of this avowed policy discussions were held in July 1957 with Sears to acquire the exclusive Canadian sales contract held by him, for which at that time, Mize testified the appellant offered to pay $200,000 based upon $50,000 (being the annual profit realized by Electro-Technical Labs. Canada, Ltd.) for each of the four years the contract had to run. However the negotiations were broken off by Sears.

In August 1957 a similar exclusive arrangement with Electro-Tech International Ltd. with respect to marketing the appellant's products in areas other than Canada and the United States was purported to be terminated which resulted in the instigation of the law suit referred to in paragraph 10 of the Agreed Statement of Facts during the currency of which the trading agreement with Electro-Technical Labs. Canada, Ltd. was honoured.

Mr. Mize further testified that in negotiating the settlement of the law suit a value of $150,000 was placed upon the Canadian sales contract being on the basis of $50,000 per year for the three unexpired years.

The appellant herein had obtained an injunction restraining Electro-Tech International Inc., from using any funds it received from the sale of equipment of the appellant. Because of this Sears was in financial difficulty and made overtures to the appellant to effect a settlement. Sears was therefore negotiating from a position of weakness whereas the appellant was negotiating from a position of strength.

The promissory note for $150,000 (Appendix "P") made by Electro-Tech International Inc. to the appellant was endorsed by the appellant to Electro-Technical Labs. Canada, Ltd. without recourse upon the appellant. This was done, Mr. Mize testified, because the original obligation to pay was between sister companies.

The appellant in preparing its income tax returns for the years 1958 and 1959 claimed amounts as deductions on

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account of amortization allowances with respect to the acquisition of the trading agreement. However in its Notice of Appeal from the assessments the appellant alleges that it should not have claimed amortization allowances, but rather should have claimed the payment of $150,000 as a deduction which would result in a loss in both the 1958 and 1959 taxation years and accordingly claims a refund of taxes and interest paid.

The appellant in its income tax return for 1958 disclosed a loss of $7,538.26 and in computing that loss it had deducted "Amortization of payment to Electro-Technical Labs. Canada, Ltd. $26,286.96".

Similarly in its 1959 return the appellant disclosed a net income of $20,680.68 in the computation of which there was deducted $52,573.93 described as "Amortization of trading franchise".

In assessing the appellant the Minister disallowed both the amounts of $26,286.96 and $52,573.93 as not being proper deductions under the *Income Tax Act*.

The appellant objected to the assessments by notices dated April 1961. The respondent confirmed the assessments from which assessments the appeals are brought to this Court.

There is no dispute as to the amounts involved but the dispute is as to the taxability thereof. The face value of the note endorsed by the appellant is $150,000 in United States funds. It is agreed that the corresponding value in Canadian funds is $144,578.31.

There are three issues in the present appeals. In the first instance the Minister disputes that the note in question was given solely in consideration for the acquisition or cancellation of the exclusive sales contract and says that the appellant received other benefits as well. If that contention is correct, it follows that the appellant has failed to discharge the onus of proving the expenditure.

The second issue is whether the payment of $150,000 U.S. funds (assuming such to have been established) in the circumstances outlined above, made by the appellant to Electro-Technical Labs. Canada, Ltd. constitutes an outlay or payment on account of capital within the meaning of section 12(1)(*b*) of the *Income Tax Act* and accordingly is not properly deductible as a current expense in computing income, as contended by the Minister.

This issue involved consideration of section 12(1)(*b*) of the Act which provides as follows:

12. (1) In computing income, no deduction shall be made in respect of

...

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part, ...

The third issue arises if the second issue is resolved against the contention of the appellant and the payment is held to have been a capital outlay. The appellant then contends that the acquisition of the trading agreement was a purchase of a franchise, concession or licence which had approximately three years to run and accordingly the appellant is entitled to deduct the amount of the payment of $144,578.31 in Canadian funds, by way of capital cost allowance over a three year period in accordance with section 11(1)(*a*) of the *Income Tax Act* and the regulations promulgated thereunder.

Section 11(1)(*a*) reads as follows:

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

...

The pertinent regulation is 1100(1)(*c*) of Part XI of the Income Tax Regulations, reading as follows:

1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

(*c*) such amount as he may claim in respect of property of class 14 in Schedule B not exceeding the lesser of

(i) the aggregate of the amounts for the year obtained by apportioning the capital cost to him of each property over the life of the property remaining at the time the cost was incurred, or

(ii) the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

Property of class 14 in Schedule B is described as follows:

Property that is a patent, franchise, concession or licence for a limited period in respect of property ...

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(The exceptions subsequently outlined are not applicable.)

The question so raised for determination is whether what the appellant acquired was a "patent, franchise, concession or licence for a limited period in respect of property" within the meaning of the introductory words of class 14 of Schedule B, it being common ground that the appellant is entitled to such allowance if the rights acquired by it so qualify.

In view of the conclusions I have reached on the second and third issues raised in these appeals, it is not necessary for me to consider the first issue referred to above, that is, whether the payment of $150,000 U. S. funds was given solely for the acquisition or termination of the exclusive sales contract between the appellant and Electro-Technical Labs. Canada, Ltd. For the purpose of considering the remaining issues I assume that it was without in any way deciding the matter.

The first question for determination is, therefore, whether the payment was an outlay or payment on account of capital.

The matter was succinctly put by Abbot, J. in *British Columbia Electric Railway Company Limited v. The Minister of National Revenue*[1] as follows:

> Once it is determined that a particular expenditure is one made for the purpose of gaining or producing income, in order to compute income tax liability it must next be ascertained whether such disbursement is an income expense or a capital outlay. The principle underlying such a distinction is, of course, that since for tax purposes income is determined on an annual basis, an income expense is one incurred to earn the income of the particular year in which it is made and should be allowed as a deduction from gross income in that year. Most capital outlays on the other hand may be amortized or written off over a period of years depending upon whether or not the asset in respect of which the outlay is made is one coming within the capital cost allowance regulations made under s. 11(1)(*a*) of *The Income Tax Act*.

Applying such test to the facts of this particular case, it is clear that the payment was made for the ultimate purpose of gaining or producing income in the sense that greater profits would accrue to the appellant but in my view such payment cannot be construed as an income or operating expense. What the appellant acquired was the right and the means to sell in Canada. As indicated in paragraph 21 of the "Agreed Statement of Facts" the

[1] [1958] S.C.R. 133 at 137.

appellant took over the entire staff, with one exception, of Electro-Technical Labs. (Alberta) Ltd. and Electro-Technical Labs. Canada, Ltd. To me this was not an expense of running the business in Canada but rather an expense incidental to launching its own selling organization in Canada. To be able to do that it had to rid itself of the covenants in the sales agreement.

In order to determine whether a particular outgoing represents an outlay of capital, several tests have been proposed, one of which is that of Lord President Clyde in *Robert Addie & Sons' Collieries Ltd. v. I.R.*[1]

> Is it an expenditure laid out as part of the process of profit earning? Or, on the other hand, is it a capital outlay? Is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?

The most notable and frequently cited declaration as to what constitutes a capital outlay is that of Viscount Cave in *British Insulated and Helsby Cables Limited v. Atherton*[2]:

> ...But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

In *Vallambrosa Rubber Co. Ltd. v. Farmer*[3] Lord Dunedin said in part at page 536:

> I do not say this consideration is absolutely final or determinative; but in a rough way I think it is not a bad criterion of what is capital expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year.

In applying the foregoing classical tests to the present case, I cannot but think that the payment here in question was an outlay on account of capital. What the appellant did here was to make a payment once and for all, with a view to bringing into being an advantage for the enduring benefit of the trade. There is no question that the payment was made once and for all. I also think it is clear that what the payment brought into being was an advantage in that the appellant could operate its own selling operation in Canada without being in breach of its previously existing exclusive sales contract with Electro-Technical Labs.

[1] 8 T.C. 671 at 676.
[2] [1926] A.C. 205 at 213.
[3] 5 T.C. 529.

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Canada, Ltd. Furthermore, under arrangement for settlement of the Texas law suit, the appellant acquired not only an unfettered right to sell to any prospective customer directly on its own account rather than only to Electro-Technical Labs. Canada, Ltd. but also acquired an existing sales and servicing organization as a whole. In my view, therefore, what the appellant did was to make a capital outlay for these purposes. Once acquired, other expenditures would be made in the course of operating that organization. Such expenditures would be current.

It is true that the advantage acquired in this case was the right to begin selling operations in Canada three years earlier than the appellant would otherwise have been able to do and a question might be raised as to whether such a right is of "enduring benefit" or of a "permanent character". These phrases were introduced in some of the judicial dicta on this subject to indicate that an asset or advantage acquired must have enough durability to justify its being treated as a capital asset and the terms are not used synonymously with "everlasting". There have been many instances where an "advantage" has been held to be "enduring" despite the fact that it had a very limited life or duration.

Counsel for the appellant placed much reliance on the authority of the decision in *Anglo Persian Oil Company Limited v. Dale*[1]. However, in my view such case is readily distinguishable in that the decision was based on the relationship which existed between the Company and its agents. Lawrence L.J. in commenting on the Crown's argument said at pages 140 and 141, "The fallacy underlying the whole of this argument, in my judgment, consists in treating the agent as if he were an independent trader and not the agent of the Company carrying on the Company's trade . . . it (the Company) merely effected a change in its business methods and internal organization". In the present case Electro-Technical Labs. Canada, Ltd. was carrying on a business on its own account in Canada and not a part of the business of the appellant company. It was, in fact, an independent trader.

The payment was not a commutation of profits as in *Johnston Testers v. M.N.R.*[2] and in *Kelsall Parsons & Co. v. C.I.R.*[3] although the basis of the valuation of the

[1] [1932] 1 K.B. 124.
[2] [1955] C.T.C. 116.
[3] 21 T.C. 608.

payment was an estimate of profits for the three years the exclusive sales contract had to run. Neither was it a payment to an agent or servant of the appellant of a revenue nature.

I also think that the facts of the present case are distinguishable from those in *Scammel & Nephew Ltd. v. C.I.P.*[1] also relied on by the appellant in that the expenditure in that case was made to protect a revenue item, an account receivable, and an expenditure to protect a revenue item is itself a revenue item.

For these reasons I, therefore, hold that the expenditure of $150,000, if made by the appellant in consideration of the assignment of the exclusive sales contract, was a capital outlay and not properly deductible as a current expense under the provisions of the *Income Tax Act*.

This, therefore, brings me to a consideration as to whether the outlay was for an asset falling within the capital cost allowance regulations made under section 11(1)(*a*) of the *Income Tax Act* quoted above.

As a basic premise I accept the submission of counsel for the appellant that what the appellant granted to Electro-Technical Labs. Canada, Ltd. as a result of the exclusive sales contract between them dated May 11, 1956 was in all likelihood a "concession", "franchise" or a "licence". I think that such words must be given the meaning or sense in which they are employed in ordinary commercial usage and they extend not only to certain kinds of rights, privileges or monopolies conferred by or pursuant to legislation or by governmental authorities, but also extend to analogous rights, privileges or authorities created by contract between private persons.

But acceptance of the foregoing premise does not resolve the present issue because the question here is whether what the appellant acquired is property which was a "concession", "franchise" or "licence" for a limited period.

What the appellant did acquire was freedom to carry on selling operations in Canada without being in breach of contract three years earlier than it previously would have been able to do. The appellant, at all times, had the inherent right to sell in Canada, but during the currency of the exclusive sales contract to do so would have involved a breach of contract. It could now sell its products to any

[1] 22 T.C. 479.

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customer in Canada and was not restricted by contract to selling only to Electro-Technical Labs. Canada, Ltd.

The transaction by which the appellant obtained the discharge from its covenants in the exclusive sales contract was accomplished by way of an agreement between it and Electro-Technical Labs. Canada, Ltd. dated July 15, 1958 in which the parties were termed "assignor" and "assignee" respectively whereby the assignor (Electro-Technical Labs. Canada, Ltd.) purported to grant and assign unto the assignee (the appellant) the exclusive sales contract and all rights, title and interest thereto for the assignee's own use and benefit. I must assume that the parties to the assignment deliberately and consciously adopted this method rather than by the more direct method of release or cancellation of the exclusive sales contract.

However, I am obliged to look at the substance of the transaction and the consequences which flow therefrom. In so stating I have not overlooked the statements of the House of Lords in *The Commissioners of Inland Revenue v. The Duke of Westminster*[1] that every man is entitled to order his affairs, by his ingenuity, so that a tax attaching is less than otherwise. But here what must be done is to consider the proper legal operation of the agreement.

It is axiomatic at common law that a person cannot contract with himself. It is meaningless to say that a person can accept something from himself which is already his own. Therefore,the appellant herein could not grant a "concession", "franchise" or "licence" to itself. As against this, counsel for the appellant contends that the doctrine of merger, which is dependent on intention, does not apply and that what the appellant intended to acquire was the right to go into business in Canada three years earlier than it ordinarily would by purchasing the exclusive sales contract. But as I have mentioned before, what the appellant acquired was a release from its covenant to sell exclusively to Electro-Technical Labs. Canada, Ltd. It did not acquire property. Therefore it follows that the appellant did not acquire property that is a "concession", "franchise" or "licence" within the meaning of the introductory words of class 14 in Schedule B to the regulations under section 11(1)(*a*) of the *Income Tax Act*.

The appeals are, therefore, dismissed with costs.

[1] [1936] A.C. 1.

BETWEEN:

CHARLES EDMUND BROWN .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Toronto 1965 June 14 July 5

Income tax—Federal—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(la)—Alimony and maintenance payments—Whether paid for maintenance of "recipient"—Whether payable on "periodic basis".

As a result of an action brought before the Supreme Court of Ontario by his wife appellant was ordered to pay to his wife the sum of $65 00 per week as interim alimony and to his wife's father certain arrears of alimony.

The Minister disallowed the deductibility under s. 11(1)(*la*) of the sum of $1,170 paid by appellant as arrears of alimony to his wife's father in respect of rent owing by appellant's wife to her father.

Later in the same year by a judgment *nisi* dissolving the marriage appellant was ordered to make weekly payments to his former wife of $150 and upon the judgment being made absolute the sum of $10,000.

The Minister disallowed the sum of $10,000 as a deduction because: firstly, it was not made for the maintenance of the recipient and secondly, because it was not an allowance payable on a periodic basis.

Held, that the facts adduced in evidence before the Court were in substance the same as those which were submitted before the Tax Appeal Board and also the same arguments were advanced. No further issue or question of law was raised.

That the Court, being in agreement with the reasoning of and conclusions reached by the Tax Appeal Board which held that the arrears of $1,170 were not paid for the maintenance of the recipient and therefore did not qualify as a deduction under section 11(1)(*la*) of the *Income Tax Act* and further that the sum of $10,000 was not payable on a periodic basis for the maintenance of the recipient and therefore did not qualify under section 11(1) (*l*) of the Act as a deductible payment.

That the Court dismissed the appeal with costs.

APPEAL from a decision of the Tax Appeal Board.

H. G. Chappell, Q.C. for appellant.

D. G. H. Bowman and *M. Barkin* for respondent.

CATTANACH J.:—This is an appeal from a judgment of the Tax Appeal Board dated November 20, 1964[1] whereby an appeal from an assessment to income tax for the appellant's 1962 taxation year was dismissed.

[1] 37 Tax A.B.C. 87.

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As a result of an action brought before the Supreme Court of Ontario by his wife, the appellant by order of the Senior Master in Chambers, dated February 27, 1962, was ordered to pay to his wife the sum of $65 per week as interim alimony commencing at the date of the issue of the Writ of Summons (i.e. October 26, 1961) and it was further ordered that the arrears of alimony owing from that date were to be paid to the appellant's wife's father, Wilfred Baker, in respect of rent owing by the appellant's wife to her father. These arrears, being a total of $1,170, were paid forthwith by the appellant by a cheque for that amount payable to his wife's father in accordance with the order of the Master.

Later in the same year by a judgment *nisi* of the Supreme Court of Ontario dated June 29, 1962, dissolving the marriage, the appellant was ordered to make weekly payments to his former wife of $150 for her support and maintenance beginning June 29, 1962 and also, upon the judgment being made absolute, the sum of $10,000. The judgment was made absolute on October 11, 1962 and the appellant immediately paid his former wife the sum of $10,000 in accordance with that order.

In completing his income tax return for the year 1962 the appellant claimed as a deduction from income an amount of $16,175 being the total of the payments made by him during the 1962 taxation year pursuant to the order of the Senior Master and the judgment of the Supreme Court of Ontario.

Of the amount so claimed by the appellant, the Minister refused to allow as a deduction the sum of $1,170 paid by him to his wife's father and the sum of $10,000 paid by him to his former wife on the grounds that:

> the amount of $10,000 paid to Whilhelmina E. Brown pursuant to the Judgment Nisi of the Supreme Court of Ontario dated 29th June, 1962 claimed as a deduction from income was not an allowance payable on a periodic basis for the maintenance of the recipient thereof within the meaning of paragraph (*l*) of subsection (1) of section 11 of the Act; that the amount of $1,170 paid to the father of Whilhelmina E. Brown pursuant to the Order of the Senior Master at Toronto dated 27th February, 1962 claimed as a deduction from income was not an allowance payable on a periodic basis for the maintenance of the recipient thereof or the maintenance of the said Wilhelmina E. Brown and further that at the time the payment was made the taxpayer was under no obligation to make the payment to the said Whilhelmina E. Brown within the meaning of paragraph (*la*) of subsection (1) of section 11 of the Act.

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In dismissing the appeal, the learned member of the Tax Appeal Board held that the arrears of $1,170 were not paid for the maintenance of the recipient and therefore did not qualify as a deduction under section 11(1)(*la*) of the *Income Tax Act* and further that the sum of $10,000 was not payable on a periodic basis for the maintenance of the recipient and therefore did not qualify under section 11(1)(*l*) of the Act as a deductible payment.

It was from that decision that an appeal was taken to this Court.

The facts adduced in evidence before me were in substance the same as those which were before the Tax Appeal Board. Further it is apparent that the same arguments as were advanced by counsel to the Tax Appeal Board were presented to me and that no further issue or question of law was raised before me.

Since I am in agreement with the conclusions reached by the learned member of the Tax Appeal Board and the reasoning by which he reached those conclusions, the appeal is dismissed with costs.

Calgary 1964

Mar. 31, Apr. 1

Ottawa 1965

Oct. 22

BETWEEN:

DAVID WARREN SMITH ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Company promoter—Loss on sale of company shares—Whether business loss or capital loss.

Appellant, who had for many years been engaged in company promotional activities, got together a group of 15 persons who reorganized a dormant oil company, provided it with new capital and launched it on an active exploration program, their object being to develop a market for the company's shares and to sell their own shares at a profit. Under the arrangement appellant acquired a block of shares in the company, but despite his efforts to promote their sale, using customary promotional methods, he suffered a loss of $6,945.50 in 1958 on the sale of some of his shares.

In 1960 appellant obtained an option to buy 800,000 shares in a uranium company together with an outstanding promissory note of the company in the amount of $150,000, both for $165,000 payable over some months. He paid $20,000 thereon but allowed his option to lapse when it was

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discovered that the company's ore contained impurities. In result appellant, who had expected to make a profit on the transaction, and actively promoted the company's shares on the market, lost $20,000.

Held, both the loss of $6,945 50 sustained in 1958 and the loss of $20,000 sustained in 1960 were business losses and not capital losses, and were deductible in computing appellant's income for those years.

(*Income Tax Act*, R S.C. 1952, c. 148, s. 12(1)(*b*), 139(1)(*e*) and 1(*x*) referred to.)

APPEAL from income tax assessments for 1958 and 1960.

J. H. Laycraft, Q.C. for appellant.

R. A. MacKimmie, Q.C. and *E. E. Campbell* for respondent.

KEARNEY J.:—We are here concerned with what can be regarded as two cases, which I will proceed to deal with in a single judgment, arising out of two separate sets of facts, the first of which occurred in the appellant's taxation year 1958 and the second in 1960.

In his income tax return for 1958, contained in the documents transmitted by the respondent to this Court pursuant to R.S.C. 1952, c. 148, s. 100(2), the appellant claimed, as an allowable expense from his otherwise taxable income, what is described therein as an "Underwriting loss" incurred in respect of the capital stock of New York Oils Limited (NPV) which amounted to $6,945.50.

In his income tax return for 1960, the appellant claimed as deductible a loss of $20,000 incurred in a transaction described in his return as "Black Bay Uranium Limited Option Loss".

By notices of reassessment, both dated November 24, 1961, the Minister disallowed the deductions claimed in respect of the appellant's aforesaid taxable years 1958 and 1960. Following a notice of objection thereto filed by the appellant, the Minister, on reconsideration, by notice dated July 27, 1962, confirmed his two previous reassessments on the ground that "the amounts of $6,945.50 in 1958 and $20,000 in 1960 claimed as deductions from income were not business losses sustained by the taxpayer but were capital losses" within the meaning of s. 12(1)(*b*) of the *Income Tax Act*, R.S.C. 1952, c. 148. The appellant, relying more particularly on the extended meaning of "business"

and "loss" as contained in s. 139(1)(*e*) and (*x*) respectively of the Act, submits that the reverse is true; hence the present appeal.

Since only the nature and not the amount of each loss is in issue, it follows, I think, that whether the two aforesaid losses are deductible or not depends on whether, in the light of the evidence, they should be considered as business or non-business losses having regard to the two above-mentioned sections of the Act, which read as follows:

> 12 (1) In computing income, no deduction shall be made in respect of
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,
>
> 139 (1) In this Act,
>
> (*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;
>
> (*x*) "loss" means a loss computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* (but not including in the computation a dividend or part of a dividend the amount whereof would be deductible under section 28 in computing taxable income) minus any amount by which a loss operated to reduce the taxpayer's income from other sources for purpose of income tax for the year in which it was sustained;

Besides the exhibits, the evidence on behalf of the appellant consists of his own testimony and that of Mr. G. C. Field, who, apart from acting as the appellant's counsel, was also a member of the group engaged in the New York Oils transaction.

Mr. G. V. Fulton, an appeal officer with the Department of National Revenue in Calgary, was heard on behalf of the respondent—and I will make reference to his evidence later.

Before examining seriatim the documentary and verbal evidence with respect to the 1958 and 1960 losses it would be appropriate, I think, to place on record here the early background and main occupation of the appellant, since they are pertinent to both cases.

The appellant was born in New York City in 1928, where he attended school to the end of Grade XII. He has no professional degree but went to M.I.T. and graduated from Harvard College in 1949. Immediately following graduation he went to California and joined the Rio Bravo Oil Company of California, which shortly thereafter sent him to

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Calgary, Alberta, where he has since remained. Since his earliest childhood he has lived in an environment related to "securities and security market corporate promoting and financing." "His father", he stated, "was almost a legendary figure in New York City and had a successful world-wide experience in the promotion and financing of companies". His brother is a member of the New York Stock Exchange and a specialist in securities there. At the age of 15 the appellant worked during the summer of 1943 as a page-boy on the floor of the New York Exchange and in the summers of 1946, 1947 and 1948 he was engaged by a company named LaMort Maloney and Company, which is a member of the New York Stock Exchange. He later acquired a 5 per cent interest in that company, which he retained until 1956. The LaMort Maloney Company was actively engaged as principals in underwriting securities and in financing many companies. He continued in the employ of the Rio Bravo Company until 1952, when, as the company desired to place him in a post outside Canada and as he wished to remain in Canada, he resigned from the company. While working for that company, which catered especially to the requirements of the oil exploration industry, he had devoted part of his time to a company known as Field Service Ltd. When the appellant left the Rio Bravo Company, he engaged on a full-time basis with the Field Service Company. The appellant acquired a 50 per cent interest in the said Company and its name was changed in *1950* to Smith Title Service Limited. The Company's principal business was determining the ownership of mineral holdings in Western Canada and compiling information into maps and documents for oil companies. The witness acquired Canadian citizenship in 1959.

Mr. Smith stated that in 1954-55 he first became interested in Black Bay Uranium Limited, which had been recently incorporated in the Province of Alberta. He knew the principals quite well and they knew his background and associations. The company was looking for financing and the witness suggested a group of eight people who ultimately gave a firm commitment to acquire 200,000 shares of Black Bay Uranium and took options on several hundred thousand more shares. The appellant's father was a member of the underwriting group. The appellant, through a

verbal agreement, acquired a 2 per cent interest in the underwriting. Mr. Field had a similar interest and a Mr. Piller had a 1 per cent interest. Both the appellant and Mr. Field, in 1956, disposed of their interest at a profit, which led to an assessment in 1956 which the appellant raised as a subsidiary submission in paragraph 5 of his notice of appeal.

For reasons which appear later, I consider it unnecessary to make any further reference to the 1956 assessment or to the evidence adduced concerning it, which was admitted subject to objection of counsel for the respondent.

Now with respect to the 1958 loss, according to the testimony of the appellant it was incurred through his participation in an underwriting and stock promotion venture which proved unsuccessful and gave rise to an agreement dated July 3, 1958, which was amended by a further agreement of July 7, 1958, therein described as "the Underwriting and Drilling Agreement" between a company originally known as York Oils Limited (NPL), the name of which was later changed to New York Oils Ltd., of the First Part (sometimes hereinafter referred to as "York" or "the Company"), and a group which the appellant gathered together consisting of himself and fifteen other persons, of the Second Part, and therein called "the Participants".

By consent, copies of the aforesaid agreements, in lieu of the originals, were filed as Exhibits 3 and 4, and as the terms and conditions thereof are not disputed and the verbal testimony of the appellant deals with the circumstances which gave rise to them, I think the following summary will sufficiently describe their purport.

The first agreement (Ex. 3) between York, of the First Part, and the group composed of the appellant and the fifteen other participants, of the Second Part, contained, *inter alia*, the following declarations:

York is a body corporate, incorporated under the laws of the Province of British Columbia, with authorized capital of Three Million (3,000,000) shares without nominal or par value of which, as of the date hereof, approximately One Million Five Hundred Thousand (1,500,000) shares have been issued and are outstanding; and

pursuant to the terms of an Agreement dated the 17th day of January, A.D. 1958 between Canadian Superior Oil of California Ltd., of the 1st part and R. Adair Oil Management Ltd., (hereinafter called "Adair") of the 2nd part (hereinafter called "the Canadian Superior Agreement"), Adair

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acquired an undivided interest in certain petroleum and natural gas rights in the Province of Alberta, upon the terms and conditions in the said Agreement contained; and

by Agreements dated the 21st day of January, A.D. 1958 between Adair of the one part and certain of the Participants and York of the other part (hereinafter called "the Adair Agreement"), certain of the Participants together with York acquired the interest of Adair in the Canadian Superior Agreement; and

pursuant to the terms of the Canadian Superior Agreement a well was drilled by certain of the Participants together with York upon the lands described in the Canadian Superior Agreement, which well is productive of petroleum and natural gas; and

some of the Participants together with York have agreed to drill two further wells upon the Canadian Superior lands; and

York desires to acquire the interest of the Participants in the Canadian Superior Agreement subject to the terms and conditions of the Adair Agreement, and has agreed to issue certain of its capital stock as consideration therefor; and

certain of the Participants together with York acquired a petroleum and natural gas Reservation No. 368 and York is desirous of acquiring the interest of such other Participants in such reservation, and has agreed to issue certain of its capital stock as consideration therefor; and

to implement this Agreement, York will be required to revise its capital structure by the consolidation of each ten (10) existing shares for one (1) new share and by the creation of additional common shares ranking pari passu with the existing shares, which shares after such consolidation are hereinafter referred to as "the new shares";

NOW THEREFORE THIS MEMORANDUM WITNESSETH as follows:

1. In consideration of the issue and allotment to the Participants and/or their nominees of Nine Hundred Seventy-Two Thousand, Eight Hundred Eighty-Seven (972,887) fully paid and non-assessable shares in the capital stock of York as constituted after the reorganization of York, at the time, in the manner, and upon the conditions hereinafter contained, the Participants do hereby assign, transfer and convey unto York all of their right, title, estate and interest in and to the said drilling reservation No. 368, and in and to the said Canadian Superior Agreement.

In further consideration of the anticipated allotment of the aforesaid new shares totalling 972,887, the participants agreed to drill two additional wells on the aforesaid petroleum and natural gas properties, and the Company agreed to pay a part of the cost of the said drilling.

A few days after Exhibit 3 had been signed, in a certain respect it was found to be faulty, and as appears by Exhibit 4 (which is short), Exhibit 3, while otherwise remaining the same, was amended to read in part as follows:

Exhibit 4

WHEREAS the parties hereto entered into an Agreement dated the 3rd day of July 1958, hereinafter called "the Underwriting and Drilling Agreement", whereby the Participants assigned certain petroleum and natural gas rights to York and agreed to drill certain wells as in the Agreement more particularly provided;

AND WHEREAS it was not realized by the Participants at the time the Agreement was entered into that they would, in effect, be assuming the responsibility for drilling oil wells on lands in which they had no legal or beneficial interest, and it was not the intent of the Participants to place themselves in such a position, and

WHEREAS in effect York was in any event to drill such wells in accordance with the terms of the said Agreement;

NOW THEREFORE THIS MEMORANDUM WITNESSETH and the parties hereto mutually covenant and agree to and with each other as follows:

1. The participants agree to pay to York forthwith upon the execution hereof the sum of ONE HUNDRED AND SEVENTY-TWO THOUSAND ($172,000) DOLLARS in consideration for which York shall allot to the participants or their nominees in such denominations as the participants may direct Four Hundred and Seventy-Seven Thousand Two Hundred and One (477,201) fully paid and non-assessable shares in the capital stock of York as constituted after the reorganization of York as provided for in the said Agreement.

2. In consideration of the issue and allotment to the participants and /or their nominees 373,541 fully paid non-assessable shares in the capital stock of York as constituted after the reorganization of York the participants do hereby assign, transfer and convey unto York all of their right, title, estate and interest in and to the said Canadian Superior Agreement subject only to terms of the Adair Agreement and also the interest of the participants in the East Innisfail Trust Account with the Canada Trust Company, Calgary, Alberta, and in and to all wells heretofore drilled thereon and all equipment used in connection therewith and in all production obtainable therefrom.

3. In consideration of the issue and allotment to the participants and/or their nominees of 122,145 fully paid and non-assessable shares in capital stock of York as constituted after the reorganization of York the participants hereby assign, transfer and convey unto York all of their right, title, estate and interest in and to the said Drilling reservation No. 368.

IN WITNESS WHEREOF these presents have been duly executed as of the day and year first above written.

In due course, the revision of the capital structure of the Company was effected and the above-mentioned shares were issued to the participants or their nominees in accordance with their respective interests.

The appellant, as a participant, received the following twofold interest in the aforesaid block of shares: (1) in his own right alone, an interest exceeding 25% which entitled him to about 250,000; (2) an equal share with G. C. Field, who was then his legal adviser, in a further 5 per cent share interest which was allotted to Smith-Field Title Service Limited, acting as agent for the appellant and Mr. Field.

The 1958 case is concerned only with the appellant's loss arising out of his share in the said 5 per cent interest which,

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in round figures, amounted to 22,000 shares for which he had paid about $9,000 and which, as later explained, he sold for less than $2,000, resulting in a loss of about $7,000.

This is confirmed, since in the Minister's reply it is stated that in assessing the appellant as he did he acted, *inter alia*, upon the following assumptions: that pursuant to the said agreement of July 7, 1958, New York Oils Ltd. allotted to Smith-Field Title Service Ltd. 45,759 shares in the capital stock of New York Oils Limited (NPL) in consideration of the payment of $17,433.41; that the said shares were sold for $3,542.40 resulting in a loss of $13,891.01; that Smith-Field Title Service's share, or alternatively the appellant's share, of the said loss was $6,945.50; that the said loss was a loss of capital.

In respect of the aforesaid case of York the appellant testified as follows:

In 1957, when he became interested in it it was "inactive and just about broke"; it was, however, listed on the Canadian Stock Exchange. The witness conceived a plan to reorganize the Company and he assembled a group consisting of himself and fifteen others to participate with him in doing so (See Exhibits 3 and 4). The share structure of the Company was to be revised by issuing one new share for each ten old shares, as appears more particularly in paragraph No. 6 of Exhibit 3, which reads as follows:

> 6. York covenants that it shall forthwith proceed to convene a meeting of its shareholders for the purposes of considering special resolutions of the Company.
>
> (*a*) to consolidate its presently authorized capital on the basis of one (1) new share for each ten (10) shares presently authorized.
>
> (*b*) to increase its authorized capital by the creation of Two Million Seven Hundred Thousand (2,700,000) shares to allow York to carry out its obligations hereunder, such new shares to rank pari passu in all respects with the existing shares.

The group agreed to finance the Company through underwriting or subscribing for approximately One Million (972,887) new shares, to be issued following recapitalization. In the meantime, the group provided the necessary means to embark the Company on a new drilling and exploration venture. The appellant hired a local oilman to inspect a certain area which he thought had high prospects and the latter negotiated a farm-out agreement, on behalf of New York Oils, which is referred to in Exhibit 4 as "Drilling Reservation No. 368."

As appears by agreements Exhibits 3 and 4 and the appellant's testimony, this group guaranteed the drilling performance of York by advancing over $370,000 in money or money's worth to Canada Trust Company, which amount the Company expended as bills were rendered in advance of receipt of the one million new shares of York to be issued as soon as the Company would be in a position to deliver them. In speaking of the disposition that was to be made of the said shares the appellant stated:

A. The group intended to resell the shares as quickly as possible at a profit and if it deemed advisable at that time to acquire additional shares under option, to further enrich the company's treasury.

Q. What share did you have in this group?

A. I participated in the group in two ways. In one way in a partnership with Mr. Field. I personally had about two and a half percent. In the other way it was one hundred percent my own. I had between twenty-five and thirty percent. I was the largest individual member of the group.

In respect of the 5 per cent held by the appellant and Mr. Field, agreements Exhibits 3 and 4 were signed by Field-Title Service Limited as their respective agent under a power-of-attorney which was filed as Exhibit 2. Speaking of the fourteen other participants, the witness stated: "I had this group in the palm of my hand and they each signed a power-of-attorney in my favour." Three samples which were regarded as typical were filed by consent as Exhibit 5.

When asked if he took any steps to promote the shares of the Company, the witness replied that he resorted to the tried and tested pattern of all people that promote shares. He tried to arrange dramatic news releases concerning the programs that they were carrying out. He tried to stir the fancy of brokers with the great program he had under way and told practically every one he met to buy the shares. He, himself, bought and sold between 50,000 and 60,000 shares on the market in the course of the drilling program, trying to create activity in the shares.

The Company, the witness said, proceeded to drill two more wells, one of which was a very marginal one and, in fact, perhaps should not have been completed as such (gas well) and the other was drilled as a dry hole, offsetting the company's initial discovery well.

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Owing to the fact that York did not encounter the flush type of production anticipated, it was difficult to create or sustain any interest in the York shares; as a result, by the end of the year 1958 the price had sagged.

The witness further stated that he sold the shares he had purchased jointly with Mr. Field at the end of that year and that by the end of 1963 he had disposed of all the 250,000 shares he had acquired in his own right.

Mr. G. C. Field was heard and corroborated the evidence of the appellant.

I might add that whereas, in so far as actual subscribing to or underwriting the new shares of York, his participation was relatively little, as it consisted of less than $9,000, for which he received about 23,000 shares, in respect of promotional activities, the appellant was almost a factotum, which explains why he was allotted a further 250,000 shares.

There is no doubt in my mind—and I so hold—that the testimony of the appellant, which is supported by his background, by the documentary evidence and in many important respects by the testimony of Mr. G. C. Field, clearly establishes that at all material times the York transactions bear the unmistakable earmarks of an underwriting and promotional venture and that the loss of $6,945.50 was a business loss and accordingly deductible.

I will now consider the second case relating to the appellant's income tax return and assessment for 1960.

The $20,000 loss claimed by the appellant arose as the result of a tripartite agreement dated March 15, 1960 (Ex. 6), entered into by Joanne Holdings Limited, of the First Part (hereinafter referred to as "Joanne") and Messrs. Sullivan, Burt, Glick and Manley, of the Second Part (hereinafter referred to as "the creditors"), and the appellant, of the Third Part (hereinafter referred to as "the optionee").

The said agreement contains, *inter alia*, the following declarations:

> The authorized stock of Black Bay Uranium Limited (a company incorporated under the laws of the province of Alberta hereinafter referred to as Black Bay) consisted of 3,000,000 shares of no par value whereof 2,897,171 had been issued as fully paid up and listed for trading on the Toronto Stock Exchange and Joanne is the owner of 800,000 of the said issued shares; Black Bay is indebted to the creditors in the sum of

$175,366.47, evidenced by a promissory note made in favour of Chimo Gold Mines Limited and endorsed by the latter without recourse to the creditors; Joanne and the creditors (subject to conditions later mentioned) have jointly agreed to grant to the optionee the sole and exclusive right or option to purchase the said 800,000 shares of Black Bay and the said debt of $175,366. for and in consideration of the sum of $165,000, apportioned as follows: $50,000 as the price of the debt and $115,000 as the price of the shares. In order to keep the option in good standing, the optionee is required to pay the sum of $10,000 contemporaneously with the signing and delivering of the option and, not later than April 26, 1960, to pay the balance of $155,000, the said payments to be made by certified cheques.

The down payment of $10,000 was to be apportioned thus: $9,000 to the creditors and $1,000 to Joanne and the final payment of $155,000 on July 26, 1960, to be divided as follows: $41,000 to the creditors and $114,000 to Joanne.

It is to be noted that among the covenants given by Joanne to the optionee was one which declared that

the contract between Eldorado Mining and Refining Company and Black Bay Uranium Limited re the purchase and sale of uranium ore is presently in good standing.

As appears more fully by an agreement dated July 26, 1960 (Ex. 7), between the same parties, Joanne and the creditors consented to extend the life of the agreement of March 15, 1960, to October 26, 1960, provided the optionee pays immediately the sum of $10,000 and a further sum of $10,000 on July 26, 1960. The aforesaid agreement (Ex. 7) also included the following stipulations, which, I think, are worthy of mention:

2. It is specifically understood and agreed that while this is an option only and the Optionee is not obligated to make any of the payments above-mentioned, failure on his part to do so as and when same are due will automatically terminate the option hereby extended.

3. It is understood and agreed that each of the $10,000 payments referred to in paragraph 1 hereof shall be apportioned between Joanne and the Creditors as follows:—

9/10ths for Joanne; and

1/10th for the Creditors.

4. It is understood and agreed that while the said option is in good standing, Joanne and the creditors shall have the right if they so desire to offer the optioned shares for sale through the Toronto Stock Exchange under the following conditions:—

(*a*) if the bid price on the Toronto Stock Exchange for shares of Black Bay is 20¢ or more they shall have the right to sell up to 100,000 shares;

(*b*) if the bid price on the Toronto Stock Exchange for shares of Black Bay is 25¢ or more they shall have the right to sell up to an additional 200,000 shares;

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(c) if the bid price on the Toronto Stock Exchange for shares of Black Bay is 30¢ or more they shall have the right to sell up to an additional 200,000 shares;

(d) if the bid price on the Toronto Stock Exchange for shares of Black Bay is 35¢ or more they shall have the right to sell sufficient additional shares to fully satisfy the option price.

The proceeds from any such sales to apply on account of the option price.

It is further understood and agreed that while the option is in good standing the Optionee shall have the right to take down optioned shares of Black Bay at 15¢ per share, but it is specifically understood and agreed that the Optionee shall not be entitled to optioned shares for the two payments of $10,000 each referred to in paragraph 1 hereof.

It is specifically understood and agreed that if and when the Optionee becomes entitled to delivery of the Promissory Note for $175,366.47 made by Black Bay to Chimo Gold Mines Limited and endorsed without recourse to the Creditors, that the Creditors will endorse the said Note without recourse to the Optionee.

The appellant testified that for some considerable time prior to 1960 Black Bay mining operations had been closed down although a great deal of money had been spent on the installation of plant and equipment, so much so that the Company had overspent its treasury by $175,000.

Late in 1959 however, a Toronto group had furnished sufficient funds to the Company to allow it to resume operations, in consideration whereof Joanne, whose head office was in the City of Toronto, acquired a controlling interest in Black Bay consisting of 800,000 shares.

The witness declared that he thought he saw "a magnificent opportunity to make some money." He contacted Joanne and the creditors and their negotiations resulted in the signing of an option agreement (Ex. 6) and an extension thereof, as appears by Exhibit 7.

As appears from the aforesaid agreements, the taxpayer's option entitled him to acquire the Company's note which had a face value of over $175,000 for $50,000 or the equivalent of less than 30¢ on the dollar and 800,000 shares for $115,000, which was less than 15¢ per share.

The appellant, apparently, had two schemes in mind which could be combined for raising sufficient money to pay the balance of the option price and at the same time yield him a handsome profit. He stated that Black Bay was producing $36,000 worth of ore a month, and he anticipated that the Company, out of ore production, would be able to redeem its promissory note of $175,000 at its face value and

that the difference between this and the option price of $50,000 would yield a profit sufficient to enable him to pay the option price of the 800,000 shares and thus obtain them for nothing. As appears from the following extract of his evidence, he also planned to raise the market value of the stock by buying and selling Black Bay shares on the Toronto Stock Exchange:

Q. Now, when you entered into this transaction you mentioned that your plan was to promote the stock?
A. Well, it was that, certainly.

Q. Why would it have been necessary to promote the stock?
A. Well, any time you go into a deal in the market in size it is necessary to promote the shares and use all the facilities at your command to do so.

Q. How did you contemplate doing this?
A. I contemplated doing it in exactly the same way that I did it, and again, if I may say, in a tried and tested pattern of promoters. I publicized dramatically, I took active part in the management of the company and I tried to regulate or at least activate the trading in the shares. I took people into the property as I had done earlier. I did everything I could.

Q. Did you enter into any market transactions?
A. I traded the shares actively during the process of four or five months that my option was valid and I was also a director of the company during that time.

Q. With what purpose did you buy and sell the stock?
A. To activate trading and assist in promotion.

Q. Did you become a director of the company?
A. I was a director during the period that my options were in effect which was from March to July of 1960.

There is little doubt that, disregarding the anticipated payments on the note out of production, if the appellant's stock market manipulations were fully successful, the profit thus realized could be more than sufficient to pay the entire option price of $165,000 and leave the appellant with the promissory note—for what it was worth—as a clear profit. In this connection, it should be recalled that, as appears by paragraph 4 of agreement Exhibit 7 *supra*, if the appellant succeeded in raising the bid price on the Stock Exchange to 20¢ per share Joanne and the creditors would have been entitled to sell 100,000 of the option shares and if it advanced to over 25¢ to sell 200,000 more, if it exceeded 30¢ to sell another 200,000 and, if the price reached 35¢ or more to sell sufficient of the 300,000 remaining shares to fully satisfy the option price.

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Kearney J.

The effect of the contemplated transactions reduced to figures is as follows:

Total shares sold		Price	Amount realized
100,000	@	.20	$20,000
200,000	@	.25	50,000
200,000	@	.30	60,000
say 100,000	@	.35	35,000
600,000			$165,000
Balance of shares unsold 200,000			Balance due on option Nil

The appellant testified that some time in July 1960 Eldorado Mining and Refining Limited which was milling and buying Black Bay ore discovered that it contained impurities which contaminated ore from other mines with which it was mixed during the process of refinement. It would have cost Eldorado $200,000 or $300,000 to install special machinery to refine the Black Bay ore, which it declined to do, and it cancelled the existing contract with Black Bay. This caused the witness' plans to completely fall apart because the Company could no longer produce or gain any revenue. As a result, the anticipated payments from mined ore did not materialize and his efforts to make a market for Black Bay shares through trading in them on the Toronto Stock Exchange proved fruitless. He therefore allowed the option to lapse and forfeited the aforesaid $20,000 which he had paid on account.

As appears in his cross-examination—which was very brief—the appellant was asked:

Q. And what happened was that due to the unfortunate impurities that were contained in the ore by the time July came, the stock was of no value, or at least you felt it was of no value?

A. Well, my position wasn't one that I could make money on and I elected not to call any more money into the venture. The stock still had some value and to this day has a value. All stocks have a value and are made to be sold.

Q. That surprises me, sir. Is it trading today?

A. Yes, sir, it is and it is listed.

Q. Can you give me some idea of the price fluctuation since you dropped this option?

A. It has probably been as low as 6 cents and as high as 52 cents.

In the absence of any evidence to the contrary it would appear from the foregoing that, if the appellant had been willing and able to maintain his option in good standing, he would conceivably have realized a handsome profit. If he

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had done so, I would not hesitate in declaring it taxable. By the same token, I consider that since he incurred a loss it is a loss from a business within the extended meaning of that term under s. 139(1) (*e*) of the Act.

In view of the conclusions I have reached I see no necessity to refer to the secondary issue raised by the appellant pertaining to a previous assessment for his taxation year 1956 or any evidence led concerning it, and as Mr. Fulton's evidence only dealt with the above-mentioned assessment, it does not call for comment.

For the foregoing reasons I find that the appellant was justified in deducting from his otherwise taxable income for the years 1958 and 1960 the amounts of $6,945.50 and $20,000 respectively.

The appeal is maintained with costs and the record is referred back to the Minister for reassessment accordingly.

Toronto
1965

June 23

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

EGIDIO PEVATO ..... RESPONDENT.

Income Tax—Federal—Income Tax Act, R.S.C. 1952, c. 148, s. 20(1), (2)—Income Tax Regulations s. 1101(1)—Capital cost allowance recapture followed in same year by acquisition of other property—Whether new property imputable to "same business" so as to avoid recapture.

After the sale of his interest in the Parklane Hotel, the Respondent acquired the Canadiana Motel which the Minister considered a different business for the purpose of s. 1101(1) of the Regulations.

In the Minister's view the capital cost allowance recaptured on the sale of the first property would not be affected by the subsequent acquisition later in the same year whereas in the respondent's view both properties related to the same business and were accordingly in the same class. So that the amount otherwise recapturable would be applied in reduction of the undepreciated capital cost of the new property.

Held: That the Respondent, at all material times, was engaged in the same business of an innkeeper or "motel-keeper", which was in essence the business of providing accommodation to guests and it was irrelevant.

2. That the facilities in one premise were different from those in the other.

3. That in the Parklane Hotel his interest was as a member of a partnership whereas in the Canadiana Motel it was that of a single proprietor.

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4. That the physical plant of the Canadiana Motel was not completed until after the disposition of the physical plant of the Parklane Hotel.

5. That there was a smaller number or different category of employees at the hotel than at the motel.

6 That in view of this finding it was unnecessary to consider whether section 1101(1) of the Regulations was *ultra vires*.

7. That the appeal be dismissed.

APPEAL from a decision of the Tax Appeal Board.

C. R. O. Munro, Q.C. and *R. W. Law* for appellant.

Donald J. Johnston, for respondent.

GIBSON J.:—I am of the opinion that this case can be decided on the question of fact raised in the action. The question of fact, in brief, is whether the respondent, Egidio Pevato, was engaged in the same business at all material times within the meaning of s. 1101(1) of the regulations made under the *Income Tax Act* when he sold his interest in the Parklane Hotel at Sudbury, Ontario, and acquired the Canadiana Motel, also at Sudbury.

In my opinion the business of the respondent was that of an innkeeper or hotel or motel keeper at all material times, which is in essence the business of providing accommodation to guests. In my opinion it is irrelevant whether the facilities as opposed to the room accommodation in the Parklane Hotel and those in the Canadiana Motel are different; that the Parklane Hotel was a partnership, whereas the interest of the respondent in the Canadiana Motel is that of a single proprietor; that the physical plant of the Canadiana Motel was not completed until after the disposition by the respondent of the physical plant of the Parklane Hotel, and that there was a smaller number or different category of employees at the Parklane Hotel than there is or was at any material time at the Canadiana Motel.

In view of this finding, I do not propose to deal with the question of law submitted as to whether or not s. 1101 (1) of the regulations made under the *Income Tax Act* is *intra vires* of the Governor in Council.

In the result, therefore, the appeal is dismissed, with costs.

BETWEEN:

Toronto
1965
June 21

JAY-ZEE FOOD PRODUCTS LTD. .....APPELLANT;

AND

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE *et al.* ..... RESPONDENTS.

Sales Tax—Federal—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30, 32—Schedule III—Interpretation Act, R.S.C. 1952, c. 58, s. 15—Whether re-constituted orange juice "exempt tax as" fruit juice consisting of at least 85% of the pure juice of the fruit.

The issue was whether re-constituted orange juice, made by extracting water and other substances in Florida and shipping the concentrate in Ontario where water was added to it, was exempt from tax under Schedule III to the *Excise Tax Act*.

It was common ground that a rival product, canned single strength in Florida from which the water was not removed, was exempt.

Held: That a taxing statute should be interpreted, wherever possible, so as to avoid any anomaly or absurdity such as that distinguishing the two products referred to, and that if a statute admitted of two interpretations the one producing the more reasonable result should be preferred.

2. That in respect to a taxing statute, it was the duty of the Court to give effect to the intention of the legislature as that intention was to be gathered from the language employed, leaving regard to the context.

3. That "pure" was not a synonym for "fresh" or "natural" but implied freedom from defilement, corruption or impairment.

4. That the product in question was "pure juice of the fruit" within the meaning of the words of Schedule III of the *Excise Tax Act* and therefore not subject to the tax.

5. That the Appeal is allowed with costs.

APPEAL from a declaration of the Tariff Board.

John J. Robinette, Q.C. for appellant.

D. S. Maxwell, Q.C. and *D. H. Aylen* for respondent.

GIBSON J.:—This is an appeal from a declaration of the Tariff Board dated November 20, 1964, taken by the appellant, Jay-Zee Food Products Limited, a person who entered an appearance pursuant to s. 57 of the *Excise Tax Act* and who was heard by the Tariff Board at its hearing on the application of the respondent Edgewater Canning Company. Leave to appeal to this Court was granted by Order of the President dated the 18th day of December, 1964.

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JAY-ZEE FOOD PRODUCTS LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE

Gibson J.

Pursuant to that Order leave to appeal was granted upon the following question of law:

"Did the Tariff Board, having held as a matter of fact

(*a*) that re-constituted orange juice is a product made by the addition to concentrated orange juice of water and certain other substances lost in the process of concentration, and

(*b*) that re-constituted orange juice is a product more than 75% of which consists of the water so added to the concentrated orange juice,

err as a matter of law in holding that re-constituted orange juice is not included in the words 'fruit juice consisting of at least 85% of the pure juice of the fruit' within the meaning of those words in Schedule III of the *Excise Tax Act*?"

The issue in this appeal, therefore, is whether the product of the respondent Edgewater Canning Company, which is called "Saico", one tin of which was filed on the hearing before the Tariff Board as Exhibit A-1, is a product within the exemption from sales tax prescribed in those words posed in the question of law by the Order of this Court.

"Saico" is a reconstituted orange juice made by extracting the water and certain other substances in Florida and shipping the concentrate to Picton, Ontario, where water is added to it. The problem on this appeal is whether this product can be categorized as coming within the words of Schedule III of the *Excise Tax Act* as "fruit juice consisting of at least 85 per cent of the pure juice of the fruit".

It is common ground, and it is mentioned in the reasons of the Tariff Board, that the product known as "Horsey Orange Juice", a tin of which was produced as Exhibit A-5 on the hearing before the Board, is exempt from sales tax. This product is made in Florida and is a tinned single-strength orange juice which does not contain more than 15 per cent of materials or properties that do not come from the natural or fresh orange juice.

There is thus an anomaly or absurdity in respect to these two products. One is declared to be exempt from sales tax, while the other, which is practically the equivalent from the pure food point of view, practically the same product, is

declared to be subject to the tax. If the Court on a true interpretation of the statute can avoid such a result it should do so.

The provisions of s. 15 of the *Interpretation Act,* R.S.C. 1952, c. 58, apply to a taxing statute, with which we are concerned here, as the Supreme Court of Canada held in *The King v. Algoma Central Railway Company*[1] and in *Cartwright v. City of Toronto*[2]. The Court of Appeal in England also, in *Attorney General v. Carlton*[3] said that in respect to a taxing statute, as in the case of any other statute, the duty of the Court is to give effect to the intention of the legislature as that intention is to be gathered from the language employed, having regard to the context in connection with which it was employed. And in *City of Victoria v. The Bishop of Vancouver*[4] which was a case dealing with an exemption from municipal taxes in British Columbia, the Privy Council held that if the words of a statute admit of two interpretations, and if one interpretation leads to an absurdity and the other leads to a reasonable result, the latter is to be preferred.

In my opinion, in the case before the Court the key word in Schedule III of the *Excise Tax Act* is "pure" and it is not a synonym for "fresh" or "natural". This view is reinforced by a reading of the very clause in which the word appears, which provides that materials other than the natural or fresh juice of the fruit—in this instance, the orange—may be added, to the extent of 15 per cent, and the resulting product will be within the exempting provision. The removal of the water in Florida and the addition of the water in the Province of Ontario does not make the composition unpure. I think the word "pure" in Schedule III of the Act has the connotation that the resulting product must not be defiled, corrupted or impaired, and the addition of the water does not defile, corrupt or impair the reconstituted orange juice which is the subject of this appeal.

In my opinion, therefore, this product "Saico" is pure juice of the fruit within the meaning of Schedule III of the *Excise Tax Act*. In the result the question of law posed by the Order of this Court must be answered in the affirmative. The appeal, therefore, is allowed, with costs.

[1] (1902) 32 S.C.R. 277 at 283.
[2] (1914) 50 S.C.R. 215 at 219.
[3] (1889) 2 Q.B. 158 at 164.
[4] [1921] 2 A.C. 384 at 388.

Toronto 1965 / Sept. 20 / Ottawa Sept. 30

BETWEEN:

GUNNAR MINING LTD. .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Income Tax—Federal—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(c), 12(1)(c), 83(5)—Income Tax Regulations—Section 1201(2), (4)(d)—Whether interest paid on debentures wholly attributable to income derived from the operation of a mine during exempt period or attributable in whole or part to interest income derived from short-term investment of surplus funds—Depletion—Whether interest paid wholly deductible from profits reasonably attributable to the production of minerals or imputable in part to short-term investment income.

The appellant is a company incorporated under the laws of the Province of Ontario. It established a business in Saskatchewan consisting of mining and milling uranium ores from mineral claims, producing uranium concentrates and selling the same.

The appellant had borrowed $19,500,000 by way of a debenture issue and had used the money to bring into operation its uranium mining and milling activities.

Under section 83(5) the income derived from the operation of its mine for the 36 months period ending February 28, 1959 was not included in computing the appellant's income for tax purposes.

The matter in issue was whether the debenture interest paid should be considered a deduction in computing the exempt income or, as claimed by the appellant, a deduction in whole or in part as a cost in computing its non-exempt income, namely, interest earned from the short-term investment of surplus funds prior to the retirement of the debentures.

Held: That none of the interest paid on the debenture debt was a cost of earning the interest income from the short-term investments.

2. That none of the statutory provisions relied on by the appellant was relevant.

3. That the appeal be dismissed.

APPEAL from a decision of the Tax Appeal Board.

R.M. Sedgwick, Q.C., and *J.M. Shoemaker* for appellant.

T. Z. Boles and *D. G. H. Bowman* for respondent.

GIBSON J.:—This is an appeal from the decision of the Tax Appeal Board dated September 24, 1963 in respect of assessments for income tax made against the Appellant in the sum

of $1,753,200.07 being respectively a tax in the sum of $171,271.01 levied in respect of income for the taxation year 1958, a tax in the sum of $222,252.93 levied in respect of income for the taxation year 1959 and a tax in the sum of $1,359,676.13 levied in respect of income for the taxation year 1960.

The Appellant is a company incorporated under the laws of the Province of Ontario.

The Appellant established a business in the Beaverlodge Area of Saskatchewan consisting of mining and milling uranium ores from mineral claims, producing uranium concentrates and selling the same to Eldorado Mining and Refining Limited. For the 36 month period ending February 28, 1959 the Appellant was not required to include in computing its income the "income derived from the operation of (its) mine" by reason of the provisions of s. 83 (5) of the *Income Tax Act*.

In order to bring into operation its uranium mining and milling activities, the Appellant raised $19,500,000. by way of sale to the public of debentures bearing interest at 5%. The evidence discloses that the Appellant expended all these monies prior to any relevant taxation year in respect of which this appeal is concerned.

Subsequently, namely after March 1, 1956 and during the relevant taxation years, the Appellant in its mining and milling operations earned very substantial sums of money and accumulated large profits, but instead of using these accumulated profits to pay off and extinguish all of its liabilities in respect to its debenture debt, the Appellant invested certain of the surplus funds derived from these profits in short term investments such as Dominion of Canada bonds and provincial government bonds. On balance, these short term investments did not earn 5%. The Appellant, in its interest accounting, netted the debenture interest payable on its debentures outstanding and the interest received from these short term investments. By co-relating the interest paid out and the interest received, because the interest paid out in all cases was 5% and the interest received was less than 5% it was inevitable that the net interest account was less than it otherwise would have been.

The schedule attached to this Judgment illustrates this.

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GUNNAR MINING LTD. v. MINISTER OF NATIONAL REVENUE

Gibson J.

The Appellant founded its appeal substantially on the evidence of its expert witness Mr. R. M. Parkinson, a chartered accountant of some 36 years experience.

The evidence of Mr. Parkinson in brief was that it was proper from a commercial and business point of view for the Appellant, or indeed for any business, to differentiate in its statement of income and expenditures between what he refers to as "operating items" and "non-operating items".

The figure obtained by considering only operating items, this witness said, results in arriving at a figure of "operating income". This is done by first obtaining the figure of gross sales less returns, allowances etc., and subtracting from that sum the cost of sales to arrive at a figure for gross profit. From this figure is then deducted selling expenses and general and administrative expenses from which the figure of operating income is obtained.

Then this witness said it is proper to consider the non-operating items in the business.

These non-operating items the witness said are categorized as "other income", and include interest and dividends and miscellaneous items on the receipt side and also on the disbursement side; and from which there is computed the figure of income before federal and other taxes. Then the witness said that it is proper to make a computation of federal and other taxes and subtract the figure so found from the figure of income above referred to, in order to obtain the figure of "net income" of the business for the fiscal year.

It is the submission of the Appellant that if the provisions of the *Income Tax Act* are considered in relation to this approach to the statement of income and expenditure, that the deductions from its income hereinafter referred are legally proper.

It is convenient to consider this appeal from the point of view of two periods of time, because different provisions of the *Income Tax Act* are relevant to each.

The first period may be referred to as the exempt period, that is the 36 month period ending February 28, 1959. This is the period during which the Appellant's income from the operation of its mine was exempt from taxation by reason of s. 83 (5) of the *Income Tax Act*.

The second period may be referred to as the non-exempt period by which is meant the period after the 36 month interval referred to in s. 83 (5) of the *Income Tax Act* had expired.

In respect to the first period, it is the submission of the Appellant that the income that the company received from its investments in short term securities is correctly categorized as non-exempt income and that the remaining income of the company namely, "that derived from the operation of (its) mine" was the exempt income.

The submission of the Appellant is that by reason of s. 11(1)(*c*) the Appellant was entitled to deduct interest for the purpose of computing its income from all sources and that this subsection did not require or permit the Appellant to relate separate portions of the permissible interest deduction to its various sources of income; and that the only interest deduction permitted to the Appellant during the exempt period by s. 11(1)(*c*) was to the extent that interest expense for that year "may reasonably be regarded as having been made or incurred for the purpose of gaining or producing *exempt income*" within the meaning of s. 12(1)(*c*).

The Appellant therefore submits that a determination of fact must be made as to what part of the debenture interest may reasonably be considered a cost of earning this non-exempt income; and such interest expense so found, the Appellant submits, is a permissible deduction under s. 11(1)(*c*) and is not taken away by s. 12(1)(*c*). Any method of computing the quantum of this sum, the Appellant says, is legally correct so long as it is reasonable; and it submits that netting the interest account as it did is a reasonable method. That is the submission in so far as the first period is concerned.

The second period is the non-exempt period.

The matter of trying to allocate any expense of debenture interest under s. 12(1)(*c*) is not in issue during this period because the deduction of debenture interest was allowed in full under s. 11(1)(*c*).

What is in issue during this second period is the quantum of the depletion allowance authorized by Regulation 1201(2). This regulation provides for a depletion allowance of 33⅓% of "the aggregate of...profits for the taxation

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Gibson J.

year reasonably attributable to the production of...industrial minerals...minus the aggregate amount of deduction provided by..." Regulation 1201(4)(*d*). This latter regulation is the deduction permitted under s. 11(1)(*c*) "in respect of (i) borrowed money used in connection with, or used for the purpose of acquiring property used in connection with, or (ii) an amount payable for property used in connection with...production of...industrial minerals...".

It is the submission of the Appellant that in calculating the depletion allowance under Regulation 1201(2) there must be deducted from the operating profits "reasonably attributable to the production of...industrial minerals..." only such part of the Appellant's interest expense on its debentures incurred during the taxation year as is attributable to its mining operations and not the portion of such debenture interest as is attributable to earning income on its short term investments. In other words, the Appellant submits that the historical approach to the purpose for which the original debenture debt was incurred is not the proper approach but instead the approach should be on the basis of an annual inquiry of the use any borrowed monies are being put in any taxation year and that such is a question of fact. If such borrowed monies are used to earn income from more than one source, it is the submission of the Appellant that any reasonable method of calculating the portion of interest charges applicable to each separate source of income is legally correct. The Appellant submits that netting the interest costs and interest expenses is such a reasonable method. The Appellant further says that the fact that it employed surplus monies in earning income on short term investments rather than in paying off its debenture debt or rather than leaving the money in the bank without earning interest does not destroy *pro tanto* its right to make such a deduction from the interest on its debentures from its income.

I accept Mr. Parkinson's evidence in so far as it describes a method currently recommended as good practice and employed by many accountants in determining the profit or loss of a company from its business operations including miscellaneous revenues of investments of surplus cash. His method no doubt is not only good accounting practice but

is also acceptable as a method of determining the company's income for the purpose of the *Income Tax Act* for a fiscal year (When the company is taxable on its income from all sources) in that it is not contrary to any particular statutory direction.

In the matter under appeal, however, what is being considered is not income for the year from all sources but income from a source other than the company's mining business, namely, the income from its short term investments. Therefore it becomes necessary as a matter of accounting fact to consider solely the question as to what sources particular expenses are related to, and for the purposes of the *Income Tax Act* to consider the same in relation to its relevant provisions.

It is therefore necessary firstly to resolve a question of fact.

The sole question of fact is whether or not part of the interest paid on the debenture debt of the Appellant was a cost of earning the interest income on its short term investments. In my opinion on the evidence it was not. There was nothing adduced in evidence through Mr. Parkinson or any other witness to prove this; indeed no connection between these transactions was established at all.

In view of this finding, it follows, in respect to both of the said two periods, that none of the provisions of the *Income Tax Act*, by reason of which the Appellant submits that some deduction should be allowed in computing its income, are relevant.

The appeal therefore fails and is dismissed with costs.

THIS IS THE SCHEDULE REFERRED TO IN THE JUDGMENT OF GUNNAR MINING LTD. *et al*

	5% Sinking Fund Debentures outstanding at commencement of Period	5% Sinking Fund Debentures outstanding at end of Period	$ Amount of Short Term Investments at commencement of Period	$ Amount of Short Term Investments at end of Period	Interest Expense on Debentures during Period	Interest Income on Short Term Investments during Period	Net Interest Expense* or Revenue
1958....	11,920,000	7,700,500	1,773,863	8,048,076	485,878	231,198	254,680*
First 2 Months of 1959. ..	7,700,500	3,289,000	8,048,076	15,159,485	60,151.90	68,922.28	8,770.38
Last 10 Months of 1959....	—	—	—	—	175,940	343,930	167,990
1960....	3,289,000 (By 1 Oct 60 Completely redeemed).	0	15,159,485	20,371,805	114,603	504,764	390,161

ENTRE:

LE MINISTRE DU REVENU NATIONAL ..... APPELANT;

Québec 1965 — 8 septembre — 7 décembre

ET

GÉRARD STE-MARIE ..... INTIMÉ.

Revenu—Impôt sur le revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, ch. 148, arts. 44(1), 46(4)(a), (b), (6), 63(6)(7)—Suppression de revenus taxables de la succession aux mains des bénéficiaires plus de quatre ans après la première cotisation. Présentation erronée est imputable aux bénéficiaires.

Le 26 février 1955 décédait ab intestat J. Ulysse Ste-Marie laissant sa veuve et onze enfants comme co-héritiers, dont l'intimé Gérard Ste-Marie.

Sur avis du Conseil de famille dûment homologué par la Cour Supérieure, Dame J. Ulysse Ste-Marie est nommée tutrice à la personne de Gérard Ste-Marie, encore mineur et la Société d'Administration et de Fiducie, tutrice à ses biens. En outre, «le partage des biens de la succession est différé aussi longtemps que l'épouse du de cujus vivra, que les dettes n'auront pas été intégralement payées et que le plus jeune des enfants alors vivant n'aura pas atteint sa majorité».

Trois exécuteurs fiduciaires sont nommés avec pouvoir d'administrer les biens de la succession «jusqu'à ce que le partage soit effectivement demandé et complètement exécuté».

En temps et lieu, les rapports d'impôt sur le revenu pour l'année 1956 furent préparés pour le compte de chacun des héritiers et, après signature par ceux-ci, transmis au Ministre pour cotisation.

Plus de quatre années après, le 15 août 1961, le Ministre procéda à une nouvelle cotisation, ajoutant au revenu imposable de l'intimé, pour 1956, la somme de $3,349.31, comme étant sa part de revenus supprimés par la succession au cours de sa première période fiscale d'administration.

Selon le Ministre, un relevé des livres de la succession «pour la période fiscale du 26 février 1955 au 29 février 1956», révèle des suppressions de revenus effectuées de trois façons différentes et pour les montants suivants:

a) ventes supprimées 23,702 42
b) escompte supprimé 6,668.18
c) achats et dépenses fictifs 24,892.38

Les héritiers ont signé leur déclaration d'impôt sans l'avoir cependant eux-mêmes préparée et sans avoir participé à l'administration des affaires de la succession.

Jugé: Bien que l'intimé ait signé son rapport d'impôt et la formule d'attestation solennelle en accréditant l'exactitude, aucun grief de fraude, qui suppose essentiellement une intention dolosive ou mens rea, ne peut lui être attribué, non plus qu'aux autres héritiers.

2. La condition requise par l'art. 63, sous paragraphes 6 et 7, est à l'effet que le revenu d'une fiducie ou d'une succession doit être calculé comme un revenu que les bénéficiaires sont en droit de recevoir, soit qu'ils perçoivent ce revenu ou non dans l'année. Les bénéficiaires

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sont liés par leur déclaration solennelle signée par chacun d'eux. Car, les renseignements donnés dans cette déclaration et dans tous les documents annexés sont légalement présumés, à tous égards, vrais, exacts et complets, et présenter la totalité de leurs revenus individuels.

3. Or, nul ne peut s'exonérer d'avoir souscrit une déclaration formelle sous le prétexte qu'il n'aurait pas pris connaissance de la pièce qu'il certifie sous la foi du serment.

4. Comme conséquence directe de cette infraction à la *Loi de l'impôt sur le revenu*, le droit de revision ministérielle n'est pas limité par le délai de six ans prévu au sous paragraphe (*b*) de l'art. 46(4).

5. L'amendement de 1956, reportant à quatre ans le délai prescriptif, ne prit effet que le 1er janvier 1957.

6. L'appel du Ministre est accueilli. Les moyens de défense invoqués par l'intimé sont rejetés avec dépens.

APPEL d'une décision de la Commission d'appel d'impôt sur le revenu:

Paul Boivin, c.r. pour l'appelant.

Ovide Laflamme pour l'intimé.

DUMOULIN J.:—Le Ministre du Revenu national interjette appel devant cette Cour d'une décision de la Commission d'appel de l'impôt, datée le 13 octobre 1964[1], maintenant un pourvoi de l'intimé relativement aux cotisations pour l'année d'imposition 1956.

Dès le début de l'audition, le 8 septembre 1965, les parties déclarèrent que la preuve établie dans cet appel et les moyens de droit invoqués seraient les mêmes, *mutatis mutandis*, dans tous les autres appels et que, conséquemment, le jugement à intervenir en l'espèce s'appliquerait par parité de motifs dans les autres cas, soit aux instances portant les numéros B-282 à B-291 inclusivement des registres de cette Cour.

Passons aux faits.

Le 26 février 1955, décédait J. Ulysse Ste-Marie, en son vivant un industriel dont le principal siège d'affaires était Beauport, en banlieue de Québec.

L'intimé, Gérard Ste-Marie, est l'un des onze enfants de feu J. Ulysse Ste-Marie, tous co-héritiers avec leur mère survivante, Dame Marie-Irène Sauriol.

Par suite d'une omission malheureusement trop fréquente, feu Ste-Marie ne laissait pas de dispositions testamentaires. Le contrat de mariage intervenu entre les époux Ste-Marie avait stipulé la séparation de biens entre les futurs conjoints.

[1] 36 Tax A.B.C. 129.

Les intéressés eurent recours à l'Assemblée législative de Québec, qui, le 2 février 1956, adoptait le Bill Privé N° 178 intitulé: «Loi concernant la succession de J. Ulysse Ste-Marie», mesure sanctionnée le 23 février de la même année. Le préambule de ce bill donne acte de ce que:

Dame Marie-Irène (Reina) Sauriol a été, sur avis du conseil de famille dûment homologué par la Cour supérieure du district de Québec, nommée tutrice à la personne de Jean-Charles et Gérard Ste-Marie, les deux héritiers encore mineurs dudit J. Ulysse Ste-Marie, la Société d'Administration et de Fiducie tutrice à leurs biens et J. Edouard Gagnon leur subrogé-tuteur.

L'article premier statue que:

Le partage des biens de la succession de J. Ulysse Ste-Marie est par les présentes différé aussi longtemps que son épouse vivra, que les dettes existant lors du décès dudit J. Ulysse Ste-Marie n'auront pas été intégralement payées et que le plus jeune de ses enfants alors vivants, issus de son mariage avec ladite dame Marie-Irène (Reina) Sauriol n'aura pas atteint sa majorité.

Toutefois, après le paiement des dettes et la majorité du plus jeune des enfants alors vivants, le partage pourra être fait si ladite dame Marie-Irène (Reina) Sauriol y donne son consentement par acte notarié.

Au cas de décès de dame Marie-Irène (Reina) Sauriol avant la majorité du plus jeune des enfants vivants et après le paiement des dettes, le partage sera retardé jusqu'à cette majorité.

L'article 3 décrète ce qui suit:

3. Dame Marie-Irène (Reina) Sauriol veuve de J. Ulysse Ste-Marie et monsieur Joseph-Edouard Gagnon ainsi que la Société d'Administration et de Fiducie, corporation dûment constituée et autorisée à agir comme exécuteur-fiduciaire, sont par les présentes nommés à toutes fins que de droit exécuteurs-fiduciaires des biens composant la succession dudit J. Ulysse Ste-Marie, leurs pouvoirs comme tels devant durer jusqu'à ce que le terme ci-dessus fixé pour la fin de l'indivision et le partage soit arrivé, sans préjudice toutefois du droit et de la capacité desdits exécuteurs de continuer d'agir comme tels avec les mêmes pouvoirs et les mêmes obligations, jusqu'à ce que le partage soit effectivement demandé et complètement exécuté.

Peu après le décès de feu J. Ulysse Ste-Marie, la Banque Provinciale, dont il était l'un des clients, désigna un contrôleur chargé de surveiller ses intérêts dans la liquidation prochaine des affaires du défunt.

La première période fiscale de liquidation successorale s'échelonna du 26 février 1955 au 29 février 1956, comme il appert à l'index des états financiers produit au dossier de l'appel.

Le Ministre du Revenu national allègue à l'article 6 de son avis d'appel qu'un examen des livres de la succession

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J. Ulysse Ste-Marie relatif à l'année précitée «révèle des suppressions de revenus effectuées de trois façons différentes et pour les montants suivants:

a) ventes supprimées $23,702.42
b) escompte supprimé 6,668.18
c) achats et dépenses fictifs .....24,892.38»

Le 26 avril 1957, l'intimé produisit une déclaration d'impôt rapportant un revenu imposable de $6,122.79. Il est à propos de consigner le fait que ce document fut signé et attesté par J. Edouard Gagnon, en sa qualité de subrogé-tuteur aux biens de Gérard Ste-Marie, alors âgé de moins de 18 ans. Il y a lieu aussi de présumer que cette déclaration d'impôt ne fut pas préparée par Gérard Ste-Marie. Par ailleurs, Gérard Ste-Marie avait atteint sa majorité lorsque, le 15 août 1961, l'appelant, dans une nouvelle cotisation, ajoutait au revenu imposable de l'intimé, pour 1956, la somme de $3,349.31 «comme étant sa part de revenus supprimés par la succession J. Ulysse Ste-Marie au cours de sa première période fiscale..» (avis d'appel, art. 8).

Il est encore allégué par l'appelant que l'intimé, héritier *ab intestat* de feu J. Ulysse Ste-Marie, «...s'est rendu coupable de mauvaise représentation et fraude en faisant défaut de déclarer dans son rapport pour l'année d'imposition 1956 les revenus supprimés par la succession J. Ulysse Ste-Marie et appartenant à ladite période» (avis d'appel, art. 11).

Les dispositions statutaires invoquées à l'appui de l'appel sont l'article 46(4)(*a*) et (6) et l'article 63(6) et (7) et les motifs, comme susdit, sont que «l'intimé s'est rendu coupable de mauvaise représentation ou fraude au sens de l'alinéa (*a*) du paragraphe (4) de l'article 46...».

Le plaidoyer de défense de l'intimé oppose à l'appel les moyens découlant de ce que les exécuteurs fiduciaires de la succession eurent la saisine de tous les biens meubles et immeubles pour toutes fins juridiques et autres durant 1955-1956; que l'entière administration de la succession incomba à la Société d'Administration et de Fiducie et à la Banque Provinciale du Canada; que ni la succession ni les co-héritiers, dont l'intimé, ne bénéficièrent «d'aucune sorte de reddition de compte de la part des administrateurs de la succession».

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Gérard Ste-Marie soumet enfin, à l'instar de tous les autres intimés, qu'il n'a jamais reçu ou touché aucun revenu de la succession paternelle pendant l'année en question «pas même ceux réclamés dans ses rapports d'impôt préparés par les administrateurs de la succession».

C'est ainsi que s'engage le débat.

Je disposerai d'abord du second motif invoqué à l'art. 13 de l'avis d'appel à l'effet que l'intimé se serait rendu coupable de fraude dans sa déclaration d'impôt pour 1956, et, qu'il me soit permis de le répéter, mes remarques sur ce point s'appliqueront aussi aux co-héritiers.

Que des actes frauduleux et mensongers afin d'échapper aux prescriptions de la *Loi de l'impôt* aient été commis par un certain René Falardeau qui, en 1955-1956, occupait les fonctions d'assistant comptable à l'emploi des Entreprises Ste-Marie, alors qu'en sa qualité officielle il faisait les entrées dans le livre de ventes et celui de la caisse-recettes (general ledger), cela ne souffre aucun doute, de l'aveu même de cet individu. Dans son témoignage devant la Commission de l'impôt, dont le dossier fait partie de celui du présent appel, Falardeau avoue formellement avoir imaginé des dépenses et achats fictifs pour un total de $24,892.38 selon les instructions, ajoute-t-il, d'un nommé Fernand Turgeon, alors contrôleur de la succession J. Ulysse Ste-Marie. Le procédé était aussi simpliste que faux: des chèques en paiement de prétendus achats étaient préparés à l'ordre de preneurs fictifs, dont René Falardeau endossait les noms afin de retirer de la banque le montant indiqué sur ces chèques, dont il remettait le produit à Fernand Turgeon. Le récit de ces manœuvres apparaît au long dans la transcription officielle du témoignage de Falardeau, aux pages 17 à 24 inclusivement.

Quant aux chèques, au nombre de huit, portant l'entête «J. Ulysse Ste-Marie, entreprises Générales», tirés sur la Banque Provinciale à Québec, ils figurent en liasse au dossier de l'instance sous les cotes I-1 et I-3.

La récapitulation de cette fumisterie se totalise exactement, selon qu'il est allégué au poste (*c*) du paragraphe 6 de l'avis d'appel, au grand total de $24,892.38.

Il en est ainsi à l'item (*a*) où sont mentionnées des ventes supprimées au montant global de $23,702.42. Ce grief est abondamment prouvé aux pièces I-5, I-6 et I-7,

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trois ventes à la compagnie Braund Plywood Inc. de Birmingham, État du Michigan, pour des montants de $7,758.43, $6,760.12 et $9,183.87. Annexés aux pièces I-6 et I-7 sont deux chèques de $6,760.12 et de $9,183.87 émis par Braund Plywood Inc. à l'ordre de «J. Ulysse Ste-Marie Estate», endossés par la Société d'Administration et de Fiducie «pour dépôt au crédit de J. Ulysse Ste-Marie Estate». Je n'ai relevé aucun chèque apurant le montant de $7,758.43, mais une facture de la Cie de Contreplaqués Ste-Marie, une filiale de la compagnie-mère, atteste la vente à Braund Plywood.

Cependant, le préposé aux enquêtes spéciales, au ministère du Revenu national, monsieur Morisset, a déclaré devant la Commission d'appel de l'impôt que ces différents montants, bien que reçus n'apparaissent point aux livres de caisse des Entreprises Ste-Marie. Le procureur de l'appelant a rappelé devant moi que ce témoignage n'avait jamais été contredit sans soulever pour autant aucune protestation de la part du procureur de l'intimé.

Enfin, au sous-alinéa (*b*) du paragraphe 6 de l'avis d'appel, sous la rubrique «escompte supprimé», apparaît un poste de $6,668.18.

La preuve de cette réclamation serait possiblement insuffisante en tout autre cas, mais il en va différemment lorsque le Ministre du Revenu national établit incontestablement qu'un rapport d'impôt est entaché de fraude ou, à tout le moins, de représentation erronée. Il incombe alors au contribuable, intimé ou appelant, de prouver que la cotisation ministérielle est mal fondée. Or, l'intimé n'a pas davantage contesté cette demande que les deux autres. Ce commentaire s'autorise, entre autres autorités, de la savante décision de l'honorable Juge Cameron, autrefois de cette Cour, dans l'instance *Ministre du Revenu national v. Taylor*[1]; je cite:

> Finally, on this point I think that when the Minister has satisfied the Court that "any fraud has been committed or any misrepresentation made", he has done all that he is then required to do. He will thereby have fulfilled the statutory requirement which alone authorizes him to make a re-assessment beyond the statutory period of limitation. Thereafter, the onus of proof that there is error in fact or in law in the re-assessment falls on the taxpayer.

En ce qui concerne Gérard Ste-Marie, comme il n'a pas signé son rapport d'impôt ni la formule d'attestation solennelle en accréditant l'exactitude, il est impossible de retenir

[1] [1961] R.C. de l'É. 318 à la. p. 322.

contre lui des griefs de fraude qui supposent essentiellement une intention dolosive ou *mens rea*.

La preuve précitée divulgue manifestement les noms d'au moins deux des auteurs de la manœuvre frauduleuse et démontre que l'on ne saurait étendre la responsabilité à Gérard Ste-Marie non plus qu'aux autres intimés.

Par contre, l'avis d'appel fait état d'un premier reproche, celui de présentation erronée (misrepresentation) qui s'avère beaucoup plus approprié.

L'article 63, sous-paragraphe (6) de la *Loi de l'impôt sur le revenu* édicte que:

(6) La partie du montant qui constituerait le revenu d'une fiducie ou succession pour une année d'imposition si aucune déduction n'était opérée sous le régime du paragraphe 4) ou des règlements établis en application de l'alinéa *a*) du paragraphe 1), qui était payable dans l'année à un bénéficiaire ou à une autre personne y ayant un intérêt bénéficiaire, est incluse dans le calcul du revenu de la personne à qui elle est ainsi devenue payable, qu'elle lui ait été payée ou non en cette année...

En outre, le paragraphe (7) du même article se lit comme ci-après:

(7) Pour l'application des paragraphes (4) et (6), un montant n'est pas réputé avoir été payable pendant une année d'imposition à moins qu'il n'ait été versé dans ladite année à la personne à qui il était payable ou que celle-ci n'ait eu le droit dans ladite année d'en exiger le paiement.

Il semble bien que l'intention de ces deux articles tende, en quelque sorte, à individualiser le rendement d'une succession indépendamment de la qualité des signataires de la déclaration, qu'ils soient le bénéficiaire même, un fiduciaire ou des exécuteurs testamentaires.

Préparé, présumément, par les fiduciaires de la succession et signé par le subrogé-tuteur, J. Edouard Gagnon, au nom de Gérard Ste-Marie, le rapport d'impôt pour la période fiscale 1956 engage la responsabilité du co-héritier, Gérard Ste-Marie, dès que, au sens du sous-paragraphe (6) de l'article 63, «la partie du montant qui constituerait le revenu d'une fiducie ou succession pour une année d'imposition...qui était payable dans l'année à un bénéficiaire ou à une autre personne ayant un intérêt bénéficiaire, est incluse dans le calcul du revenu de la personne à qui elle est ainsi devenue payable, qu'elle lui ait été payée ou non en cette année...». Il importe peu pour les fins de la Loi que l'intimé ait ou non perçu les revenus déclarés dès que ceux-ci lui étaient légalement payables.

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Pour ce qui regarde les neuf autres intimés, tous signataires de l'attestation solennelle inscrite sur leur formule d'impôt sur le revenu, la solution est davantage nette et impérative.

L'article 44(1), sous-paragraphe (*a*) du statut fiscal fait une obligation à toute personne de transmettre au Ministre, au plus tard le 30 avril de l'année qui suit l'année d'imposition, une déclaration de son revenu pour fins d'impôt. Puis, l'article complémentaire 46(4), sous-paragraphes (*a*) et (*b*), déclare que:

> (4) Le Ministre peut, à toute époque, répartir des impôts, intérêts ou pénalités, et peut,
>
> *a) à toute époque, si le contribuable ou la personne produisant la déclaration a fait une fausse déclaration, ou a commis quelque fraude en produisant la déclaration ou fournissant les renseignements prévus par la présente loi, et*
>
> b) dans les six années qui suivent le jour d'une première cotisation en tout autre cas,
>
> procéder à de nouvelles cotisations ou en établir de supplémentaires.

(Les mots en italique sont les miens)

Comme je l'indiquais précédemment, s'il est manifeste que les intimés majeurs ne se soient pas rendus coupables de fraude, il n'en reste pas moins que leur déclaration solennelle signée de leur main à l'effet «que les renseignements donnés dans cette déclaration et dans tous les documents annexés sont à tous égards vrais, exacts et complets et présentent la totalité de [leurs] revenus individuels» constitue à n'en pas douter ce que la Loi prohibe sous la désignation de présentation erronée.

Nul ne peut s'exonérer d'avoir souscrit une déclaration formelle sous le prétexte qu'il n'aurait pas pris connaissance de la pièce qu'il certifie sous la foi du serment.

Comme conséquence directe de cette infraction à la *Loi de l'impôt sur le revenu*, le droit de revision ministérielle n'est pas limité par le délai de six ans prévu au sous-alinéa (*b*) de l'article 46(4), applicable lorsque l'on ne saurait reprocher au contribuable la commission d'aucune fraude ou présentation erronée. L'amendement de 1956, reportant à quatre ans le délai prescriptif, ne prit effet que le 1er janvier 1957.

Par ces motifs, la Cour maintient l'appel du Ministre, rejette les moyens de défense invoqués par l'intimé Gérard Ste-Marie, avec tous dépens contre ce dernier.

BETWEEN:

HER MAJESTY THE QUEEN ..... PLAINTIFF;

AND

MEAD JOHNSON OF CANADA LTD. .....DEFENDANT.

Toronto
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June 21, 22

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Revenue—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(cc), 30-57 —Old Age Security Act, R.S.C. 1952, c. 200, ss. 10-32—"Metrecal" product, a foodstuff—Exemption from sales tax which falls within one of the categories in Schedule III of the Excise Tax Act—"Metrecal" not a pharmaceutical within the meaning of s. 2(1)(cc) of the Act.

In this action the plaintiff claims from the defendant sales tax imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, and *Old Age Security Act*, R.S.C. 1952, c. 200, in respect to the product "Metrecal" manufactured or produced by the defendant.

"Metrecal", that is the subject of this litigation, was and still is manufactured or produced in four forms or articles, namely: in soup form, in biscuit form, in powder form and in liquid form.

Held: That the Tariff Board could not, as a matter of law, make a decision and it was therefore open to the Court to decide whether the powder form of the product was taxable or not.

2. That "Metrecal" was a "foodstuff" within the meaning of Schedule III.

3. That "Metrecal" was not a "pharmaceutical".

4. That even if "Metrecal" was a pharmaceutical, the fact that it was also a foodstuff exempted it from tax in the absence of any statutory indication to the contrary, such as by the use of the words "other than a pharmaceutical" in the case of "farm and forest products".

5. That the action be dismissed.

INFORMATION of the Deputy Attorney-General of Canada.

D. H. Aylen and *D. G. H. Bowman* for plaintiff.

Hon. R. L. Kellock, Q.C. for defendant.

GIBSON J.:—In this action the plaintiff claims from the defendant sales tax imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, and old age security tax imposed by s. 10 of the *Old Age Security Act*, R.S.C. 1952, c. 200, in respect to the product "Metrecal" manufactured or produced by the defendant during the month of March 1964. The result of this litigation, however, will determine the liability for such taxes and as a consequence very substantial sums of money are contingently involved.

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The product "Metrecal" that is the subject of this litigation was and still is manufactured or produced in four forms or articles, namely, in soup form, in biscuit form, in powder form and in liquid form. The defendant submits that the product is exempt from sales tax and old age security tax by reason of s. 32 of the *Excise Tax Act* and Schedule III referred to in the said s. 32.

In respect to "Metrecal" in powder form the plaintiff first of all contends that this Court does not have jurisdiction in this action to decide whether or not it is subject to or exempt from consumption or sales tax. The submission is that the Tariff Board by its declaration made on the 25th of February 1963, a copy of which was filed as Exhibit 8 in this action, in an application made by the defendant under s. 57 of the *Excise Tax Act,* decided that "Metrecal" in powder form is subject to and not exempt from the consumption or sales tax imposed by s. 30 of that Act; that the defendant sought leave to appeal from that declaration to this Court, and on the 1st of May 1963, in suit No. A-2216, the then President of this Court dismissed the motion for leave to appeal.

The then President gave no reasons for dismissing the motion for leave to appeal. It was within his jurisdiction to decide either that there was a question of law to be adjudicated upon, in which event he would have given leave, or in the alternative he could have decided that the question of law decided by the Tariff Board in respect to this matter was correctly decided. In any event, even though it is not known what the basis for the decision was in refusing leave, it is my respectful opinion that the Tariff Board cannot, as a matter of law, make a decision *in rem.* It follows, therefore, that it is open to the Court in this litigation to decide whether or not "Metrecal" in powder form is subject to or exempt from consumption or sales tax.

The evidence is that "Metrecal" in its various forms or articles as previously listed is essentially the same product, that the difference between the various forms or articles arises in the carrier employed. Considering the whole of the evidence, I am of opinion that "Metrecal" is a foodstuff in its various forms and that each of those forms falls within one of the categories in Schedule III of the *Excise Tax Act*—that is, that "Metrecal" in the form of soup is listed

in the said Schedule III under "soups", that "Metrecal" biscuits are listed there under "biscuits", that "Metrecal" powder is listed there under "bases or concentrates for making food beverages", and that "Metrecal" in liquid form is listed there under "drinks prepared from milk or eggs".

I am also of opinion that "Metrecal" in all its forms is not a pharmaceutical within the meaning of s. 2(1)(*cc*) of the *Excise Tax Act*. It is true that the findings made by the Tariff Board in its declaration of February 25, 1963 have a basis by employing the words in one sense adduced in evidence at this hearing. Those findings were:

> The Metrecal label stresses a "dietary plan for weight control". It is clear from the evidence that the words "weight control" mean the control of excessive weight. The labels on Metrecal packages and the advertising by the applicant advise consumers of Metrecal to consult physicians on weight control.
>
> Metrecal is designed for human consumption, without other food, over a period, for the purpose of reducing or preventing excessive weight.
>
> It is undisputed in the evidence that overweight in man is an abnormal physical state.

I am not prepared to concur that these findings lead to the conclusions found by the Tariff Board.

Following on those findings of fact the Tariff Board concluded that:

> Section 2(1)(*cc*) of the Act is very broad in its application, but is binding in the determination of what a pharmaceutical is within the meaning of the Excise Tax Act; from the evidence it is clear that Metrecal was "sold or represented" by the applicant "for use in the...treatment, mitigation, or prevention of...abnormal physical state...in man".

The words employed by the Tariff Board in its declaration, namely, "for use in the...treatment, mitigation, or prevention of...abnormal physical state...in man", in reference to the merchandising language and techniques used by the defendant in selling its product "Metrecal" in its various forms, are a literal quotation from s. 2(1)(*cc*) of the *Excise Tax Act*. This results in a completely erroneous concept of what the product is. In the evidence reference was made by one of the witnesses, Dr. le Riche, to the meaning of "abnormal physical state" from a medical point of view. Apparently the term is difficult to define, but Dr. le Riche, who was the only physician called, said in essence that a medical person would consider it to mean a disease. In my respectful opinion it is a wrong interpretation of the statute to employ the words in the manner in which the Tariff Board employed them in its decision, and I disagree

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with the conclusion reached by employing those words in that literal fashion.

The evidence was clear that the defendant recommends that its various forms of "Metrecal" be taken in doses which result in a person's consuming about 900 calories daily. The evidence of Dr. le Riche was that a person who ate every day food containing only 900 calories would lose weight, so there is no miracle attached to a particular product which makes it a pharmaceutical by reason of the fact that the quantity or amount recommended for daily consumption contains only 900 calories.

The evidence of the defendant's witnesses also was that "Metrecal" is in essence vitamins and minerals, with a carrier. The vitamins and minerals contained in this product are, according to the evidence, contained also in some proportion in some foodstuffs. The evidence also is that "Sustagen" is a very closely related product, but has no soy content and no flavour. This latter product was used in the treatment of infants and old people.

Obviously the defendant hit upon a very economic product and entered upon a merchandising technique that resulted in a substantial mark-up over competitive and noncompetitive food products. The fact is, as everyone knows, that the word "diet" on the label of any particular food product facilitates merchandising of the product at a substantial mark-up over what could be obtained if the product were marketed as a non-diet food.

In any event, however, irrespective of whether the various forms of "Metrecal" are pharmaceuticals, the fact that they are also foodstuffs within Schedule III of the *Excise Tax Act* in my opinion exempts them from sales tax. It is my respectful opinion that, on a true interpretation of the Act, once it is found that an article is a foodstuff, then in order for it not to be exempt from taxation by reason of its being a pharmaceutical also there would have to be in Schedule III or elsewhere in the Act clear words denying the article exemption from sales tax by the employment of such words as "other than a pharmaceutical", as was done in the case of farm and forest products listed in Schedule III.

In the result, therefore, the action is dismissed with costs.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

MANITOU-BARVUE MINES LTD. .....RESPONDENT.

Toronto 1965 Dec. 6 Dec. 16

Income tax—Revenue—Income Tax Act, R.S.C. 1952, c. 148, ss. 24(1), 106(1)(b), 108(7), 109(5), 123(8)—Non-resident tax—Interest payable to non-residents in terms of U.S. Currency but payable in shares of stock—Security in satisfaction of income debt—Liability of payer to deduct tax.

The taxpayer's debenture indebtedness "payable in lawful money of the United States" amounted to $1,070,000 on which interest at 5% was payable annually.

It was provided however that this interest, while calculated in terms of U.S. currency at the prevailing rate of exchange, was to be paid in treasury shares, to which the prevailing market value was attributed.

Tax was not deducted by the taxpayer on the ground that the interest was exempted by s. 106(1)(*b*)(iii) as interest payable in a currency other than Canadian.

The Minister, on the other hand, relying on ss. 24(1) and 108(7) securities in satisfaction of income debt and s. 106(1)(*b*) assessed on the basis that the exception in subparagraph (iii) thereof did not apply because the interest was not payable in currency but in shares.

The Minister therefore assessed the taxpayer as liable for the tax under s. 109(5) for failure to withhold from payments to non-residents.

Held: That the common shares issued in satisfaction of the interest were "securities" within the meaning of s. 24(1).

2. That the issuance of shares in lieu of payment of interest, pursuant to the express words of the deed of trust and mortgage were not "interest payable in a currency other than Canadian" within the meaning of s 106(1)(*b*)(iii).

3. That the Minister's appeal be allowed.

APPEAL from a decision of the Tax Appeal Board.

M. A. Mogan and *John E. Sheppard* for appellant.

John G. McDonald, Q.C. and *M. L. O'Brien* for respondent.

GIBSON J.:—This is an appeal from the decision of the Tax Appeal Board dated December 23, 1964 in respect to the income tax assessments of the Respondent for its 1960, 1961 and 1962 taxation years.

The Appellant claims that the Respondent is liable to pay as tax the amounts of $8,642.56, $8,642.07 and $8,990.30 respectively in the Respondent's 1960, 1961 and

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1962 taxation years, being the amounts the Appellant claims the Respondent should have deducted or withheld pursuant to the provisions of ss. 109(5) and 123(8) of the *Income Tax Act* from amounts paid or credited or deemed to have been paid or credited to non-resident persons.

The circumstances giving rise to the issue in this appeal concerns the issuing of common shares from the treasury of the Respondent to non-resident persons during each of the said years in satisfaction of interest payable on 5% convertible debentures issued by the Respondent under the terms of a deed of trust and mortgage dated as of December 31, 1958 and made between the Respondent and National Trust Company Limited (Trustee).

The details of the issue of such common shares to non-resident persons in each of the said taxation years are as follows:

in 1960 taxation year—84,981 common shares having a value of $57,617.11

in 1961 taxation year—200,745 common shares having a value of $57,613.81

in 1962 taxation year—237,368 common shares having a value of $59,935.32

By the terms of the said deed of trust and mortgage the said 5% convertible debentures which were issued provided for:

(*a*) $2,830,000 of such debentures to be payable in lawful money of Canada; and

(*b*) $1,070,000 of such debentures to be payable in lawful money of the United States.

It is in respect of the payment by way of issuing the said common shares in lieu of interest on these debentures payable in lawful money of the United States during the said taxation years that this appeal is concerned.

The specific provision pursuant to which these said common shares were issued in lieu of interest payable during the said taxation years according to the debentures reads as follows:

> Interest at the said rate both before and after maturity and before and after default and interest on overdue interest shall be payable annually on the thirty-first day of December in each year; provided that until all of the Bonds have been purchased or redeemed by the Company interest on the Debentures shall be payable only in fully paid and non-assessable shares of the capital stock of the Company calculated to the nearest full share at a

price per share being the average of the prices of the last trade for said shares on the Toronto Stock Exchange on each of the ten (10) trading days preceding the respective interest payment date; . . .

The issue in this case is what is the true meaning of s. 106(1)(*b*)(iii) in Part III of the *Income Tax Act* and s. 24(1) in Part I of the *Income Tax Act* in relation to the facts of this case.

Section 24(1) of the *Income Tax Act* is imported into Part III of the Act by reason of s. 108(7).

These said sections of the Act read as follows:

106 (1) Tax. Every non-resident person shall pay an income tax of 15% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of,

. .

(*b*) Interest—interest except

. . .

(iii) interest payable in a currency other than Canadian currency to a person with whom the payer is dealing at arm's length, on

. . .

24. Securities in satisfaction of income debt.

(1) Where a person has received a security or other right or a certificate of indebtedness or other evidence of indebtedness wholly or partially as or in lieu of payment of or in satisfaction of an interest, dividend or other debt that was then payable and the amount of which would be included in computing his income if it had been paid, the value of the security, right or indebtedness or the applicable portion thereof shall, notwithstanding the form or legal effect of the transaction, be included in computing his income for the taxation year in which it was received; and a payment in redemption of the security, satisfaction of the right or discharge of the indebtedness shall not be included in computing the recipient's income

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(7) Securities. Where, if section 24 were applicable in computing a non-resident person's income, that section would require an amount to be included in computing his income, that amount shall, for the purpose of this Part, be deemed to have been, at the time he received the security, right, certificate or other evidence of indebtedness, paid to him on account of the debt in respect of which he received it.

It is common ground between the parties that this was an arm's length transaction.

In brief, the Appellant submits that the interest on the debenture certificates payable to these non-residents during these taxation years was not payable "in a currency other than Canadian currency" but rather was payable, as required by the trust agreement, and actually paid, only in fully paid and non-assessable shares of the capital stock of the Respondent (calculated to the nearest full share at a price per share being the average of the prices of the last trade for the said shares on the Toronto Stock Exchange on

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each of the ten trading days preceding the respective interest payment date).

The Respondent submits that interest was payable and paid in United States currency, "a currency other than Canadian currency", within the meaning of s. 106(1)(*b*)(iii), and the fact that it was paid in stock instead of cash does not alter the conclusion that it was payable as first described. The Respondent submits that it could have been paid in anything in kind for example goods etc. and still qualify as aforesaid, and the fact that the directors were required pursuant to the trust agreement to make such payment in common shares does not derogate from the fact that it was in fact payable and paid "in a currency other than Canadian currency".

The Respondent also submits that s. 106(1)(*b*)(iii) is not an exempting provision but instead is an area carved out of the charging provision; and that in respect to s. 24(1) that the *ejusdem generis* rule should apply in interpreting it, and that in applying this rule it is submitted that "indebtedness" in that section refers to a liability and such common shares are not an indebtedness, and therefore the section has no application to the facts of the issuance of the said common shares above referred to. If it were otherwise, the Respondent submits, for example, that there would have been no necessity for enacting s. 105(*c*)(1a) of the Act.

The Appellant, on the other hand says that s. 24(1) should be read disjunctively.

I am of opinion, firstly, that the *ejusdem generis* rule does not apply in interpreting the meaning of s. 24(1) of the *Income Tax Act*, in that there is no genus. Instead four different things are referred to in the section, namely (1) "a security", (2) "other right", (3) "a certificate of indebtedness" and (4) "other evidence of indebtedness".

The common shares issued to non-residents in this matter in lieu of interest payable in lawful money of the United States, I am of opinion, were securities within the meaning of "a security" in said s. 24(1). The word "security" so used is capable of being construed either in its popular sense, which I do in this case, or as a word of art. I do so because there was no evidence adduced to establish that it was used as a word of art in this sub-section and

there is nothing in the sub-section, there is no interpretation clause in the Act, and there are no words elsewhere in the Act which establish it as a word of art.

Secondly, I am of opinion that this case falls to be decided upon the express words of the said deed of trust and mortgage above quoted. By these words it is provided that until the prior encumbrance is paid in full, the holders of these said 5% debentures payable in lawful money of the United States will be paid (as they have been paid in the relevant years, namely 1960, 1961 and 1962) in common shares in lieu of the payment of interest in lawful money of the United States and until these non-residents receive payment of interest in United States currency pursuant to their contractual rights as contained in the said deed of trust and mortgage and specifically as referred to above, they will not be receiving "interest payable in a currency other than Canadian currency" within the meaning of s. 106(1)(*b*) of the Act.

The appeal is allowed with costs.

Québec 1965
mai 17-20
juin 16,17
Ottawa
novembre 12

ENTRE:

SAGUENAY PEAT MOSS COMPANY LIMITED ..... } REQUÉRANTE;

ET

SA MAJESTÉ LA REINE ..... INTIMÉE.

Couronne—Pétition de droit—Réclamation en indemnité, à titre de dommage-intérêts, par la requérante pour la perte de ses biens meubles et immeubles—Fardeau de la preuve incombe à la requérante —Action rejetée.

La requérante exploite une tourbière à Bagotville dont les usines sont situées à environ deux milles et demi (2½) de la piste d'une base aérienne utilisée par le Ministère de la Défense nationale.

La requérante allègue que des avions du type turbo-réacteur (jets), conduits par des membres du Corps d'Aviation Royale Canadienne, auraient survolé ses bâtiments à une altitude excessivement basse alors qu'ils se trouvaient au-dessus de sa tourbière. En effectuant une montée très rapide, ces avions échappèrent de leurs moteurs de longs jets de flamme qui atteignirent le sol et allumèrent ainsi, le 8 juillet 1957, vers 10 heures p.m., un incendie des bâtiments de la requérante. Que, de plus, un desdits avions en trouble, après avoir mis le feu aux usines de la tourbière de la requérante, alla s'écraser 500 à 1,000 pieds plus loin.

La preuve soumise par l'intimée révèle qu'aucun de ses avions n'a pu ce soir-là mettre le feu aux propriétés de la requérante de la façon qu'ils décollèrent de la piste, de la manière qu'ils circulèrent,

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i.e., à une très haute altitude, et enfin, par le vol qu'ils effectuèrent à leur retour à leur base aérienne de Bagotville.

Le dossier du Ministère de la Défense nationale, relatif à l'enquête qui eut lieu en 1956 au sujet de la chute d'un avion à la base aérienne de Bagotville, confirme bien que, le 19 juin 1956, un avion, soit un CF-100, numéro 18459, est tombé à cet endroit et les débris trouvés correspondent à ceux trouvés en 1965. Il appert que les CF-100, en service à Bagotville en 1956, étaient des Mark IV et en 1957 des Mark V. Les débris en question étaient d'un Mark IV.

Les archives du Ministère de la Défense nationale, division du Corps d'Aviation Royale Canadienne, renferment au complet tous les accidents qui surviennent au Canada. Et, quant aux années 1956 et 1957, et plus particulièrement le 8 juillet 1957, date de l'incendie des usines de la requérante, aucune mention d'accident n'est relatée dans les livres et dossiers de ce département, non seulement pour la date du 8 juillet 1957, mais aussi pour les dates des 8 et 9 juillet 1957.

Jugé: Vu l'invraisemblance des témoignages apportés du côté de la requérante et en face de la preuve établie par l'intimée, la Cour en vient à la conclusion qu'aucun des avions de l'intimée n'a pu, ce soir-là, mettre le feu aux propriétés de la requérante.

2. La Cour, en présence de la preuve experte offerte par l'intimée, est convaincue de l'impossibilité pour un avion du type CF-100 d'incendier, en plein vol, un bâtiment même comportant une toiture en toile goudronnée.
3. Les avions de l'intimée n'ont eu rien à faire avec cet incendie.
4. Il semble donc, que les avions de l'intimée, qui circulaient ce soir-là au-dessus de Bagotville, n'ont pas volé au-dessus des établissements de la requérante et, s'ils l'ont fait, ils étaient sûrement à une altitude telle qu'ils n'ont pu y mettre le feu.
5. La pétition de droit ainsi que la demande incidente sont rejetées.

PÉTITION DE DROIT en réclamation de dommages subis à la suite d'un incendie de propriétés.

Louis M. Laroche et *Maurice L. Duplessis* pour la requérante.

Jules Landry, c.r., et *Raymond Roger* pour l'intimée.

NOËL J.:—Par sa pétition de droit produite le 16 juin 1959, la Requérante réclame de l'Intimée la somme de $141,355 avec intérêts depuis l'assignation et les dépens à titre de dommages subis le 8 juillet 1957, vers 10 heures p.m., par l'incendie de sa tourbière, y compris l'usine, l'outillage, les aménagements et tous les biens meubles et immeubles.

Le montant réclamé se compose des sommes suivantes:

Valeur des usines et équipement	$78,355.00
Perte de revenu	$22,500.00
Installation de sa tourbière à un autre endroit	$40,500.00
TOTAL	$141,355.00

Dans sa pétition la Requérante allègue que l'incendie de ses bâtiments fut causé par des avions du type turbo-réacteur conduits par des membres du Corps d'Aviation Royale Canadienne qui, le soir du 8 juillet 1957, s'envolèrent de la piste d'une base aérienne utilisée par le ministère de la Défense nationale, à Bagotville, et située à environ 2½ milles des bâtiments incendiés, et survolèrent ces derniers pour effectuer des manœuvres aériennes. Ces avions auraient volé au-dessus de la tourbière à une altitude excessivement basse et (suivant le paragraphe 7 de la pétition de droit) «alors qu'ils se trouvaient encore au-dessus de la tourbière, ils effectuèrent une montée très rapide en intensifiant subitement le feu de leur moteur et en échappant derrière eux de longs jets de flamme qui atteignirent le sol pour y allumer un incendie;».

La Requérante précise davantage la faute, négligence, imprudence ou inhabileté des pilotes des avions de l'Intimée aux paragraphes 14 et 15 de la pétition, qui se lisent comme suit:

14. Ledit incendie et les dommages qui en résultent ont été causés par les faute, négligence, imprudence ou inhabileté des pilotes desdits avions qui ont allumé l'incendie sur la tourbière de la requérante et plus particulièrement en ce que:

a) Alors qu'ils savaient ou devaient savoir que les avions qu'ils conduisaient dégageaient une longue traînée de feu et une chaleur très intense, ils effectuèrent un vol à trop basse altitude au-dessus d'une propriété qu'ils connaissaient ou devaient connaître comme étant très inflammable;

b) Alors qu'ils savaient ou devaient savoir que leur manœuvre était susceptible d'allumer un encendie sur la propriété de la requérante, ils changèrent subitement de direction pour effectuer une remontée en vol presque vertical ce qui eut pour effet de diriger le jet de leurs turbo-réacteurs directement vers la tourbière de la requérante;

c) Ils ont allumé ledit incendie sans excuse possible ou valable;

d) Ils ont négligé de se conformer aux règles les plus élémentaires de la prudence;

e) Ils étaient des pilotes imprudents, négligents ou inexpérimentés;

15. De plus, le Gouvernement canadien est responsable desdits dommages qui ont été causés par les officiers qui avaient le devoir de contrôler, de surveiller et de donner des ordres auxdits pilotes et qui ont causé lesdits dommages par leurs faute, négligence, imprudence ou inhabilité et plus particulièrement en ce que:

a) Ils ont négligé de surveiller lesdits pilotes;

b) Ils n'ont pris aucune mesure pour s'assurer que lesdits pilotes ne causeraient un incendie à la propriété de la requérante;

c) Ils ont confié lesdits avions à des pilotes imprudents, incompétents et inexpérimentés sans s'assurer qu'il pouvaient le faire sans

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danger pour la propriété d'autrui et plus particulièrement pour celle de la requérante;

d) Alors qu'ils savaient ou devaient savoir que les manœuvres desdits pilotes étaient susceptibles d'allumer un incendie sur la tourbière de la requérante, ils n'ont rien fait pour empêcher lesdits pilotes d'exécuter lesdites manœuvres;

Le 19 novembre 1964, la Requérante obtint la permission d'amender sa pétition en y ajoutant l'art. 7A ainsi conçu:

De plus, un desdits avions, qui était en trouble, après avoir mis le feu aux usines de la Tourbière, alla s'écraser 500 à 1000 pieds plus loin;

Le 4 mai 1965, soit quelques jours avant l'audition de la présente cause, qui débuta le 17 mai 1965, la Requérante produisit une demande incidente réclamant une somme additionnelle de $50,000 parce qu'elle aurait, dit-elle, subi à la suite de l'incendie de ses bâtiments une perte de profit de $20,000 pour chacune des années 1958 et 1959 et $10,000 pour l'année 1960.

La Requérante, qui avait le fardeau d'établir les allégués de sa demande, présenta à l'enquête de nombreux témoins, des résidents de l'endroit pour la plupart, qui vinrent témoigner de ce qu'ils avaient vu ou entendu le soir où les bâtiments de la Requérante furent incendiés. L'ingénieur Pierre Paul Vinet, spécialisé en génie mécanique, ainsi que le professeur Rémi Chénier, docteur en génie mécanique et qui donne des cours sur les turbo-réacteurs à l'Ecole Polytechnique de Montréal, furent aussi tous deux entendus au soutien de la Requérante.

Je n'ai pas l'intention d'examiner chacun des témoignages présentés par les nombreux témoins entendus dans cette cause, et il suffira de dire pour l'instant qu'un certain nombre, tels M. Philippe Perron, Dame Robert Belley, Dame Jeanne d'Arc Soucy Tremblay et ses deux filles, déclarèrent que le soir de l'incendie, ils entendirent une espèce d'explosion précédée par une pétarade d'un avion qui était en difficulté (certains déclarant qu'ils avaient vu une boule de feu) et que quelques minutes plus tard les usines de la Requérante étaient en feu, et qu'un autre, Gilles Tremblay, déclara que le soir de l'incendie, s'étant rendu à un certain endroit situé à environ trois quarts de mille au sud de la tourbière, il y vit des débris d'un avion qui était en feu que certains aviateurs tentaient d'éteindre. Quant à ses deux cousins, Robert et Claude Tremblay, ceux-ci déclarèrent qu'ils se rendirent (avec deux autres) le lendemain soir au même endroit, mais furent arrêtés par

des aviateurs qui leur défendirent d'avancer et ils durent rebrousser chemin, tout en ayant constaté cependant qu'il y avait à terre des morceaux ou débris d'avion.

Ces témoignages furent ensuite suivis par celui du contremaître de la Requérante, Fernand Desgagné, qui déclare s'être rendu, en 1965, avec un photographe, à un certain endroit, que sur les instances de M. Jean Julien Fortin, le propriétaire de la compagnie requérante, il avait découvert auparavant, situé au sud des usines de la Requérante près d'un certain chemin de fer, et où il y avait des débris d'avion et produisit comme exhibits R-5 à R-22 les photographies prises à cette occasion.

Ces photographies permettent de s'assurer par les numéros qui apparaissent sur les débris photographiés, qu'il s'agit bien d'un avion CF-100 portant le numéro 18459, et jusqu'à ce moment, il semble bien que l'incendie des propriétés de la Requérante a fort bien pu avoir été causé par cet avion dont les débris, découverts presque providentiellement sept ans après la date de l'incendie et allégués quelques jours avant le procès, viennent corroborer la version de certains témoins de la Requérante si ce n'était de la preuve irréfutable apportée par l'Intimée en défense qu'en fait cet avion était tombé en 1956 et, par conséquent, ne pourrait avoir été la cause de l'incendie survenu en 1957.

Cette preuve fut établie par Philip de Lacey Markham, commandant d'escadre, qui identifia les débris de l'avion sur lesquels il avait d'ailleurs enquêté dans le temps et qui, se basant sur les archives du Ministère devant lui, déclara que le 19 juin 1956, à 12.25 heures, cet avion, piloté par le chef d'escadrille Bolin, accompagné du lieutenant McKenzie, à Bagotville, P.Q., s'écrasa dans la tourbière à un endroit (précisément à l'endroit où les jeunes gens avaient vu un avion en feu) situé près du chemin de fer, dans une direction nord-est de la base aérienne de Bagotville détruisant l'appareil et tuant l'équipage.

Ce témoin déclara en transquestion qu'il ne pouvait jurer que tous les débris qui apparaissent sur la photo R-23 étaient de l'appareil 18459, certains, en effet, ne portant aucune inscription, mais il jure qu'il ne peut s'agir, quant à ces débris, que de ceux d'un seul avion, soit un CF-100, et que les débris ne peuvent être des débris d'avion T-33 ou C-45 dont quelques-uns étaient stationnés à la base de

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Bagotville en 1956 et 1957. D'ailleurs, il appert que les CF-100 en service à Bagotville en 1956 étaient des Mark IV et en 1957 des Mark V. Les débris de l'avion en question étaient d'un Mark IV.

Le témoignage de Markham fut suivi de celui de Roland Émond qui travaille à Ottawa pour la sécurité aérienne et qui est détenteur du dossier relatif à l'enquête qui eut lieu en 1956 au sujet de la chute de cet avion. Par le moyen de ce dossier il confirme que c'est bien le 19 juin 1956 que cet avion est tombé, qu'il s'agit bien du CF-100 18459 et détermine même la trajectoire qu'il a suivie avant de tomber ainsi que l'endroit où il vint s'écraser au sol, qui correspond à celui où le contremaître de la Requérante trouva les débris en 1965.

Ce monsieur, en plus, déclare que son département possède des archives complètes concernant tous les accidents qui surviennent au Canada et quant aux années 1956 et 1957, et plus particulièrement le 8 juillet 1957, date de l'incendie des usines de la Requérante, il déclare n'avoir dans les livres ou dossiers de son département aucune mention d'accident non seulement pour la date du 8 juillet 1957, mais aussi pour les dates des 8 et 9 juillet 1957. Il ne voit non plus aucune mention même d'incident (qui serait un manquement mineur ou majeur mais sans que l'avion s'écroule, tel que par exemple mauvais fonctionnement d'un engin, du système hydraulique ou électrique ou du système d'atterrissage) pour ces dates tel qu'il appert au rapport produit comme pièce D-14. Ce témoin déclare qu'il n'est pas possible qu'un accident survienne sans qu'il soit rapporté, non seulement à son département, mais à différents autres départements.

Quant aux incidents, tel que mauvais fonctionnement d'un moteur, qui pour les avions auraient une importance primordiale tant pour la sécurité des membres de l'équipage que pour l'efficacité du service des avions en général, il ne semble pas non plus qu'on en ait rapporté le 8 juillet 1957 ou même le 9 juillet 1957.

Nous devons, par conséquent, conclure que l'allégué de la Requérante au paragraphe 7A de la pétition à l'effet que l'un desdits avions qui était en trouble, après avoir mis le feu aux usines de la tourbière, se serait écrasé un peu plus loin, n'a pu être établi par la Requérante et doit être rejeté.

Il ne reste par conséquent que l'allégué 7 de la pétition à l'effet que les avions de l'Intimée alors qu'ils effectuaient des montées très rapides, en intensifiant subitement le feu de leur moteur, auraient échappé derrière eux de longs jets de flamme, allumant ainsi l'incendie des propriétés de la Requérante.

La confusion engendrée par les déclarations des témoins de la Requérante à l'effet que l'avion tombé en 1956 serait tombé à la date même de l'incendie du 8 juillet 1957 des usines de la Requérante, et qui s'explique probablement par le fait que l'enquête eut lieu 8 ans après cet incendie, nous laisse tout de même sceptique aussi sur la véracité de ces mêmes témoignages relatant ce qu'ils déclarent avoir vu quant aux manœuvres des avions ce soir-là, et plus particulièrement quant au prétendu vol en rase-mottes de certains avions de l'Intimée à cette occasion.

Notre scepticisme cependant se transforme en une certitude qu'aucun des avions de l'Intimée n'a pu ce soir-là mettre le feu aux propriétés de la Requérante en présence de la preuve irréfutable apportée par l'Intimée des avions en mouvement dans la soirée du 8 juillet 1957 au-dessus de Bagotville, de la façon qu'ils décollèrent de la piste, comment ils circulèrent à une très haute altitude et, enfin, comment ils revinrent à la base. Cette certitude cependant devient finalement une conviction en présence de la preuve experte offerte par l'Intimée de l'impossibilité pour un avion du type CF-100 d'incendier en plein vol un bâtiment, même comportant une toiture de toile goudronnée. Il n'est pas possible en effet, en présence de cette preuve, de conclure que les avions de l'Intimée aient eu quelque chose à faire avec cet incendie, et la présence sur les lieux des aviateurs de la base peu de temps après le début de l'incendie et leurs efforts pour l'éteindre et pour le circonvenir, ne peuvent en aucune façon être interprétés comme une reconnaissance de responsabilité, ce geste de leur part, tel qu'expliqué par l'un des aviateurs en charge des sapeurs de la base, Stanley Steppings, n'étant qu'une autre manifestation (car ils avaient été en plusieurs autres occasions au secours de la population en d'autres endroits, à Chicoutimi par exemple) du désir des aviateurs de maintenir avec la population civile des environs des relations de bon voisinage.

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Quant aux manœuvres des avions le 8 juillet 1957, le chef d'escadrille Norman Cairns, de l'escadrille 432, qui était à ce moment accompagné de l'officier Mahon dans un avion CF-100, nous parle d'un exercice à haute altitude qui eut lieu à cette date impliquant un autre avion CF-100 conduit, celui-là, par le chef d'escadrille Shore, et le navigateur Barry Thompson nous relate aussi un deuxième exercice à haute altitude ce soir-là de l'escadrille 413 dans un avion portant le numéro 634. Cet exercice comportait le vol de trois avions, son avion étant piloté par l'officier Thomson et les deux autres respectivement par les officiers Farley et Copeland. Ces envolées, comme toutes celles qui ont lieu à la base, sont enregistrées dans un livre de vol qui indique le genre d'avion, son numéro, la durée de l'envolée et la date. Il fut établi que le soir du 8 juillet il n'y eut que ces deux exercices.

Quant au chef d'escadrille Norman Cairns, il déclare qu'il s'envola le 8 juillet 1957 de la base de Bagotville vers les 9 heures et que l'exercice dura environ 1 heure et 45 minutes, qu'à 45,000 pieds les deux avions CF-100, dont le sien et un autre CF-100, exécutèrent des exercices d'interception, que la vitesse moyenne des avions durant cet exercice fut d'environ 400 milles à l'heure et qu'il est probable que ce fut la piste 1-1 qui fut utilisée ce soir-là pour décoller et rentrer car il y avait à ce moment un vent sud-est de 11 milles à l'heure. Il déclare qu'à 45,000 pieds d'altitude les deux avions pouvaient être jusqu'à 100 milles sud, est ou ouest de la base.

Il déclare aussi qu'au décollage, après s'être rendu à 3,000 pieds d'alitude, il était à environ $2\frac{1}{2}$ milles de la piste et nullement dans la direction des usines de la Requérante, puisqu'il lui fallait aller à l'encontre du vent. Quant au retour, qui s'est effectué probablement aussi sur la piste 1-1, il déclare qu'à 25,000 pieds d'altitude son avion était à 30 milles de la base et qu'à 5,000 pieds—soit à 10 milles de cette base—il descendit vers cette dernière dans une pente d'environ $2\frac{1}{2}$ degrés et ici encore, déclare-t-il, sa descente ne s'est pas effectuée au-dessus des installations de la Requérante.

Barry Thompson, qui était dans un des avions de l'exercice comprenant 3 avions CF-100 de l'escadrille 413, déclare de son côté qu'il quitta la base de Bagotville à 9.20 heures,

s'éleva à 45,000 pieds, participa avec deux autres avions à des exercices à cette altitude et revint ensuite à la base guidé par un centre de contrôle radar situé au sol, qui l'a conduit d'une altitude de 20,000 pieds, soit à 30 milles de la base, jusqu'à la piste 1-1 sans par conséquent ici encore passer au-dessus des bâtiments de la Requérante. Il atterrit à 11.05 heures sans encombre et sans incident et rencontra à sa descente de l'avion l'équipage des deux autres avions afin de discuter les exercices effectués pendant le vol et à cette occasion le témoin déclare qu'il ne fut aucunement question, soit d'un accident, soit même d'un incident pendant les manœuvres.

Il semble donc que les avions qui circulaient ce soir-là au-dessus de Bagotville n'ont pas volé au-dessus des établissements de la Requérante et s'ils l'ont fait, ils étaient sûrement à une altitude telle qu'ils n'ont pu y mettre le feu. La proximité d'ailleurs de pylônes portant des fils de haute tension d'une hauteur d'environ 90 pieds du sol et le danger que cela constituait pour les avions les auraient sûrement empêchés de «raser» les bâtiments.

Rémi Chénier, docteur en génie mécanique chargé de cours sur les turbo-réacteurs à l'École Polytechnique de Montréal, déclare que le gaz à sa sortie des avions atteint une température de 1,000° Fahrenheit. Il ajoute cependant que certains avions militaires sont construits de façon à pouvoir en plus, par ce qu'on appelle un post-brûleur, obtenir une poussée additionnelle et quand ce post-brûleur est utilisé la température du gaz à sa sortie peut aller jusqu'à 2,500° Fahrenheit. Cette chaleur, cependant, diminue évidemment au fur et à mesure que le gaz s'échappe dans l'atmosphère. Il faudrait d'après ce témoin, 525°F pour mettre le feu à la toiture goudronnée d'un bâtiment.

Pierre Paul Vinet, ingénieur professionnel, fut ensuite entendu au soutien de la demande. Il est chef du département de génie mécanique de l'École Polytechnique depuis 1932. Il n'a pas fait d'expériences avec des avions, mais puisant dans un livre intitulé «Aircraft Engines of the World» par Wilkinson, il déclare que la température des gaz à la sortie de la queue d'un avion dépend des types de moteurs, que pour les «jets» cela peut varier entre 1100° et 1600° et que pour le CF-100 Mark V sa température d'échappement est de 1300° Fahrenheit. Il admet que cette

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température baisse dès que le gaz sort à l'air et que pour y mettre le feu il faudrait qu'il s'agisse de combustible qui se serait échappé sans avoir brûlé et qui serait encore suffisamment chaud pour incendier l'objet sur lequel il serait tombé. Il prétend que cela a pu se produire dans le présent cas et que le feu des bâtiments de la Requérante a pu commencer par l'incendie de la toiture goudronnée des bâtisses.

Il produit comme pièce R-26 la photographie d'un F-86 Sabre prise la nuit et qui représente un gaz incandescent qui sort de l'arrière d'un avion au sol. Il admet cependant en transquestion qu'il s'agit là d'un essai de nuit en vue de vérifier le moteur au sol et qu'en vol normal on ne pourrait voir cette incandescence. Il ne connaît pas la vitesse minimum d'un CF-100 et ne peut dire pendant combien de temps un objet donné pourrait être en contact avec les gaz provenant d'un tel avion en plein vol.

Les explications données et les théories présentées par les experts de la Requérante relativement à l'origine possible de ce feu ne peuvent cependant être acceptées en face de la preuve produite par l'Intimée. H. S. Fowler, officier sénior du Conseil National des Recherches, Ottawa, un spécialiste des avions «jets» de grande expérience, ayant écrit 40 à 50 articles sur ce sujet, et qui a même fait des expériences sur la possibilité pour ces avions avec moteur Orenda tels que les CF-100 Mark V de mettre le feu à des bâtiments en volant bas, ayant aussi au mois de janvier 1964 conduit au sol une expérience afin de découvrir la température des gaz à la sortie de ces avions, expérience d'ailleurs qui fut publiée par le Conseil National des Recherches et dont une copie fut produite comme pièce D-25, déclara qu'il n'est pas possible qu'un avion en plein vol puisse incendier un bâtiment.

Il affirme tout d'abord que la théorie du post-brûleur ne peut s'appliquer aux avions CF-100 car ces derniers ne comportent pas ce dispositif de mécanisme et la chaleur des gaz à la sortie ne peut par conséquent d'après lui dépasser 1300° Fahrenheit. Il relate que la chaleur peut être communiquée de l'avion au sol de trois façons, soit par radiation, convection ou conduction. Quant à la radiation, la chaleur peut se transmettre par rayons comme la lumière par exemple; quant à la convection (la seule façon pour un

avion en plein vol d'incendier un objet si la chose est possible) il faut que l'objet visé puisse voir l'objet qui émet la chaleur, qu'il n'y ait pas d'écran entre les deux, qu'il soit suffisamment près et que la chaleur soit appliquée assez longuement pour l'incendier. Il déclare que si l'on se place derrière un jet dont les moteurs fonctionnent l'on ne peut rien voir et que les expériences qu'il a conduites indiquent que les températures accrues, obtenues à l'arrière d'un avion jet dont les moteurs fonctionnent sont pour 100 pieds, 150 pieds, 200 pieds et 300 pieds, respectivement de 54°F, 45°F, 27°F et 18°F, bien inférieur par conséquent à la chaleur requise, soit 523°F, pour incendier un objet comme le toit goudronné d'un bâtiment. Ce témoin en effet, reprenant les données précitées et les intégrant dans une température du mois de juillet qu'il fixe pour les fins de son calcul à 70°F, arrive aux conclusions suivantes:

— à 100 pieds à l'arrière avec une élévation de température de 59° et 3 pieds en bas de l'horizontal de l'avion, le maximum ne peut dépasser 59 + 70, soit 129° F;

— à 200 pieds à l'arrière avec une élévation de température de 27° et 3 pieds en bas de l'horizontal de l'avion, le maximum ne peut dépasser 70 + 27, soit 97°F.

Dans les deux cas précités, ce témoin déclare que si l'avion n'est qu'à 25 pieds au-dessus du sol la température maximum d'émanation au sol ne pourrait s'élever au-dessus de 100° F et aura cette intensité pour $\frac{1}{3}$ de seconde seulement et que même si l'avion n'était qu'à 11 pieds du sol la température maximum momentanée de l'air ne pourrait s'élever au-dessus de 130° F et durerait moins qu'une demi-seconde.

Il appert aussi du témoignage de Fowler que quelle que soit la proximité qu'aurait pu atteindre un des avions CF-100 des bâtiments de la Requérante, il est sûr que les orifices du «jet» n'ont pu à aucun moment pendant le vol être directement en ligne avec le toit des bâtiments, car il existe un maximum d'angle de montée pour ces avions qui, dépassé, comporte pour l'avion une tension qui aurait pour effet de le briser et qui, pour les membres de l'équipage, les rendrait inconscients. Ces avions n'ont pu, par conséquent, tel qu'allégué par la Requérante, effectuer au-dessus des

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bâtiments «une montée très rapide en intensifiant subitement le feu de leur moteur et en échappant derrière eux de longs jets de flamme qui atteignirent le sol pour y allumer un incendie».

D'ailleurs, cette possibilité que ces avions aient pu échapper des flammes ou une incandescence telle que représentée par la pièce R-26 produite par M. Vinet, est également prise à partie par Fowler qui déclare que la photographie en question a été prise à un moment où le moteur fut mis en mouvement au sol et qu'il est possible, si l'on est négligent et si l'on permet à l'air de s'infiltrer, que l'on puisse avoir pour une ou deux secondes une telle incandescence. Cependant si cela durait le moindrement les lames seraient éjectées et la turbine serait endommagée. Il ajoute qu'au début avec les CF-100 Mark III il était possible pour un pilote négligent de trop ouvrir l'obturateur d'air, ce qui avait pour effet de donner trop de pétrole et de provoquer une incandescence suivie de la destruction de la turbine et de l'écrasement de l'avion. Cependant dans les CF-100 mark V (tels que ceux employés à Bagotville en 1957) les turbines sont maintenant alimentées mécaniquement et cette alimentation est contrôlée par un dispositif spécial. Il faudrait que ce contrôle fasse défaut pour obtenir maintenant cette incandescence avec les CF-100 Mark V et avec ce dispositif de contrôle le pilote pourrait quand même, en fermant le moteur défectueux, revenir au sol. Si la chose s'était produite le soir du 8 juillet 1957, il déclare qu'une réparation majeure aurait été requise et cette réparation aurait été rapportée.

Ce témoin, enfin, s'adressant à la théorie émise comme possibilité par Vinet que du pétrole qui n'aurait pas été transformé en gaz dans les turbines ait pu s'échapper à une température suffisamment chaude pour mettre le feu ou aurait, après s'être ainsi échappé, pris feu sur le toit des bâtiments, déclare d'abord qu'il est très difficile d'allumer du pétrole dans l'atmosphère qui, d'ailleurs, le refroidit très rapidement, et qu'il n'est pas possible qu'il en fut ainsi et il étaye son opinion par une expérience dont il a été témoin en Angleterre, soit à Farmborough en 1949, lorsque le pilote d'un avion semblable au CF-100 (qui avait été photographié dans le temps et dont la photographie fut produite comme partie de la pièce D-26) volant à une

hauteur de 6,000 pieds au-dessus de l'aéroport, plongea soudainement, ferma ses deux moteurs, fit marcher ses pompes de combustible, le pétrole s'échappant à l'arrière en gouttelettes, et vint passer au-dessus de lui à environ 50 pieds. Il constata en cette occasion que toutes ces gouttelettes de pétrole s'évaporaient avant d'atteindre le sol et ne pouvaient par conséquent incendier quoi que ce soit, et cette expérience fut répétée plusieurs fois.

La preuve révèle aussi que si du pétrole s'était ainsi échappé d'un avion en plein vol, cela aurait pour le moins créé un incident ou peut-être même un écrasement qui aurait été sûrement rapporté.

Fowler établit d'ailleurs d'une façon décisive qu'un toit en toile goudronnée ne prend feu à 523°F que s'il est exposé à une chaleur de cette intensité pendant quelques secondes, or il appert que quant au dit toit, s'il avait été exposé à une telle intensité de chaleur par un avion en marche, n'aurait pu l'être, étant donné le mouvement ou la vitesse de l'avion, que pendant une fraction de seconde, soit pendant une période trop courte pour l'incendier. Le témoin en effet fit une démonstration devant la Cour avec une torche acétylène dont il mesura l'intensité de chaleur à 1300° F soit celle du gaz à sa sortie de l'avion et à cette intensité, qui serait bien supérieure à celle du gaz qui pourrait toucher au toit à cause de son refroidissement par l'air, il a pris plus qu'une seconde pour incendier une toile goudronnée qu'il avait d'ailleurs attachée par le coin et en dessous, ce qui comportait des conditions beaucoup plus favorables à l'incendie de la pièce que si le feu y avait tout simplement été déposé par une substance provenant de l'avion tombée sur le toit.

L'incendie d'ailleurs semble s'expliquer plutôt par la combustion probablement spontanée d'un matériel fort inflammable qui se trouvait dans les bâtiments de la Requérante à ce moment-là, soit la tourbe, matériel tel qu'au témoignage du propriétaire de la Requérante, M. Fortin lui-même, aucune compagnie d'assurance ne veut assurer.

Aylmer Swinnerton, un expert en matières combustibles tel que tourbe, pétrole, huile, charbon, etc., employé au département des mines à Ottawa et qui, en 1958, publia un volume intitulé «La Tourbe de Mousse au Canada», déclare

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à la page 356 des témoignages, relativement au danger d'incendie des tourbières, ce qui suit:

A. Well that was given considerable thought to that matter, our investigations, and discussions with different people, and I am quite sure that a lot of these fires that take place in peat are due to spontaneous combustion. These fires take place in the middle of the night, suddenly the buildings get filled with smoke, and then the fire gradually develops. I would like to just amplify that. Anybody who is a gardener and who has a mulch pile which develops quite a bit of heat, and especially if there is very much grass, a big pile of grass cutting, wet, after two (2) weeks will develop considerable heat; you would be surprised how much heat it develops.

Il appert en effet d'après son témoignage que cette chaleur est développée par la fermentation et la décomposition des matières organiques et le fait que la mousse contienne un peu d'humidité tel que la Requérante a voulu l'établir, loin de rendre cette mousse moins inflammable, l'aide précisément à prendre feu. Ceci appert également à la page 367 des notes sténographiques du témoignage de ce même témoin, questionné par la Cour:

Q. And in the storage shed it would consist of forty percent (40%) humidity and what?

A. It would dry a little more...not very much.

Q. Then there would be sixty percent (60%) material?

A. It would still have thirty (30) to forty percent (40%) when it is still in the bale.

Q. It would still be humid?

A. Oh yes.

Q. And would that humidity prevent it from taking fire?

A. No because it needs a certain amount of humidity for the fermentation; if it is too dry it would overheat and if it is too wet...it is somewhere in-between.

Q. There is a fermentation?

A. The danger of stacking hay when it is damp, it will quite often...the stack will catch fire going into the heat of the fermentation, that is why the farmers dry their hay on the field well before they put into the stack It is the same thing with the peat, perhaps at fifty percent (50%) it could develop fermentation and eventual fire.

Q. So it is more dangerous if it is relatively humid?

A. No.

Q. Do you say no or yes?

A. Oh yes, yes.

Q. Than when it is completely dry?

A. Yes.

Q. Because of the fermentation process?

A. Oh yes, yes.

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La pétition de droit ainsi que la demande incidente sont par conséquent rejetées. L'intimée pourra, mais quant au renvoi de la pétition de droit seulement, recouvrer de la pétitionnaire déboutée tous ses frais et honoraires taxables.

Toronto 1965 Dec. 6

Ottawa Dec. 16

BETWEEN:

JAMES M. McLEAN ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Estate tax—Estate Tax Act, S.C. 1958, c. 29, ss. 3, 5(1)(a), 58(1)(o) and (s)—Valuation of leasehold interest—Possibility of leasehold interest having no value, a plus value, or a minus value—Rent payable vs. economic rent.

At his death the deceased was a tenant under a written lease that still had 26 months to run at a monthly rental of $300 and his estate sought to deduct the full liability therefor, or $7,800, as a debt of the estate.

The Minister, on the other hand, while agreeing to allow this deduction, sought to add the sum of $4,340 as the value of the unexpired term of the lease in the absence of any obligation to pay rent.

Held: For the purpose of the *Estate Tax Act*, R.S.C. 1958, c. 29 as amended, a leasehold interest as an item of property has no market value when a tenant is paying pursuant to his lease contract the full rental value that the property is worth that is the economic rental; when a tenant is paying less than the economic rent his leasehold interest as an item of property has a plus value; and when a tenant is paying more than the economic rental it has a minus value; and it is the amount of the burden of a leasehold interest on an estate that has to be assessed and allowed to be deducted from the value of the deceased's estate before determining the balance on which the Estate Tax is payable; and this can be done in two ways, namely, by doing it the way the Minister has, or by valuing it on a net basis, either of which way the same result obtains.

2. That the appeal be dismissed.

APPEAL from a decision of the Tax Appeal Board.

M. C. McLean for appellant.

D. G. H. Bowman for respondent.

GIBSON J.:—This is an appeal from a decision of the Tax Appeal Board dated November 13, 1964 in respect of the

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estate tax assessment dated March 26, 1964 of James M. McLean executor under the will of Charles Harold Jaimet of the City of Hamilton in the County of Wentworth.

The issue in this appeal is the determination of the true computation of the aggregate net value of the property passing on the death of this deceased in so far as such property relates to a lease of premises situate at 65 Markland Street, Hamilton, Ontario.

Among the facts agreed to by the parties are the following:

1. At his death the deceased was a tenant of the said premises under a written lease made in pursuance of *The Short Forms of Leases Act* of the Province of Ontario, which provided for a monthly rental of $300 per month and the term of which did not expire until January 31, 1965.
2. The said lease constituted property passing on the death of the deceased.
3. The economic rental for the demised premises at the date of death of the deceased was $200 per month.
4. The executor of the estate of the deceased would, at the date of death of the deceased, have been obliged to pay in the market to a substantial person in order to induce him to take an assignment of the lease (including an assumption of the obligations thereunder) the sum of $3,460.
5. The value, at the date of death of the deceased, of the remainder of the term of the lease was, in the absence of any obligation to pay rent, $4,340.
6. At the date of death of the deceased all rent which had accrued due under the lease up to November 30, 1962 had been paid by the deceased.

The Appellant submits that this leasehold interest has no "value" within the meaning of s. 58(1)(*s*)(ii) of the *Estate Tax Act* and therefore was not "property" as defined in s. 58(1)(*o*) of the Act and should not be included in computing aggregate net value of property passing on the death of this deceased under s. 3 of the Act, because there was no "fair market value" of this leasehold interest in that "the economic rental for the demised premises at the date of the death of the deceased was $200 per month and the cost of

collecting this economic rental of $200 per month was the rent payable under the lease, namely $300 per month".

At the same time, the Appellant submits that he should be entitled to deduct in computing such aggregate net value as a debt of the deceased the sum of $7,800 being the rental payable of $300 per month for the unexpired term of this lease.

Counsel submits that the Respondent in making his final assessment:

(*a*) added the sum of $4,340 to the aggregate net value of the property passing on the death of the deceased being the value at the date of death of the deceased, of the remainder of the term of this lease, in the absence of any obligation to pay rent, pursuant to the provisions of s. 3 of the *Estate Tax Act;* and

(*b*) deducted the sum of $7,800 as a debt of the deceased, being the rental payable over the balance of the term remaining of this lease at $300 pursuant to the provisions of s. 7 of the *Estate Tax Act;*

(note that the sum of $4,340 is a capitalized figure, whereas the sum of $7,800 is not, and therefore if this assessment is correct, the Appellant was given a slightly larger deduction than he is legally entitled to),
and that the Respondent could also have legally assessed this leasehold interest on a net value basis.

It is patent that such an item of property as a leasehold interest for a number of purposes may have (i) no market value, (ii) a plus value or (iii) a minus value. (See re: *City of Toronto and McPhedran*[1]; *City Parking Ltd. v. City of Toronto*[2]; Challies, The Law of Expropriation, page 158 et foll.; *In re Brand*[3]; *In re Will of Inglis*[4].)

For the purpose of the *Estate Tax Act,* R.S.C. 1958 c. 29 as amended, a leasehold interest as an item of property has no market value when a tenant is paying pursuant to his lease contract the full rental that the property is worth (i.e. the economic rental or in other words the "fair market value" within the meaning of s. 58(1)(*s*)(ii) of the *Estate Tax Act*); when a tenant is paying less than the economic

[1] 54 O.L.R. 87, Middleton, J. A. at p 91.
[2] (1959) 19 D.L.R. (2d) 689 and [1961] S.C.R. 336.
[3] (1945) Northern Ireland Law Reports 1.
[4] (1890) 8 N.Z.L.R. 28.

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rental his leasehold interest as an item of property has a plus value; and when a tenant is paying more than the economic rental it has a minus value.

The subject lease in this case has a minus value as an item of property for estate tax purposes. It is the amount of the burden of this leasehold on this estate that has to be assessed and allowed to be deducted from the value of the deceased's estate before determining the balance on which the estate tax is payable.

This can be done in two ways, namely by doing it the way the Minister has done, as referred to above in these reasons, or by valuing it on a net basis, that is by calculating what the executor of this estate would have been obliged to pay in this market to a substantial person in order to induce him to take an assignment of this lease including an assumption of the obligations thereunder. Such a sum the parties agree in this case would be $3,400.

By either method the same result is obtained.

The appeal is therefore dismissed with costs.

Toronto 1965 Dec. 7, 8

Ottawa Dec. 21

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

CONSOLIDATED MOGUL MINES LTD. . . RESPONDENT.

Income tax—Revenue—Income Tax Act, R.S.C. 1952, c. 148, s. 83A(3)(b)—Deductions—Prospecting—Exploration and development expenses—Mining and management company—Principal business—Admissibility of evidence.

In each of the years 1957, 1958, 1959 and 1960 the appellant company sought to deduct, under the provisions of s. 83A(3) prospecting, exploration and development expenses incurred by it in searching for minerals in Canada.

The Minister disallowed the deductions on the ground that the principal business of appellant was not "mining or exploring for minerals" as required by the Section.

According to the Minister, the respondent's activities, during each of its 1957, 1958, 1959 and 1960 taxation years, were confined almost entirely to the management of its investment portfolio, to providing technical services to other companies from whom it received management fees and to arranging financing for other companies.

The evidence disclosed that respondent in each of said years had power to engage in a general mining business and exploring for minerals.

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In the main during the years 1957 to 1960 inclusive, the respondent did not itself do the mining and exploring for minerals. The way it carried on business was that many claims were drawn to its attention, which claims were either held by individuals or by other companies. In most cases, neither of them had sufficient finances to explore for minerals.

The respondent in such cases entered into an arrangement of such prospects through third party limited companies. If the owner of a prospect did not have a company, a company was incorporated. If the owner of a prospect was held by another company, then this was not necessary. The respondent very often loaned money by way of debenture to such third companies and at the same time received shares from the treasury of such companies and usually entered into a contractual relationship with such companies by which it controlled the expenditure so advanced for the purpose of exploration.

Held: That the manner of conducting the mining and exploring business of the respondent is the usual and accepted one in the industry and it is permissible to use the expenditures for mining and exploring for minerals made by these third party companies as a criteria for determining whether or not the principal business of the respondent was mining or exploring for minerals within the meaning of s. 83A(3)(*b*) of the Act.

2. That mining or exploring for minerals during the years 1957 to 1960 was the respondent's principal business within the meaning of s. 83A(3)(*b*) of the Act.

3. That the appeal be dismissed with costs.

APPEAL from a decision of the Tax Appeal Board.

M. A. Mogan and *John E. Sheppard* for appellant.

John G. McDonald, Q.C. and *M. L. O'Brien* for respondent.

GIBSON J.:—This is an appeal from the Judgment of the Tax Appeal Board dated February 9, 1965 by the Minister of National Revenue in respect of the income tax assessment of the Respondent for the 1957, 1958, 1959 and 1960 taxation years.

The sole issue for determination by the Court on this appeal is whether or not the Respondent's principal business in the years 1957 to 1960 inclusive was "mining or exploring for minerals" within the meaning of s. 83A(3)(*b*) which reads as follows:

> 83A. Exploration, Prospecting and Development Expenses.
>
> (3) . . . A corporation whose principal business is
>
> . . .
>
> (*b*) mining or exploring for minerals,
>
> may deduct, in computing its income under this Part for a taxation year, the lesser of
>
> . . .

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It is not disputed that the words "mining" and "exploring" in the said sub-section should be read disjunctively.

In assessing the Respondent the Appellant made the following assumptions:

(*a*) that the Respondent's income for each of its 1957, 1958, 1959 and 1960 taxation years was derived from its investments in shares, debentures and loans and from management fees received from other companies for whom it provided services of a technical nature under management contracts and that no income whatever was received from mining operations or exploring for minerals;

(*b*) that the Respondent's assets, including its available funds, were, during each of its 1957, 1958, 1959 and 1960 taxation years, almost entirely applied to its substantial invesment portfolio of shares, debentures and loans and only a very small nominal part thereof was applied to its mining assets;

(*c*) that the Respondent's activities and those of its officers and employees, were, during each of its 1957, 1958, 1959 and 1960 taxation years, confined almost entirely to the management of its substantial investment portfolio as aforesaid, the providing of management and technical services to other companies and the arranging for and the actual financing of other companies, including the underwriting of shares, the guaranteeing of loans and the lending of money to other companies and that in comparison to these activities, the Respondent's activities in the fields of mining and exploration were almost negligible; and

(*d*) that the Respondent's principal business was not, during any of its 1957, 1958, 1959 and 1960 taxation years, mining or exploring for minerals.

The assumptions in (*a*) and (*b*) above quoted are admitted by the Respondent to be correct but the Respondent disputes the assumptions in (*c*) and (*d*) above. The onus of disproving these latter assumptions is therefore on the Respondent within the meaning of *Johnston v. M.N.R.*[1]; *M.N.R. v. Pillsbury Holdings Limited*[2]; and *Talon Exploration Limited v. M.N.R.*[3]

[1] [1948] S.C.R. 186. [2] [1965] 1 Ex. C.R. 676 at 686.

[3] [1965] 1 Ex. C.R. 376 at 389 et foll

In evidence and argument the Respondent submitted that its principal business in each of the said years was mining and exploring for minerals.

The Appellant on the other hand submitted that on the evidence the principal business of the Respondent during each of the relevant years was mine management and that such submission is supported by the words used in the assumptions of the Minister which were made in assessing the Respondent and are in assumption entitled (*d*) above, namely "the providing of management and technical services to other companies".

"Mining or exploring for minerals" within the meaning of s. 83A(3)(*b*) of the Act the Respondent sought to describe and put in evidence, and it is common ground between the parties that part of Exhibit R-30, filed, probably adequately explains the details of the same as conducted in the Province of Ontario by such persons as the Respondent. Such part of said Exhibit R-30 reads as follows:

VARIOUS METHODS OF PURSUING EXPLORATION, DEVELOPMENT AND MINING ACTIVITIES

A. EXPLORATION AND MAINTENANCE OF ORGANIZATION

Presentation—Appraisal

1. Staking Claims
2. Option of Claims—(i) participant in vendor's position and purchase of shares to finance explorations—
   Formation of new company.
3. Purchase of shares in existing company.
   $0 — $25,000 Plateau—rarely $100,000.

B. DEVELOPMENT

(i) Loan of funds—least favourable.

(ii) Purchase of shares in existing company.

(iii) Direct application in wholly-owned project.
$100,000 — $500,000 plateau

C. MINING AND PRODUCTION

(i) Purchase of shares usually Control to Finance expenditures.

(ii) Creation of funded debt

(a) Simple First Mortgage

(b) Convertible to equity interest at future date.

(iii) Loan of funds to wholly-owned subsidiary or project
$500,000 — Millions required for Capital Investment.

All Instances:

(i) Isolation of Risk

(ii) Spreading and Diversification of Interests

(iii) Permits Distribution of Expenses.

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"A" and "B" describe and categorize "exploring", and "C" "mining" for minerals.

From this evidence and the *viva voce* evidence adduced it was established that substantial sums of money must be expended to explore for minerals and relatively huge sums must be expended in order to mine for minerals.

The evidence also was that only a relatively few prospects for minerals after preliminary investigation are actually mined within the meaning indicated here because there must be some reasonable basis for hope of success before such sums of money will be risked by any person. It is also the evidence that of those so-called prospects which are actually explored within the meaning discussed here that only a very small number actually result in and reach the stage of mining operations within the meaning also referred to here.

Of necessity therefore the method and manner of financing, exploring and mining for minerals is difficult and specialized and takes a form or forms which are different from the financing of ordinary industrial or commercial ventures.

The evidence is that the Respondent investigated many prospects, caused the exploration of a great number, and caused or contributed to the actual mining of a few during the years 1957 to 1960. Most of the details of what was done, where and how by the Respondent are set out in Exhibit R-30.

In the main during the years 1957 to 1960 the Respondent did not itself do the mining and exploring for minerals. It caused others to do so.

In brief, the Respondent in evidence established that the way it carried on business was as follows. Many claims were drawn to its attention, which claims were either held by individuals or by other companies. Neither of them had sufficient finances to explore for minerals. If after preliminary investigation by its geologist and others the Respondent decided such prospects warranted further investigation, it entered into an arrangement with such owners of such prospects. In all cases it was done through a third party limited company. If the owner of a prospect did not have a company, a company was incorporated. If the owner of a prospect was held by another company, then this was not necessary. The Respondent very often loaned money by

way of debenture to such third party company, received shares from the treasury of such company and entered into a contractual relationship with such company by which it controlled the expenditure of the money so advanced for the purposes of exploration.

In this way, the Respondent limited its specific liability in any particular venture. It obtained a share of the equity stock in such company which would be valuable if the venture turned out to be successful. It often obtained also a fee from the third party company for what work it did or direction it gave.

On the other hand, the third party company retained part of its equity stock so that if the venture proved successful, the original owners would receive their reward.

Sometimes this process involved another strata of limited company in that the Respondent might hold shares in a third party company which in turn held shares in still another company which latter company actually did the exploring.

In one case this latter situation obtained in connection with a mining company, namely the mine in the Republic of Ireland.

This was the *modus operandi* so to speak of the Respondent during these relevant taxation years according to the evidence. The precise relationship of the Respondent to each of these third party companies with whom it was associated or connected in this fashion and what was actually advanced to such companies by the Respondent and what was received by the Respondent was not given in evidence.

The source and application of capital funds of the Respondent in connection with the Respondent's relationship with these companies was also not given in evidence.

The Court at one juncture requested that such evidence be adduced but for reasons which are not now relevant for this judgment, the same was not adduced.

But on the evidence adduced the parties in fact assumed that this was the factual situation and for the purposes of this judgment I am holding that this is so.

This evidence established that in the year 1957 the Respondent proceeded in the way above referred to, and submitted that it was in the mining business by reason of

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its association with Harvey Hill Mine Limited, and in the exploration business by reason of its association with Consolidated Halliwell Limited, North Rankin Nickel Mines Limited, Coldstream Copper Mines Limited, Canam Copper Company and Irish Copper Mines Limited and others.

This evidence also established that the Respondent during the years 1958 to 1960 inclusive was in both the mining and exploration business but mainly the exploration business by reason of its association with the said companies and others, except Harvey Hill Mine Limited which had been put on a stand-by basis in 1957.

Exhibit A-1, filed by the Appellant is an analysis of the revenues and expenditures of the Respondent during the years 1956 to 1961 as taken from the records and published financial reports of the Respondent save and except the one line which is inserted under the paragraph entitled "Amounts Expended in Years 1957-1960 for Administrative Expenses and Exploration Expenses" which is described as:

Exploration expenditures incurred as agent for others

1956	1957	1958	1959	1960
$4,654,716	$1,842,545 35	$2,341,320.04	$620,785	$833,001

This line was inserted on the request of the Respondent and is filed as an exhibit and evidence of the Respondent.

This line shows the expenditures in the main made by the associated company Consolidated Halliwell Limited which incurred these expenditures on exploring for minerals within the meaning here, and it is the submission of the Respondent that these expenditures can be used for the purpose of determining that the Respondent at the same material time was also in the business of exploring for minerals.

The Respondent for the purposes of the *Income Tax Act* itself has exploring and mining expenses which were incurred prior to 1957. Under the Act it is permissible to cumulate them and they may be used by it as a deduction from income in any subsequent year without time limit.

In brief, the Respondent says that the expenditures of Consolidated Halliwell Limited and these other companies during each of the years 1957 to 1960 inclusive which the

Respondent caused them to make in the manner set out above may be used by the Respondent not for the purpose of obtaining a deduction from its income but for the purpose of determining whether or not mining or exploring for minerals during the years 1957 to 1960 was the Respondent's principal business.

The Appellant on the other hand submits that if the Respondent does not get the deduction of exploration expenses such as those incurred by Consolidated Halliwell Limited and these others, it cannot use such expenditures as criteria to be considered in the determination of whether or not the principal business of the Respondent was mining or exploring for minerals during the years 1957 to 1960 inclusive.

In other words the Respondent submits that the exploring business of Consolidated Halliwell Limited along with the exploring businesses of the other associated companies referred to in the evidence of the Respondent, cannot be used as such criteria on the basis that it is "irrational" to use the same exploration activities to establish the principal business of the Respondent as exploring for minerals.

I am of opinion that the manner of conducting the mining and exploring business of the Respondent as adduced in the evidence is the usual and accepted one in the industry and that it is not only permissible, but, indeed the only sound criterion in this case for determining the principal business of the Respondent during these taxation years. On this evidence I conclude that during each of the taxation years 1957 to 1960 inclusive the principal business of the Respondent was mining or exploring for minerals within the meaning of s. 83A(3)(*b*).

The Respondent has satisfied the onus of proving that the assumptions of the Minister above set out in paragraphs entitled (*c*) and (*d*) are wrong.

The appeal is therefore dismissed with costs.

Toronto 1965 Dec. 9 Ottawa Dec. 22

BETWEEN:

FOREIGN POWER SECURITIES CORPORATION LTD. ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Public investment company's profit on sale of shares—Securities transactions—Capital gain—Shares acquired at cost from parent private investment company—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 16(1), 17(2), 138(A), 139(1)(e).

The appellant, a *bona fide* public investment company, realized a gain of $703,636 in 1957 from the sale of 16,000 common shares of Trans-Canada Pipelines Ltd. and from 725 common shares of Quebec Natural Gas Corporation.

In 1958, it realized a reduced gain of $63,932 83 from the sale of shares of the same two companies. The Minister sought to tax these amounts on the grounds that:

1° The profits on the sales resulted from an adventure in the nature of trade on the basis of the activities and intentions of the appellant's controlling shareholder (N T. Company, private investment company), and as a means used by N T. Company to transfer its profits

2° The transactions were underwriting transactions on the part of Nesbitt Thomson Company and its subsidiary, the appellant.

3° The two corporations were not dealing with each other at arm's length, as during the period they were either controlled by the same interests or one controlled the other.

4° The shares were sold to the appellant by N.T. Company at cost which was below their true value at the time.

5° The above factors indicated a deliberate plan to divest N.T. Company of certain trading assets to the appellant.

For these reasons, the appellant appealed the assessments before this Court.

Held: That the appeal was allowed. The profits from the sales of the shares were the realization of an investment and non-taxable.

2. That the acquisition of a controlling interest in the appellant by N.T. investments occurred in the ordinary course of the latter's investment policies and did not give rise to any presumption of business activity.

3. Even if the profits were taxable as underwriting transactions in the case of N.T. Company, they could not be considered as such in the hands of the appellant.

4. That the appellant and N.T. Investments were not dealing at arm's length as the question was not pertinent in the absence of a specific provision of the Act referring thereto in the present context.

5. That an exact evaluation of the shares of a public utility company in the initial stages of development was difficult.

6. That the Court found it impossible, even assuming that the avoidance of taxes was one of the elements which activated the transaction, to come to the conclusion that the profits realized by the appellant resulted from an adventure in the nature of trade and thus were taxable.

7. That if the profits were taxable for the reasons advanced by the Minister it would seem that the party to be assessed in respect thereof should have been N T. Investments instead of the appellant, under the authority of either Section 16 or 17.

APPEAL from assessments of the Minister of National Revenue.

R. De Wolf MacKay, Q.C., Charles Gavsie, Q.C. and *Keith Eaton* for appellant.

Alvin B. Jacobs, Q.C. and *Paul Boivin, Q.C.* for respondent.

NOËL J.:—This is an appeal against the appellant's income tax assessments for the years 1957 and 1958. The appellant (hereinafter sometimes called Foreign Power) realized a gain of $703,636 in 1957 on the sale of 16,000 common shares of Trans-Canada Pipelines Limited (hereinafter sometimes called Trans-Canada), 725 common shares of Quebec Natural Gas Corporation (hereinafter sometimes called Quebec Gas), 16,000 class B shares of Quebec Gas and 150 units of Trans-Canada and (because of a loss sustained of $6,025 on the sale of 500 Quebec Gas units and the loss of $77,625 on the sale of 2,500 units of Trans-Canada) a reduced gain of $63,932.83 in 1958 on the sale of 2,367 common shares of Trans-Canada and 8,865 class B shares of Quebec Gas.

The sole question for determination is whether these gains were realizations of an enhancement in the value of investments by the appellant and, therefore, not subject to income tax as claimed by it or income from the appellant's business within the meaning of sections 3 and 4 and the definition of business in section 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148 and, therefore, taxable as submitted on behalf of the Minister.

Sections 3 and 4 of the Act read as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

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Section 139(1)(*e*) defines "business" as follows:

139. (1) In this Act,

. . .

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

Taxation of the appellant here is sought by the Minister under somewhat extraordinary circumstances in that as the appellant is a *bona fide* public investment company, whatever gains it may realize on its investments should normally not be taxable.

The Minister, however, in this instance has asked the Court to go beyond the actual purchase and sale of the shares involved herein, delve into the manner in which they were obtained from a company called N.T. Investments Ltd. and look at the interrelationship between the appellant, its officers and two corporations, N.T. Investments Limited and Nesbitt Thomson and Co. Ltd. and its officers and directors and consider the fact that N.T. Investments Ltd. purchased the control of the appellant in between the purchase in two batches of some of the shares involved herein.

The above facts were brought into this appeal by the respondent immediately prior to this appeal being placed on the roll by way of a motion to amend his reply by inserting therein paragraph 12 which lists a number of assumed facts on which he relies for the assessments. This motion was strongly opposed before the President of this Court on the basis that facts which occurred prior to the date when the appellant acquired the securities as well as matters dealing with other companies and persons are irrelevant. The President, however granted the motion but reserved the appellant's right to argue at the trial whether the said assumptions were relevant or not as well as to object to the production of any document dealing with any other person than the appellant.

Prior to the evidence adduced at this appeal, one of the appellant's counsel reiterated its objection to any evidence dealing with the assumptions of fact submitted by the Minister which facts had occurred prior to the time when the appellant acquired the securities as well as to all matters dealing with companies and persons other than the

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appellant and it is now incumbent upon me to deal with this matter.

The appellant here, relies on the often referred to *Salomon v. Salomon & Co. case*[1] where Lord Halsbury stated:

> But short of such proof it seems to me impossible to dispute that once the Company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the Company are absolutely irrelevant in discussing what those rights and liabilities are.

as well as on the *Pioneer Laundry case*[2] and the decision of Lord Thankerton at p. 417:

> Their Lordships agree with the Chief Justice and Davis J. that the reason given for the decision was not a proper ground for the exercise of the Minister's discretion, and that he was not entitled, in the absence of fraud or improper conduct, to disregard the separate legal existence of the Appellant company and to enquire as to who its shareholders were and its relation to its predecessors. The taxpayer is the company and not its shareholders.

Now, although there is no question that in questions of property and capacity, of acts done and rights acquired or liabilities assumed, the company is always an entity distinct from its corporators, it appears that for the purpose of determining the character in which property is held and the conditions on which the capacity to act is enjoyed and acts are done, the character of a company's shareholders and corporators are open for consideration and this would not seem to be at variance with the principle stated in the *Salomon case* (*supra*) if one refers to the dictum in *Daimler Company Limited v. Continental Type and Rubber Company* (*Great Britain*) *Limited*[3] at p. 340.

It also appears that the facts surrounding a purchase may be of some assistance in determining taxability on the basis that the true nature of the transactions involved must always be considered and where motives are important, the interconnection or interrelationship of companies dealing with each other as well as the motives and acts of a company's manager or directors must be explored because a corporation is but a legal entity which cannot have purposes separate from those of its managers and directors.

The question as to whether the intention of a company may be ascertained through its manager or directors has

[1] [1897] A.C. 22 at 30. [2] [1938-1939] C.T.C. 411.
[3] [1916] A.C. 307.

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come before our courts and been affirmed in several instances, i.e., in *Atlantic Sugar Refineries Limited v. M.N.R.*[1] where Kerwin J., as he then was, stated that:

> While the circumstances of these two cases are entirely different, the intention in each, as stated by Mr. Seidensticker, the company's president and manager, was the same, i.e., to offset losses either actual or feared. His intention, and therefore the intention of the appellant, was to do something as part of the latter's business and to secure a profit.

In *Regal Heights v. M.N.R.*[2], where although the taxpayer was a corporation, Judson J. stated:

> There is no doubt that the primary aim of the partners in the acquisition of these properties, and the learned trial judge so found, was the establishment of a shopping centre but he also found that their intention was to sell at a profit if they were unable to carry out their primary aim.

And in *Rivershore Investments Ltd. v. M.N.R.*[3] where my brother Kearney stated at p. 127:

> I consider, however, that the intentions of the appellant are deemed to be those of its directors and it is bound by the artificiality of the transactions carried out by the said directors.

The question also of whether individuals or a corporation have constituted another company their or its agent is always a question of fact and may be looked into, cf. *Palmolive Manufacturers Co. (Ontario) Ltd. v. The King*[4] and may be useful in some cases in determining the nature of a transaction and assist in fixing liability for taxes. The sole fact, however, that the controlling corporators hold a majority or even the whole of the shares and are the managing directors will not alone suffice to establish the relationship of principal and agent as pointed out by Thurlow J. in *Davidson v. M.N.R.*[5]

> Moreover though the appellant was the president and the sole owner of the capital stock of Davidson Securities Ltd., and no doubt dictated its course of action, there is nothing in the evidence to indicate that the company was in fact or in law an agent for the appellant in carrying out its transactions or that its business was not its own and a separate one from that of the appellant.

And, finally, in some cases in matters of taxation it is necessary for the court to go beyond the corporate entity in order to determine whether a transaction was at arm's length or not or artificial (*Vide Shulman v. M.N.R.*[6]) and *Rivershore Investments Ltd. v. M.N.R.* (*supra*) or to find

[1] [1949] S.C.R. 706 at 707.
[2] [1960] S.C.R. 902 at 905.
[3] [1964] C.T.C. 112.
[4] [1933] S.C.R. 131 at 136 and 137
[5] [1964] Ex. C.R. 48 at 56.
[6] [1961] Ex. C.R. 410.

out whether the corporation should be characterized as a "paper sham" a "similacrum", cloak or alias or alter ego or an artificial vehicle, (*Vide Rolka v. M.N.R.*[1]) and thereby in some cases establish whether the transaction entered in by it be given legal effect or not. Before parting with this matter I should add here that even a corporation set up as a sham cannot, however, be disregarded, although as stated by Lord Buckmaster in *Rainham Chemical Works Ltd. v. Belneden Fish Guario Co.*[2] p. 475:

> . . . it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence

For the purpose of dealing with the appellant's objection here, it will be sufficient, I believe, to rely only on the necessity for the Court to consider the true nature of the transactions involved herein which will then require an examination of all the facts listed in the appellant's assumption of facts. Whether such a course of action will be useful, however and will sustain the respondent's contentions is another matter and this will be dealt with after reviewing and assessing the evidence adduced.

It is with this in mind that I now turn to the facts assumed and relied on by the respondent in assessing the appellant and which are recited in paragraph 12 of the respondent's reply which is reproduced hereunder:

> 12 In making the assessment appealed from, he relied on the following assumptions:
>
> (*a*) On December 22, 1954, The Warnock Hersey Co. Ltd which was controlled by P Thomson acquired control of N T Investments Ltd and on June 28, 1956, acquired control of Foreign Power Securities Corp Ltd On December 31, 1956, The Warnock Hersey Co. Ltd. sold its controlling interest in Foreign Power Securities to N T Investments Therefore, from June 29th to December 31, 1965, N.T. Investments and Foreign Power Securities were controlled by The Warnock Hersey Co Ltd From December 31, 1956, and at all relevant times thereafter, Foreign Power Securities was a subsidiary of N.T. Investments Ltd ;
>
> (*b*) N T. Investments Ltd. was originally Nesbitt Thomson & Co. Ltd. The latter, whose business was underwriting and dealing in securities, was one of the underwriters when in 1950 a project was entered into for the construction of a pipe line to carry natural gas from Alberta to Eastern Canada;
>
> (*c*) To this end, during the years 1950, 1951 and 1952, Nesbitt Thomson & Co. Ltd. made advances to Western Pipe Line Ltd. and to Alberta Interfield in the amount of $84,142 22, which expenses were

[1] [1963] Ex. C.R. 138. [2] [1921] 2 A C. 465.

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charged against taxable income and allowed as such for income tax purposes;

(*d*) In 1952, Nesbitt Thomson & Co. Ltd. changed its name to N.T. Investments Ltd. and changed also its corporate powers from those of a dealer in securities to those of an investment company;

(*e*) A new company, Nesbitt Thomson *and* Co. Ltd., was created for the purpose of carrying on the trading activities of the predecessor company and by agreement dated April 1, 1952, all trading assets including rights to financing and underwriting agreements were purported to be transferred to the new company, and the assets considered in the nature of investment were retained by N.T. Investments Ltd.;

(*f*) The pipe line project was not transferred to Nesbitt Thomson and Co. Ltd. despite the fact that it was a trading asset and had been considered as such by the old company;

(*g*) After it had changed its name to N.T. Investments Ltd., further advances were made to the Western Companies, which expenses were not charged against income but were capitalized as being investments;

(*h*) On January 12, 1954, N.T. Investments Ltd., through its agent, Nesbitt Thomson and Co. Ltd., and together with and as one of a group of original participators in the financing of the pipe line project, entered into an agreement with Canadian Delhi Petroleum Ltd. for the purpose of joining forces in the carrying out of the pipe line project under the existing incorporated company, Trans-Canada Pipe Lines Ltd., and with the understanding that no group would have control;

(*i*) For the advances to the Western Companies by Nesbitt Thomson & Co. Ltd. in 1950, 1951 and 1952, N.T. Investments Ltd. in 1954 and 1955 received 72,624 common shares of Trans-Canada Pipe Lines Ltd. In addition to the above treasury shares, it also acquired from Canadian Delhi Petroleum Ltd. 10,712 common shares of Trans-Canada Pipe Lines Ltd.;

(*j*) The 72,624 treasury shares and the 10,712 shares acquired from Canadian Delhi Petroleum Ltd. forming a total of 83,336 common shares of Trans-Canada Pipe Lines Ltd. were disposed of at cost as follows:

Date		Shares
1954 – Nov/10	Hudson Bay Oil & Gas	1,910
Nov/30	"	156
1955 – May/11	P. Thomson	14,500
"	Canadian Power & Paper Securities	14,600
"	Power Corp.	14,600
Nov/19	Mr. Tanner	417
1956 – Jan/27	Mr. J. R. Donald	416
Apr/11	Canadian Power & Paper Securities	5,400
	Power Corporation	9,400
July/6	Foreign Power Securities Corp. Ltd.	11,225
1957 – Feb/18	Foreign Power Securities Corp. Ltd.	7,142
Mar/5	Nesbitt, Thomson and Company Ltd.	3,570
	TOTAL SHARES	83,336

(*k*) Foreign Power Securities Corp. Ltd. disposed of the 18,367 shares of Trans-Canada Pipe Lines Ltd. as follows:

Date	Number of shares	Selling Price	Cost	Profit (Loss)
May/28/57	6,000	$167,880 00	$ 48,096 00	$119,784.00
June/15/57	10,000	426,960 00	79,904 00	347,056.00
Jan/13/58	2,367	55,600 83	18,936.00	36,664.83
	18,367	$650,440.83	$146,936.00	$503,504.83

(*l*) Foreign Power also acquired in March 1957, 150 Units of Trans-Canada Pipe Lines Ltd. for $26,650.00 which it resold in the same month for $29,163 00, making a profit of $2,513 00;

(*m*) Foreign Power Securities also acquired, in June 1957, 2,500 Partial Units of Trans-Canada Pipe Lines Ltd., which it disposed of as follows:

Date	Number of Partial Units	Selling Price	Cost	Profit (Loss)
Nov/4/57[1]	2,500	$229,875.00	$377,500.00	($77,625 00)

(*n*) Quebec Natural Gas was incorporated in June, 1955, for the purpose of acquiring the gas distributing business of Hydro-Quebec including the gas manufacturing operations of Montreal Coke and the shipping facilities of Keystone Transports.

(*o*) Upon its organization, 5,000 common shares were issued at $10 00 per share as follows:

N. T. Investments Ltd.	725 shares
Wood, Gundy & Co. Ltd.	725 "
International Utilities Corp.	1,000 "
Canadian Delhi Oil Ltd.	1,250 "
Lehman Brothers	625 "
Alben & Co.	625 "
Osler, Hammond & Nanton Ltd.	50 "
	5,000 "

N.T. Investments transferred its common shares at cost to Foreign Power Securities as follows:

Jul/1956	612½ shares at $10.00 or	$6,115 00
Jan/1957	112½ " " 10.00 "	1,125 00
	725	$7,250 00

[1] The Nov/4/57 date should read Nov/4/58.

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(p) Financing of Quebec Natural Gas Corporation was to be made by the above companies in proportion to their interest in common shares;

(q) During 1956 and 1957, there was an initial advance of $1,200,000 plus an additional $3,159,880 00 for which 544,986 Class B shares at $8 00 were issued;

(r) N.T. Investments Ltd. entered into an agreement in or about September 1956 with various companies including Foreign Power Securities Ltd. whereby these companies were to participate in the financing of Quebec Natural Gas to the extent of N.T. Investments' interests in common shares;

(s) The companies involved and the extent of their participation were as follows:

Foreign Power Securities Ltd.	$250,000 00	31,250	Class "B" share
Power Corporation of Canada Ltd.	100,000 00	12,500	"
Great Britain and Canada Inv. Ltd.	30,000 00	3,750	"
Can. Power & Paper Securities Ltd.	200,000 00	25,000	"
Nesbitt, Thomson & Co. Ltd....	52,184 00	6,523	"
	$632,184 00	79,023	"

(t) The 79,023 shares received were issued to N.T. Investments Ltd, which company in turn endorsed the shares to the above companies;

(u) The 725 common shares acquired at cost from N.T. Investments Ltd. in July 1956 and January 1957 were disposed of as follows:

Date	Number of Shares	Selling Price	Cost	Profit (Loss)
Apr/27/57	725	$21,373 00	$7,250 00	$14,123 00

(v) The 31,250 Class "B" Shares acquired from N.T. Investments Ltd. on March 26, 1957, were disposed of as follows:

Date	Number of Shares	Selling Price	Cost	Profit (Loss)
May/28/57	10,000	$228,900 00	$ 80,400 00	$148,500 00
Oct/1/57	6,000	120,000 00	48,840 00	71,160 00
May/22/58	1,000	24,565 00	8,040 00	16,525 00
May/27/58	1,000	24,565 00	8,040 00	16,525 00
Jun/19/58	300	6,957 00	2,412 00	4,545 00
Jun/20/58	100	2,319 00	804.00	1,515 00
Jun/23/58	1,740	39,132 60	13,989 60	25,143 00
Jun/27/58	1,500	33,735 00	12,060 00	21,675 00
Jul/28/58	500	11,595 00	4,020 00	7,575.00

Date	Number of Shares	Selling Price	Cost	Profit (Loss)
Jul/29/58	100	$ 2,319 00	$ 804 00	$ 1,515 00
Jul/31/58	200	4,838 00	1,608 00	3,230 00
Aug/1/58	50	1,209.50	402 00	807.50
Aug/5/58	50	1,209 50	402 00	807.50
Aug/6/58	200	4,838 00	1,608 00	3,230 00
Sep/2/58	500	11,845 00	4,040 00	7,825.00
Nov/12/58	125	2,961 15	1,005 00	1,956 25
Nov/28/58	1,000	21,690 00	8,040 00	13,650 00
Dec/1/58	500	10,845 00	4,020 00	6,825 00
Jan/16/59	1,400	31,077 50	11,256 00	19,821 50
Jan/19/59	100	2,219 00	804 00	1,415 00
Jan/20/59	625	14,025 00	5,025 00	9,000 00
Jan/21/59	375	8,415 00	3,015 00	5,400 00
Jun/2/59	500	8,595 00	4,020 00	4,575 00
Jun/3/59	300	5,157 00	2,412 00	2,745 00
Jun/4/59	300	5,174 50	2,412 00	2,762 50
Jun/12/59	1,000	16,690 00	8,040 00	8,650 00
Jun/24/59	200	3,338 00	1,608 00	1,730 00
Feb/23/61	100	840 50	804 00	36 50
Feb/23/61	385	3,191 65	3,095 40	96 25
Feb/28/61	1,100	9,119 00	8,844 00	275 00
	31,150	$661,366 00	$251,850 00	$409,516 00

(*w*) Foreign Power also acquired in June 1957, 500 Partial Units of Quebec Natural Gas Corp. which it disposed of as follows:

Date	Number of Partial Units	Selling Price	Cost	Profit (Loss)
Nov/4/57[1]	500	$58,475 00	$64,500 00	($6,025 00)

(*x*) N T Investments, as a continuation of the old Nesbitt Thomson & Co Ltd., did not throw off the trading nature of its interest in the pipe line project when in 1952 it sold its purported trading assets to Nesbitt Thomson and Co Ltd and changed its corporate powers from those of a dealer in securities to those of an investment company;

(*y*) The organization and promotion of the pipe line and the Quebec Natural Gas projects proceeded in the same way when the shares were held by Foreign Power Securities as when they were held by N T. Investments or its predecessor, Nesbitt Thomson & Co. Ltd ;

(*z*) The venture in the pipe line and the Quebec Natural Gas projects was from the beginning to the end a venture in the nature of trade, the Respondent alleging that it was never the intention of the Appellant to hold as investment the shares and units of Trans-Canada Pipe Lines Ltd. and Quebec Natural Gas Corporation as appears from all the circumstances surrounding the purchases and sales thereof.

. . .

[1] The Nov/4/57 date should read Nov/4/58.

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15. He submits that the profits derived from the sales of the shares and units of Trans-Canada Pipe Lines Ltd. and Quebec Natural Gas Corporation are profits derived from a venture in the nature of trade within the meaning of section 139(1)(*e*) of the Income Tax Act and taxable under the provisions of sections 3 and 4 of the said Act.

The appellant, as already mentioned, on the other hand, submitted that the gains realized were realizations of an enhancement in the value of its investments and consideration must now be given to its evidence in this regard.

The evidence for the appellant was supplied by one witness only, William Howard Wert, a chartered accountant by profession and a vice-president and director of the appellant company since the end of June 1956. The appellant, a public company, was incorporated as a Canadian company on March 1, 1927, for the purpose of investing in securities of public utility companies throughout the world and primarily outside of Canada. It engaged in this type of activity until the early years of the last war having suffered, however, throughout the depression of the thirties many substantial losses in its investments. Its main asset, prior to the war, which it continued to hold was located in France. With the war, the assets were appropriated and nationalized by the French Government and payments of the expropriation price of its assets were made over a number of years in blocked francs. As and when the appellant was permitted to remit the francs and convert them into Canadian dollars, a portion thereof was then invested in short term Government bonds and the balance deposited in Canadian banks.

The securities purchased prior to June 30, 1956, from funds received from France and the amounts deposited in Canadian banks at that date are listed in Ex. A-2 which is reproduced hereunder:

Assets — as at June 30th, 1956

4,000	Province of Quebec 3% 1969	$ 3,895 00
75,000	Province of Quebec 2½% 1961.	74,312 50
100,000	Province of Nova Scotia 3% 1957	100,000.00
125,000	Province of Nova Scotia 2½% 1959	124,687 50
10,000	Province of New Brunswick 3¼% 1957	10,000 00
9,000	Province of New Brunswick 3¼% 1958	9,000.00
20,000	Province of New Brunswick 3% 1959.	20,000.00
5,000	Province of Newfoundland 3¼% 1957	5,006 25
320,000	Government of Canada 2⅓% Dec 15th 1956	318,930 00

Assets — as at June 30th, 1956

100,000	Government of Canada 2% 1958	$ 100,000.00
25,000	Government of Canada 2¼% July 1, 1956	24,972.50
208,000	Manitoba Hydro-Electric 3% 1962	209,020.00
87,000	City of Vancouver 3¼% 1962	87,000 00
50,000	Algoma Uranium Mines 5% 1961	49,625.00
550,000	Treasury Bills—$150,000 July 27 125,000 Aug. 3rd 275,000 Aug. 31	546,500 00
10,555	Shs. Power Corporation of Canada—Common	679,457.99
4,500	Shs. B.C. Power Corporation—Common	82,272 50
		$2,289,486 35
	Cash in Banks	$1,032,555.80
	Accrued Revenue	9,943.36
	Prepaid Accounts	1,191 40
		$3,333,176 91

$69,000 capital repayment funds temporarily deposited at June 30th, 1956 by Montreal Trust Company in 1% Non-Personal Savings Accounts.

Mr. Wert stated that up to the end of June 1956, the appellant company had no other assets than the above short term securities, some shares of stock, an amount of $1,032,555.80 in the bank and was carrying on no other activity.

In the month of July 1956, the appellant purchased a number of securities in an amount of approximately 2½ million dollars with monies obtained from the company funds as well as from the proceeds of the sale of the short term Government bonds. The securities so purchased include those sold by the appellant in 1957 and 1958 at a profit, the gains of which were assessed for income tax and which were bought from N.T. Investments Ltd. at a price of $95,925 comprising 11,225 shares of Trans-Canada Pipelines Limited at a cost of $89,800, i.e. $8.00 a share which shares were at the time represented by voting trust certificates and 612½ common shares of Quebec Natural Gas Corporation at a cost of $6,125, i.e. $10.00 per share.

Mr. Wert stated that of the total purchase of some 2½ million dollars worth of securities in July 1956 of which $95,925 were invested in Trans-Canada and Quebec Gas common shares about $1,800,000 are invested in the same securities which the appellant still holds today. On January 25, 1957, the appellant purchased from Canadian oil

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companies 112½ additional common shares of Quebec Gas at $10.00 a share also.

In December 1956 it was agreed that the appellant would purchase a further 7,142 odd common shares of Trans-Canada from N.T. Investments Ltd. represented by voting trust certificates at a price of $8 a share which were delivered shortly after the turn of the year in February of 1957. These voting trust certificates were subject to a voting trust agreement produced as Ex. A-3 which restricted the sale to the public of these shares up until 1958. These shares had been issued from the treasury of Trans-Canada for the money put up to organize and get it into an operating position.

The purchase of the 18,367 shares of Trans-Canada represented by the voting trust certificates from N.T. Investments Ltd., which according to Mr. Wert had been acquired by means of advances to provide funds in conjunction with other founders of Trans-Canada Pipe Lines Ltd. for the economic and engineering studies preliminary to the actual construction of the pipe lines, took place in the following circumstances. N.T. Investments Ltd. received in 1954 and 1955, 72,624 common shares of Trans-Canada for the advances it made to Western Pipelines Ltd. from 1950 to 1952 when it was called Nesbitt Thomson & Co. Ltd. and was trading in securities and from 1952 to 1955 when it had become N.T. Investments Ltd. as well as 10,712 common shares of Trans-Canada from Canadian Delhi Petroleum Ltd. as a result of an agreement made with the latter company on January 12, 1954, thus forming a total of 83,336 common shares which were all sold, 11,225 to the appellant at cost on July 6, 1956 and 7,142 on February 18, 1957. I should interpolate here that in December 1956 N.T. Investments Ltd. purchased 38,683 shares of Foreign Power from the appellant company for the sum of $2,000,250 thereby obtaining control of the company. Wert at page 79 of the transcript stated that when Nesbitt Thomson & Co. Ltd. changed its name in 1952 to N.T. Investments Ltd. and changed its operations from trading to that of an investment company "it retained the right to receive shares to subscribe for the monies, but surrendered any rights which it might have in conjunction

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with underwriting and for underwriting purposes another company was formed called Nesbitt Thomson and Co., Ltd."

The appellant then, on March 25, 1957, through N.T. Investments Ltd., again acquired 31,250 class B shares of Quebec Gas from the treasury of the company at a cost of $250,000, i.e. at $8.00 per share, which money had also been put up to organize it and get it in to an operating position and these shares were delivered in March 1957.

It appears from the evidence of Mr. Wert as well as from Ex. A-8, a certified extract from the minutes of a meeting of the directors of the appellant company held on September 28, 1956, that this purchase took place in the following circumstances. On September 20, 1956, the appellant had agreed "to participate to the extent of 12½/29ths of N.T. Investment Limited's option to purchase shares of Quebec Natural Gas Corporation with Foreign Power Security Corporation Limited to two hundred and fifty thousand dollars ($250,000) principal amount instalment payments on account of such sum to be payable on demand". I might point out here that N.T. Investments Limited had prior thereto undertaken to advance to Quebec Gas amounts up to $580,000 as one of the founders of the latter company. It later, however, decided to invest its money in other things and as a result of an arrangement made in September, 1956, with a number of companies such as the appellant, Great Britain and Canada Investments Ltd. and Canadian Power and Paper Securities who all agreed to put up a portion of the funds N.T. Investments had undertaken to advance, the latter had no longer any interest in the matter except for the obligation to turn over to the above companies a number of shares corresponding to their respective interests. As and when monies were required by Quebec Gas to maintain its option to acquire the facilities of the gas distribution system of Hydro-Quebec, the appellant made its portion of monies available at four or five different dates beginning about October 1, 1956, and ending in the early part of 1957 when, as already mentioned, in March of 1957 the advances of $250,000 were then converted into 31,250 class B shares issued to N.T. Investments Ltd. and then transferred to the appellant. These class B shares were subject to a limitation inscribed

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thereon, effective until March 31, 1958 (when they automatically became common shares) to the effect that they had been issued to the subscriber for his own account for investment and not with a view to their distribution and were not to be sold to the public. The company had the right to refuse transfer of any of these shares unless the transferor or transferee certified that the requested transfer was not a part of a public sale. They still, however, could be the subject of a private sale.

Six hundred and twelve and a half common shares of Quebec Gas of the 725 purchased by the appellant were bought from N.T. Investments Ltd. at cost at $10 per share and the balance of 112½ shares was purchased from Canadian oil companies also at $10 per share. N.T. Investments Ltd. had obtained the shares so sold at the formation of the company together with a group of other founders and sponsors such as Wood Gundy & Co. Ltd., International Utilities Corporation, Canadian Delhi Oil Ltd., Lehman Brothers, Allen & Co. and Osler, Hammond & Nanton Ltd. who all had received a certain number of shares. Two of the sponsors of Quebec Gas, Osler, Hammond & Nanton Ltd. and Wood Gundy & Co. Ltd. had also sponsored Trans-Canada, together with the Calgary and Edmonton Corporation Limited, Anglo Canadian Oil Company Limited and International Utilities Corporation and although there was no connection between both companies, Quebec Gas was a natural outlet for the distribution of the gas supplied and carried by Trans-Canada.

The appellant also purchased in 1957 a certain number of units of Trans-Canada and Quebec Gas of which some were sold in 1957 and the balance in 1958 as follows:

(1) 150 units of Trans-Canada were purchased on March 8, 1957 and sold the same month;

(2) 2,500 partial units of Trans-Canada were purchased on the open market from a broker of $250,000 principal amount of the subordinated debentures and 5,000 common shares (2 shares remained only of the original 5 as 3 had been stripped off which were sold by the appellant in November 1958 for an aggregate of $299,875 at a loss of $77,625).

(3) 500 partial units (100 in debentures and 2 common

shares) of Quebec Gas were purchased in June 1957 and sold in November 1958 at a loss of $6,025.

Mr. Wert explained that in purchasing these partial units the company wanted to maintain an interest in what it considered to be a sound industry, but to minimize the risk and, at the same time, to obtain an income in debentures. His explanation as to why the partial units were sold can be found at page 41 of the transcript where he stated:

> A. I believe that our judgment in buying them was poor, our judgment in selling them was good, because they continued to further depreciate in price after we had sold them, and we would be in a position of having some debenture income at a risk of a further capital loss.

From the evidence and documents produced as well as from the assessments of the respondent, it would appear that the following nomenclature sets out generally the purchase and sale of the securities involved in this appeal. For purpose of convenience Trans-Canada and Quebec Gas are hereinafter abbreviated as T.C. and Q.N.

Purchase date	No. of shares		1957 Price	Company	Sale date
July/56	11,225	common shares	$ 8.00	T.C.	10,000 – June 15/57
Feb/57	4,775				6,000 – May 28/57
July/56— 612½	725	common shares	10.00	Q.N.	Apr. 27/57
Jan/57— 112½					
Mar./57	6,000	class B shares	8 00	Q.N.	10,000 – May 28/57 6,000 – Oct./57
Mar./57	150	units		T.C.	– Mar./57

			1958		
Feb./57	2,367	common shares	$ 8 00	T.C.	– Jan.13/58
Mar./57	8,865	class B shares	8 00	Q.N.	between May 22/58 and Dec./58
June/57	2,500	units		T.C.	– Nov./58
June/57	500	units		Q.N.	– Nov./58

I should also point out here that by agreement dated May 8, 1956 made between the Government of Canada and

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Trans-Canada, the Government *inter alia* agreed to recommend to Parliament that a loan to Trans-Canada be authorized in an amount up to 90 per cent of the cost of the Western section of the pipeline, not to exceed $80,000,000 and on June 7, 1956 the *Northern Ontario Pipe Line Crown Corporation Act* came into force and the above loan was then authorized. It therefore appears that all the shares involved herein were purchased after the above agreement and the passing of the necessary authority to enable the above loan.

In February 1957, there was a public issue of Trans-Canada securities in both the United States and Canada by first mortgage bonds and their subordinated debentures. These Canadian subordinated debentures were marketed in units of $100 principal amount and five shares of common stock. In Canada, these units were marketed at $150 per unit plus accrued interest on the debentures. After the public offering, the initial trade over the Canadian market burst into action as appears from Ex. A-4, the over the counter trading record from March 1, 1957 to December 27, 1957 where on March 1, 1957 it started off at $24½ (from a value of $10) a share, went steadily up to as high as 47½ during the period June 7 to 21 and then ended off on December 27, 1957 at $20½. This occurred before the actual listing of this stock which took place on January 2, 1958.

The Quebec Natural Gas Corporation shares were offered to the public on April 12, 1957. The financing here was somewhat similar to Trans-Canada Pipe Lines Limited. The securities were marketed both in Canada and in the United States. The Canadian offering was $100 subordinated debentures to which were attached four common shares, the unit being marketed at $140 and accrued interest.

Mr. Wert also produced a similar over the counter record of the price of the Quebec Natural Gas Corporation common shares covering the period April 18, 1957, to December 27, 1957, which indicates that these shares sold on April 18, 1957 at a price of $29 to $30 (from a value of $10) went to a high of $34¾ on June 14, 1957 and then ended up just prior to being listed, which took place on November 15, 1957, at $18¾-$19½.

I might point out here that none of the 18,367 shares of Trans-Canada represented by the voting trust certificates,

nor the 31,250 class B shares and 725 common shares of Quebec Gas, acquired by the appellant and involved in the appeal were part of the public issues of February 12, 1957 and April 12, 1957 although, of course, the appellant took advantage of the market rise which occurred after the public issue of both companies to sell some of its holdings acquired prior thereto. As a matter of fact, the evidence discloses that the appellant did not subscribe for any of the units that were offered to the public by both companies nor was it involved in any way in the underwriting of the public issues.

In July 1956, when the appellant purchased the Trans-Canada and Quebec Gas shares, Mr. Wert as well as Mr. P. N. Thomson, amongst others, were directors of both the appellant and N. T. Investments Ltd. and Mr. Wert as Vice-president of the appellant, participated in the discussions which led to the purchase of 11,225 shares of Trans-Canada as well as of 31,250 class B shares of Quebec Gas. He also, as a director and secretary of N. T. Investments, together with P. N. Thomson, was instrumental in the decision by the latter company to sell the above shares to the appellant, adding that as it was a private company the other directors would readily accept the opinion of Thomson and himself in this regard.

This appears from the evidence of Mr. Wert at pages 57-58 of the transcript where, in answer to the following question, he admitted having exercised this dual function:

> Q. Could we say that at the particular time of the sale of these shares by N. T. Investments Ltd. and the purchase by Foreign Power Securities Corporation of these securities, that you were acting in the capacity of an officer of both corporations, as seller and purchaser?
>
> A. I acted as an officer of both corporations.

Wert at pages 111 and 112 of the transcript also admits he was instrumental in having Foreign Power invest $250,000 in Quebec Gas for which it received 31,250 class B shares and that N. T. Investments Ltd's plan throughout was to enlarge its holdings in the appellant company:

> A. We considered again that this was a public utility and there was every reason to believe that it should prove to be a conservative investment. Public utilities usually are This one simply developed special characteristics.
>
> ...

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Q. When did it come about that it was decided to enlarge your holdings in Foreign Power Securities?

A. Currently, no particular day, it was our general policy.

And at p. 112:

Q. But in between September and December, when the negotiations obviously were going on with Quebec Natural Gas Corporation, N. T. Investments Ltd. had the necessary funds to purchase this block of thirty-one thousand two hundred fifty (31,250) Class B shares for two hundred fifty thousand dollars ($250,000) that were eventually purchased by Foreign Power Securities Corporation?

A I repeat it was the decision of the directors that we would not invest in Quebec Natural Gas but we would hold out money for other purposes.

...

Q. This was simply, largely another understanding between you and Peter Thomson as regards your official capacity with N. T. Investments Ltd.?

A. Yes.

Q. This was a way of having Foreign Power Securities go through N. T. Investments to obtain these thirty-one thousand two hundred fifty (31,250) Class B shares?

...

A. Yes, that is correct.

Q. Knowing at that time that N. T. Investments Ltd. was planning control of Foreign Power Securities Corporation?

A. Certainly.

The policy followed by the Board of Directors of Foreign Corporation in deciding whether or not it should invest its funds in shares and bonds, which decision Wert admitted would originate between Thomson and himself would, however, according to Wert, be reported to and be approved by the full Board of Directors of the appellant as the latter was a public corporation and was governed by a desire to become active in Canadian business and investment communities and divest itself of its short term Government bonds, convert them into Canadian dollars and invest the resultant funds in situations considered potentially profitable.

The company had no special guide lines to help it make decisions, but according to Wert relied on common sense. The latter, at p. 61 of the transcript, asked whether the fact that the shares which had cost $8 were being offered at $8 per share by N. T. Investments Ltd. played any part in the decision of the appellant to acquire them, answered:

A. To this extent that we considered eight dollars ($8) a share to be a proper price.

Later the price at which these shares were sold came up again and when Mr. Wert was asked at p. 87 of the transcript, by counsel for the respondent, whether as a sound business practice and as a business man in the investment field he would have sold him those shares at $8 per share if he had approached him, he gave the following answer:

A. I can say this, there were days when you could have had them for about one cent a share.

The Court then asked Mr. Wert whether this was the situation in July 1956 and he stated:

A. But there, throughout the market value or the true market value of these shares, at a pertinent time, had nothing to suggest that they were more or that they were other than this eight dollars ($8) per share.

He later asserted that there was no information available to him that led to believe that any price other than $8 a share would be a fair market value and he referred to the Report of the Royal Commission on Energy, Ex. A-7, p. 78, where it appears that a company called Tennessee Gas Transmissions made a large investment in order to make the pipe line possible and paid $8 a share, though it appeared later that this sale took place prior to the commitment of the Government of Canada to loan $80,000,000 as they were purchased on February 8, 1956 and the loan was undertaken in the spring of 1956. And finally, at pp. 87 and 88 Wert gave the following answer to the following questions by counsel for the respondent:

Q. If I had come to you after the announcement that the Government of Canada was backing the pipe line up to eighty million ($80,000,000) dollars, and I had appeared on the same date as Foreign Power Securities Corporation, would you have sold me those shares at eight dollars ($8) per share, as you did Foreign Power Securities?

A. I am afraid I did not have to consider that matter.

And at pp. 89 and 90 of the transcript, Wert, with regard to the reasonableness of the price paid by the appellant for the shares stated:

A. I can only say that at no time in these earlier days was there any eventuality that these shares were going to be other than a reasonably sound investment in public utilities. It is not in the nature of things that public utilities stock goes from nothing to a very high price overnight. It was never anticipated, and throughout this period there was nothing to give an indication that the stock would take off in the manner that it did elsewhere, and I can only suggest that that opinion was shared by all of the oil and gas

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companies that made up Trans-Canada Pipe Lines, all of their financing advisors, because the directors and officers of Trans-Canada Pipe Lines would have been most derelict in their duty to the Trans-Canada people if they had sold to the public shares at ten dollars ($10) per share, that they thought were going to be worth forty-seven ($47) within a couple of months...

A. Having regard to my responsibility as an officer and director of Foreign Power Securities, a public company listed on the stock exchange, with several hundred shareholders with us...having seventy per cent (70%) of the stock, that is true, but having a substantial minority interest, I, as a director, had to be satisfied that the price of eight dollars ($8) that we paid was the reasonable market value of these securities, I could do nothing else but purchase at fair market value.

Q. How would you reconcile in your mind the fact that on the one hand, it was a sound, good logical investment in a public utility company that had possibilities of growth and, on the other hand, N. T. Investments Ltd, ostensibly an investment company, giving up these shares under the same terms and conditions of the possibility of growth?

A. In the case of N. T. Investments and my responsibility there, it was my opinion that while this was a good investment, in sum total there were too many dollars invested in one situation, in N. T. Investments, having regard to its total resources, and in addition to that it was, or rather as part of our corporate planning, we wished to use funds in N. T. Investments or invest by it, in the acquisition of shares of other companies, notably Foreign Power Securities and create a permanent vehicle...

Q. By selling these eighteen thousand three hundred sixty-seven (18,367) shares, particularly to Foreign Power Securities, you acquired approximately ninety thousand some odd dollars?

A. Yes.

Q. That was applied to other money to obtain control of Foreign Power Securities Corporation?

A. It, with other monies in the portfolio of N. T. Investments, were used to purchase "Securities" yes.

And at p. 95:

Q. Did you not find it strange that the shares were offered at cost, as an officer and director of Foreign Power Securities, after knowing as an officer and director of the Vendor that they were a good investment?

A. I repeat that in my opinion I was selling these shares as an officer of N. T. Investments at a fair market value and as an officer of Foreign Power Securities, I was purchasing them at fair market value.

Q. And on both sides of the coin, you were apparently satisfied that selling was proper for N. T. Investments Ltd. and just as proper, as an officer of another corporation, to purchase at what you stated was fair market value?

A. I did so consider.

He was then asked by the Court at p. 62 of the transcript what his guide was when the shares were sold on behalf of N. T. Investments Ltd., and he gave the following answer:

A. In the investment company, we had decided that we wished to put the money that was there available to other purposes and to that end we disposed of our shares in pipe line companies.

Wert admitted at p. 72 of the transcript that when the appellant decided to purchase the Trans-Canada shares from N. T. Investments Ltd., he personally knew that a pipe line was to be constructed, backed by the Canadian Government up to an amount of $80,000,000 and that the latter decision influenced the decision of the appellant "to a degree but not wholly".

The selling of the 83,336 common shares of Trans-Canada to various purchasers (18,367 of which, as we have seen, were sold to the appellant) over a period extending from November 10, 1954 to March 5, 1957 by N. T. Investments Ltd. was explained as follows by Mr. Wert at p. 86 of the transcript:

A. It was the intention of the directors of N. T. Investments to go into the situations that would be of a permanent investment nature, and the acquisition of the control of Foreign Power Securities Corporation is an example of what we had in mind.

The 18,367 shares purchased by the appellant, although purchased as a long term investment, were sold by the latter over a relatively short period of time which, however, Wert explains as follows at pp. 94-95 of the transcript:

BY THE COURT:

Q. Do you know why they were sold within four (4) months?

A. Because these dates, certainly within the date of the extreme high in the market, the shares of Trans-Canada Pipe Lines had gone to this completely unrealistic price, and we sold them, the market value had far outstripped any possible justification as an investment.

The appellant started to dispose of the 31,250 shares of Quebec Gas as early as two months after their acquisition as appears from Wert's evidence at pp. 119 and 120 of the transcript:

Q. Foreign Power Securities Corporation disposed of approximately one third (⅓) of its interest in Class B shares of Quebec Natural Gas Corporation two (2) months after the acquisition of them?

A. That is correct.

Q. And within an additional four (4) months, they disposed of a further block of six thousand (6,000) Class B shares of Quebec

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Natural Gas Corporation, making a total of pretty close to half of their portfolio of that stock?

A. That is correct.

Q. How do you account for selling those shares at a time when they were purchased for an investment in a company with potential growth?

A. Again in the case of Quebec Natural Gas there was a bidding up on the part of the public for these shares at levels that were completely unrealistic, having regard to our responsibility to the public shareholders of Foreign Power Securities, if nothing else, it was our duty to sell.

The monies received by the appellant from the sale of the shares of both companies were re-invested partly in Trans-Canada or Quebec Natural Gas partial units, in Reynolds Aluminum and in preferred shares of Canadian Car and Bus Advertising Ltd. and Inspiration Mining Development Co.

The reason why after the sale of the shares by Foreign Power Corporation, the latter re-invested part of that money in other stocks or debentures of Trans-Canada is also explained by Wert at pp. 96 and 97 of the transcript:

Q. Could you explain the reasoning behind the sale of shares by the Corporation and re-investing money in the same corporation, within a very short period of time?

A. Well, my Lord, the price of the shares had gone down, but we felt that we could purchase debentures of the Trans-Canada Pipe Lines to which were attached two (2) shares at a price which would give us a continued interest in this industry but would, at the same time, give us a senior position and assured income from the debenture interest and would permit us to keep our funds invested.

Mr. Wert was then, at p. 122 of the transcript, finally asked by counsel for the respondent, whether one of the reasons for the transactions was to transfer the profits that might have accrued to N. T. Investments to Foreign Power and gave the following answers:

A. I would say no.

Q. Even in the light of the explanation that you have given, that was not one of the reasons?

A. It was not.

Q. It just happened in the course of business?

A. We deliberately did not attempt to transfer any tax situation, and again I repeat that we had no possible knowledge, we made these decisions, that there was going to be these unprecedented and unjustified increases in the shares of these companies.

I have gone into the above evidence in some detail because it is on the basis of such facts that the respondent asks that the appellant be held taxable on the profits

realized on the sale of the securities involved in this appeal. The position taken by the Minister is a rather unusual one in that here he is seeking to have these profits held taxable as resulting from an adventure in the nature of trade on the basis of its shareholder's (N.T. Investments Ltd.) activities and intentions and as being a means used by it to transfer its profits. The respondent would indeed appear to be attempting to tax the appellant because the corporation from which it purchased the securities might have been engaged in a business or a concern in the nature of trade because of its former trading activities, had it not transferred these securities to the appellant. If such is the situation, it would appear to me that the proper party to be assessed herein would be not the present appellant but N.T. Investments Ltd. under either sections 16 or 17(1). However, as this situation is not before me, I will refrain from expressing an opinion on the taxability of N.T. Investments Ltd. if such a course had been followed.

I must now then consider the submission of counsel for the respondent as it appears to be that the profits of the appellant herein are derived from an adventure in the nature of trade within the meaning of section 139(1)(*e*) of the *Income Tax Act*.

According to the respondent, the transactions effected by the appellant should be held to be a business because (1) of the appellant's association with N.T. Investments Ltd.; (2) the transactions were from the beginning to the end, on the part of N.T. Investments and its subsidiary the appellant, underwriting transactions; (3) the two corporations were not dealing with each other at arm's length at the time of the transactions as they were either controlled by the same interests, or one was controlled by the other. Warnock Hersey Co., controlled by Peter Thomson as of December 31, 1956, acquired control of the appellant company and the same Thomson with Wert was instrumental in making this sale of the shares from N.T. Investments Ltd. to the appellant; (4) the shares were sold to the appellant at cost which was below their true value at the time and, finally, according to counsel for the respondent, the above facts as well as a proper consideration of where the shares came from, why they were acquired and why they were transferred at cost would appear to indicate almost a deliberate

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plan to divest N.T. Investments Ltd. of certain trading assets to the appellant.

The appellant's association with N.T. Investments Ltd. on which counsel for the respondent relies in determining that the transactions herein are adventures in the nature of trade is not of much assistance in this regard as the appellant is a public company with shares on the market and although during the course of the transactions N.T. Investments Ltd. purchased control of the appellant, it did so in the course of investing its monies in a public investment company having holdings in several Canadian corporations which as a private investment corporation since 1952 was a normal thing to do and I fail to see how this can be indicative of a business even within the extended meaning given the latter by section 139(1)(*e*) of the Act.

The assertion that the transactions were from the beginning to the end on the part of both N.T. Investments Ltd. and the appellant, its subsidiary, underwriting transactions, is also difficult to understand. There is no question that prior to 1952 N.T. Investments Ltd., under the name of Nesbitt Thomson & Co. Ltd., was carrying on a stockbroking business as well as that of an investment dealer and probably was also underwriting issues of shares although in some cases it might well have also invested in shares as a founder of new corporations such as Trans-Canada and Quebec Gas; whatever profits it would realize on the sale of the shares acquired prior to 1952, even after the change of the name and powers of the company in 1952 to N.T. Investments Ltd. would not change the nature of these profits which would still be considered as business profits under the authority of *Osler, Hammond & Nanton Ltd. v. M.N.R.*[1] and as a matter of fact, this was the manner in which, according to Mr. Wert, (cf. p. 131 of the transcript) an item representing the net realization of certain Trans-Canada Pipe Lines Ltd. shares received by reason of advances made to the predecessors of Trans-Canada Pipe Lines prior to April 1952 was dealt with. The amounts had been written off but when they were, later in 1956, recovered by the sale of the shares, they were brought back into the income of N.T. Investments Ltd., This appears from an examination of N.T. Investments Ltd.'s income tax return

[1] [1963] C.T.C. 164.

for 1956 produced as Ex. R-5. The profits made, however, on the realization of investments or monies which had been invested after April 1952 were taken into capital surplus account and that appears on statement IV of the statements contained in the above returns. Whether such items are taxable in the hands of N.T. Investments Ltd. could be the subject of an assessment of the latter company and I do not intend nor need to express an opinion on the taxability of such profits here. It would seem clear, however, that even if such profits were taxable as underwriting transactions in the case of N.T. Investments Ltd., they certainly could not be considered as such in the hands of the appellant corporation a *bona fide* public investment corporation with no prior underwriting activities.

Respondent's assertion that the two corporations were not dealing with each other at arm's length at the time of the transactions, might have been pertinent in a case where the *Income Tax Act* specifically refers to a transaction being taxable if it is not at arm's length but such is not the nature of the transactions involved here where, although there is an interconnection or interrelationship of the two corporations involved, and a situation where some of their common shareholders and common directors acted in a dual capacity, this inter-twining of interests cannot be of much assistance in determining the issue here which is to be decided on the sole question of whether the profits resulted from a business or not.

The submission by the respondent that the securities were sold at cost which respondent submits was well below its actual value at the time should also be commented upon. It would appear from the evidence that all of the Trans-Canada securities involved herein were sold to the appellant after the Government of Canada had undertaken to advance up to $80,000,000 and although at this time the prices set down for the sale of the shares involved, and this applies as well to the Quebec Gas shares, would appear to have been a conservative figure, it would appear that an exact evaluation of shares in such public utility companies in the initial stages is of considerable difficulty. The success of a company in such cases is dependent upon so many factors that the value of its shares at this stage can only be approximated. The financial assistance given Trans-Canada

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by the backing of the Canadian Government for the construction of the line across the northern part of Ontario although undoubtedly of considerable value, might still not have been sufficient to insure the success of the undertaking, although, at this stage, I do not believe that N.T. Investments Ltd. would have sold the shares to a stranger at the price it sold them to the appellant. It is quite difficult to establish what the real price should have been at the time. I would not, however, say that it should have been the high of 47½ for Trans-Canada and 34¾ for Quebec Natural Gas shares to which the securities went practically overnight. It could have been expected at the time that the securities would eventually do well and here I am even prepared to say that the incidence of taxation may have been an element in the minds of the directors of both the appellant and N.T. Investments Ltd. in selling shares to the appellant. I do accept Mr. Wert's statement that it was, however, never anticipated and that throughout the period, there was nothing to give an indication that the stock would take off in the manner that it did and as he asserted at p. 89 of the transcript:

> A. . . . I can only suggest that that opinion was shared by all of the oil and gas companies that made up Trans-Canada Pipe Lines, all of their financing advisors, because the directors and officers of Trans-Canada Pipe Lines would have been most derelict in their duty to the Trans-Canada people if they had sold to the public shares at ten dollars ($10) per share that they thought were going to be worth forty-seven dollars ($47) within a couple of months . . .

As a matter of fact, the unrealistic heights reached by the shares at one time were based on popular enthusiasm which eventually came back to more objective values and I am convinced that there was no possibility prior thereto for anyone to anticipate this meteoric rise. Here again the prices of the securities sold can be of little assistance in establishing that the transactions were of a business nature.

Looking at these transactions in the light of the above circumstances, as urged by the respondent, and after giving consideration to the nature and origin of the securities involved, why they were sold and the price paid for them and even assuming, as suggested by the respondent, that the above would almost indicate a deliberate plan to divest N.T. Investments Ltd. of the securities to the appellant, I still cannot see how I can reach a decision that the profits realized by the appellant should be held to be taxable.

We are dealing here with securities, shares, debentures and units, which are essentially a means of investment, as pointed out by Martland J. in *Irrigation Industries Ltd. v. M.N.R.*[1]

> Corporate shares are in a different position because they constitute something the purchase of which is, in itself, an investment. They are not, in themselves, articles of commerce, but represent an interest in a corporation which it itself created for the purpose of doing business. Their acquisition is a well-organized method of investing capital in a business enterprise.

The short period during which these securities were held by the appellant can be of little assistance to the respondent as their fast disposal was properly explained by Mr. Wert in that the directors of the appellant would have been remiss in their duties had they not taken advantage of the surprisingly high rise of the market at the time the securities were sold. The fact that the appellant entered into these transactions for the purpose of making a profit as soon as it could and took advantage of this rise as soon as it occurred, should not either change the nature of its investments if this is what they were and render them taxable as trading receipts and this also would appear from the remarks of Martland J. at p. 355 of the same decision:

> The only test which was applied in the present case was whether the appellant entered into the transaction with the intention of disposing of the shares at a profit so soon as there was a reasonable opportunity of so doing. Is that a sufficient test for determining whether or not this transaction constitutes an adventure in the nature of trade? I do not think that, standing alone, it is sufficient.

I find it impossible after reviewing this whole matter, and even assuming that the avoidance of taxes was one of the elements which motivated the transactions, to come to the conclusion that the profits realized by the appellant herein resulted from an adventure in the nature of trade and are taxable.

I should also add that though there is much to be said in favour of preventing the ingenuity expended by certain people to devise in some cases elaborate and artificial methods of disposing of income in order to avoid the payment of taxes because it thereby increases *pro tanto* the load of the tax on the shoulders of those who do not desire or know how to use such methods, in the absence of specific legislation to prevent such practices, "every man", (as

[1] [1962] S.C.R. 346 at 352.

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stated in the words of Lord Tomlin in the *Duke of Westminster's case*[1]:)

> is entitled, if he can, to order his affairs so as that the tax attracted under the appropriate Act is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however, unappreciative the Commissioner of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay more.

Or as expressed by Lord Sumner in *I.R.C. v. Fisher's Executors*[2] at p. 412:

> My lords, the highest authorities have always recognized that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law and that he may legitimately claim the advantage of any express term or of any omissions that he can find in his favour in the taxing acts. In so doing, he neither comes under liability nor incurs blame.

I would think that if it is desired to have an effective deterrent to a tax avoidance practice which is considered to be against the public interest, Parliament should legislate (as it has in some cases, such as with respect to dividend stripping in section 138A) so as effectively to block it. The Court should not be asked to accomplish the task, as it is being asked to do here, by squeezing into the notion of an adventure in the nature of trade, a transaction which is a *bona fide* investment and nothing else. Nor is the situation any different if such a *bona fide* investment was entered into with the knowledge that the capital value of the *res* would surely increase or if the situation is that, if the *res* had not been sold to the appellant until after the increase in value, it would have resulted in the person who sold to the appellant realizing a trading profit that would have been taxable in his hands. Nor, in this latter case, would the situation have been any different if the person who sold to the appellant had purchased control of the appellant and thus arranged to get indirectly a part of the increase in value of the *res* that, if it had realized it directly by a sale of that *res*, would have been a trading profit in its hands. In this same vein, I might point out that, under the Act as it is at the present time, the situation would be no different even if one of the elements in the transaction was the avoidance of taxes. There is indeed no provision in the *Income Tax Act* which provides that, where it appears that the main purpose or one of the purposes for which any transaction or transactions was or were effected was the

[1] [1936] A.C. 1920. [2] [1926] A.C. 395.

avoidance or reduction of liability to income tax, the Court may, if it thinks fit, direct that such adjustments shall be made as respects liability to income tax as it considers appropriate so as to counteract the avoidance or reduction of liability to income tax which would otherwise be effected by the transaction or transactions. The only authority of this character conferred by the statute is conferred on Treasury Board by section 138.

The appeal, therefore, succeeds and it will be allowed with costs and the re-assessments varied accordingly.

BETWEEN:

WILLIAM SLATER, SAM ROSS, DAVID ROSS, BETTY SLATER, IDA ROSS, HELEN ROSS, AND GERALD ROSS ..... APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Toronto 1965 Dec. 1, 2
Ottawa Dec. 31

Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 26(1)(a), (b), (2), 139(1)(e)—Capital gain—Real estate transaction—Apartment house built by private company—Sale of company's shares—Income from business.

William Slater and Sam Ross were the principal and active members and shareholders, together with the other appellants (wives and relatives) of Slater Ross Investments Ltd., which was formed for the purpose of constructing a 60-suite apartment building.

By consent, all appeals were heard together.

A few months after completion of the apartment building, a deal was consummated for the sale by the shareholders of all of the corporation's shares

In the Minister's view the profits derived by the shareholders on disposing of their shares constituted income from a business, whereas in the appellant's view they represented capital gains from the sale of property intended to be held as an investment.

William Slater appealed to the Tax Appeal Board which dismissed his appeal

All of the appellants appealed before this Court, on the ground that the group intended to retain the building for rental income and that they had only agreed to accept the offer to purchase the shares of the company because William Slater was in desperate financial straits.

Held: That the sale of the shares and the profits realized thereby resulted from the carrying on of a business.

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2. That the building background of William Slater and Sam Ross, the approach and offer to purchase, made by K. during the construction of the building in 1958, the continued negotiations up until the purchase date upon completion of construction and the vendors' insistence upon the sale of the shares rather than of the building, all indicated a business venture and the transactions were therefore taxable.

3. That the profits realized by the non-active shareholders could not be different in nature from those derived by the more active members, the profits derived by all were taxable.

4. Appeals dismissed.

APPEAL from a decision of the Tax Appeal Board.

John A. Gamble for appellants.

W. J. Memmerich, Q.C. and *Bruce Verchère* for respondent.

NOËL J.:—This is an appeal from a decision of the Tax Appeal Board[1] rejecting the appeal from an assessment against one of the appellants herein, William Slater, for the year 1959 whereby the sum of $13,227.80 was added to his income for the said year as a result of the sale at a profit of 1,000 common shares he held in a corporation called Slater Ross Investments Limited incorporated by Mr. Slater and the other appellants, on the basis that the profit so realized had the character of income. The appeal of each of the other appellants was also dismissed by the Tax Appeal Board for the same reasons, and the following assessments made against them as a result of the profit realized by the sale of the following number of shares of Slater Ross Investments Limited for each of them, were maintained: Sam Ross, $11,610.94 on the sale of 1,000 shares; David Ross, $12,327.91 on the sale of 1,000 shares; Betty Slater, $1,565.92 on the sale of 333 shares; Ida Ross, $1,572.76 on the sale of 334 shares and Helen Ross, $1,618.42 on the sale of 333 shares.

The first question for determination is whether these gains were realizations of an enhancement in the value of investments by the appellants, and therefore, not subject to income tax as claimed by them or income from a business within the meaning of sections 3 and 4 and the definition of section 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148 and, therefore, taxable as submitted on behalf of the Minister.

[1] 36 Tax A.B.C. 85.

Sections 3 and 4 of the Act read as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments

4 Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

Section 139(1)(*e*) defines "business" as follows:

139. (1) In this Act,

...

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

The appellant Gerald Ross (the husband of Helen Ross, another appellant) who held no shares in Slater Ross Investments Limited is only concerned with a claim for the statutory marital deduction under section 26(2) of the Act and counsel for both parties at the opening of this appeal agreed that in the event the appeal of Helen Ross was allowed, the appeal of Gerald Ross shall automatically be allowed. In the event, however, that Helen Ross's appeal was disallowed, then it follows that Gerald Ross's appeal will also be disallowed.

It also follows that if the assessments of Ida Ross, wife of Sam Ross, and Betty Slater, wife of William Slater, are upheld, their income for the 1959 taxation year will have exceeded $1250 and because of section 26(2) of the Act, their respective husbands will then be entitled only to the deduction of the $1,000 permitted by paragraph (*b*) of subsection (1) of section 26 of the *Income Tax Act* and not the $2,000 permitted by paragraph (*a*) thereof.

The position taken by the appellants herein is that Slater Ross Investments Limited was formed for the purpose of building (which it did at a cost of $412,830.20) a 60 suite apartment building, retaining it for rental revenue and thereby deriving investment income from it. The Minister, on the other hand, submits that the sale of the shares and the profits realized thereby resulted from the carrying on of a business within the meaning of sections 3 and 4 and 139(1) (*e*) of the *Income Tax Act*.

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While the transaction here involved the sale of corporate shares rather than real property, the parties, by their counsel, agree that the manner of proceeding cannot affect the character of the transaction which falls to be determined on the sole question of whether it resulted from the operation of a business or not. I might also add that the parties prior to the hearing of this appeal consented to the trial of all appeals being heard together.

W. Slater and S. Ross are the active members of the Slater Ross project. The other appellants are their wives and relatives.

Sam Ross and his father, David Ross, as well as William Slater, hold at the present time many investment properties in Toronto but have also been builders since the end of the war and have, even at times, dealt in real estate. These gentlemen had not, however, dealt in shares of a corporation before selling their shares in Slater Ross Investments Limited but they had, prior thereto, sold apartment buildings and houses which they had built for resale.

A brief background of Sam Ross and W. Slater, the two active members of the group who built the 60 suite apartment building by means of Slater Ross Investments Limited would, I believe, be of some use in determining the nature of the transactions involved in these appeals.

Sam Ross was a carpenter by trade who, for some time, with his father and a brother, bought serviced lots in Toronto and built thereon single family dwellings for resale. One of the last operations of this partnership, however, was to build in 1952 or 1953 seven eight-suite apartment buildings, two of which were sold upon completion and the profit thereon reported as income. Another building was sold some two or three years later, in 1956, and this was also held to be part of the partners' income. The remaining four apartment buildings are still held by the partners from which they are deriving substantial rental income.

Sam Ross, with his wife, was also the main shareholder in a corporation called D. Ross & Sons Limited, which came

into existence when the partnership was dissolved and which in the years 1956, 1957 and 1959 was active in the building of houses for resale.

William Slater's building background, although not as impressive as that of Sam Ross, is still substantial in that until sometime in the year 1958 he was the president of Slater Construction Company Limited, a corporation which had been engaged in the construction and sale of single and detached dwelling houses. It had, however, never built an apartment. At the trial Slater stated that he had not been in the house building business for the past four years.

On the other hand, both of these gentlemen, together with others, and in some cases with the other appellants herein, had interests in a number of companies which had built apartment buildings for the rental revenue they could get therefrom and are still held by them today.

Sam Ross in his evidence listed the following companies of which he was a manager, a director and a shareholder, as owning and operating apartment buildings:

Name of company	No. of suites	Year built
Gaylong Apts. Ltd.	76	1960–1961
Deepwood Industries Ltd.	70	1957
Cap Ross Investments Ltd.	32	1955–1956
Nouville Apts. Limited	64	1962–1963
Deanwood Apts. Limited	57	1963
Norphil Properties Ltd.	174	1964–1965

William Slater stated that he also held shares in the capital stock of Cap Ross Investments, Deepwood Investments Limited and a 10% interest in a partnership called Arbour-Glen, which had all built apartment buildings and operated them for the rental revenue derived therefrom.

They both together with the other appellants herein, also held shares in the capital stock of Slater Ross Investments Ltd., the corporation involved in these appeals, which began the construction of a 60 suite apartment building at 17 Ecclestone Drive in the municipality of Metropolitan Toronto on land acquired by Sam Ross and W. Slater in September 1957. The construction started sometime in May of 1958 and was completed in the spring of 1959. The actual

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realization of the project in the case of Slater Ross Investment Ltd. was carried on in the same way as all the other apartment buildings in which Mr. Ross or Mr. Slater were interested. A company was formed, a small amount of money was invested in its shares and in the case of Slater Ross, 4,000 shares at $1 a share were purchased, loans without interest were made by some of the shareholders and in the present case, Sam Ross loaned the company $24,100, David Ross loaned it $19,100, W. Ross loaned it $1,100 and W. Slater loaned it $19,900 and the major part of the cost of the building, up to 80% of its value, was then obtained by means of a first mortgage on the property with some interim financing at the bank between the mortgage advances. The actual construction of the building was in the case of Slater Ross (and the same would apply to all the other apartment buildings in which both S. Ross and W. Slater were interested) carried out as follows. Plans would be supplied by an architect. A construction superintendent would be appointed, and in the present case this man was John Caroll, who, for a salary, co-ordinated all the individual tradesmen and sub-contractors of masonry, plumbing and heating under the skilled supervision of S. Ross and in some cases of W. Slater. The construction superintendent would order the materials after consultation with Sam Ross on the matter of where the various items should be bought and their price. Sam Ross, however, or W. Slater, were not paid for any of the services rendered in the construction of the building. The latter, at p. 84 of the transcript, stated that he did not take too great a part in the construction of the Slater Ross building that he merely talked to certain trades and kept an eye on things in general, admitting, however, that the trades were dealt with in an office situated at 2828 Bathurst Street, Toronto, where the business of his company, Slater Construction, was also conducted.

The Slater Ross Investments Ltd. apartment building, although some of the suites had been rented and were occupied in the beginning of the year 1959, was completed in the spring of that year. The shares of the company were

then sold to a South American group of investors through a Mr. George Kalmar, a Toronto real estate agent, on July 29, 1959, at a time when the suites were nearly all occupied or rented as the building was almost entirely leased except for three suites with offers to lease on two of them.

Sam Ross stated that although the group intended to retain the Slater Ross apartment building for its rental revenue, when one of its shareholders, W. Slater, became involved in some financial difficulties in connection with another apartment building project, the Arbour Glen apartments in which he held a 10% interest, the group finally gave in and accepted to consider an offer from Mr. Kalmar for the purchase of the shares of Slater Ross Investments Limited. It was according to Sam Ross, because Mr. Slater was, as he put it "in such desperate straits" that the shares were sold and also in order to supply Mr. Slater with substantial amounts of cash to meet the calls made upon him as a partner in the Arbour Glen project which had gone far beyond the estimated cost and also to prevent Slater from becoming bankrupt, as he was involved in other projects with the Ross family and the latter were fearful of what might happen if his financial difficulties were not solved.

There was no question at the time of merely purchasing Slater's shares and reimbursing him his loan which would have solved Mr. Slater's problems because, according to Sam Ross, the purchase of Slater's interest, shares and loans at the time would have required investing an additional $45,000 more in the company and this would have been a poor investment.

The assertion that Slater was in dire need of funds to contribute his portion of the monies required to terminate the Arbour Glen project and S. Ross's intent to assist his partner, loses some of its strength when the evidence discloses that at the time the Slater Ross project was entered into in May of 1958, the major part of the increased cost of the Arbour Glen project was already well known. Indeed, the reasons given for the sale of the shares would have been

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more persuasive had not Mr. Slater admitted that (1) at the time he entered into the Slater Ross project in May 1958, the total cost of the Arbour Glen project had already attained, according to a statement from their auditors which he had at the time, the sum of between $2,200,000 to $2,300,000 which was already way beyond the original estimate of the building of $1,300,000 and (2) as the building eventually cost in the neighbourhood of $2,500,000, the difference to be made up between May 1958 and its termination in 1959 was, therefore $300,000 and the amount Mr. Slater was called upon to contribute as his share was 10% of this amount, i.e., $30,000.

It also appears that Slater's evidence prior thereto had been that the payment of such a sum would not have been a problem because in May 1958 he was not in serious financial trouble and at the time there was no reason for him to consider a possible sale of his interests in the Slater Ross building because he would have had no difficulty in getting up to $60,000 elsewhere.

A considerable part of the evidence dealt with the circumstances in which Kalmar's offer to purchase the shares of the Slater Ross company was made and the manner in which the offer was accepted for the purpose of establishing that it was unsolicited and I must say that the evidence in this regard supports this assertion. The fact, however, that the offer was unsolicited and that the company did not advertise the building for sale does not exclude the possibility that the transaction which took place in this manner is a business transaction. As a matter of fact, the manner in which the principals herein were approached by Kalmar in the fall of 1958 when these experienced and skilled builders with a prior history of building activities were in the process of constructing the building did not require them to put up a sign to sell their asset as the potential buyer was already there; the further approaches made by him to both W. Slater and S. Ross during its construction, the fact that the shares were sold shortly after completion and at a time when there was nearly complete occupancy and before the company had started to depreciate its assets which was,

therefore, at a time when the asset had attained its highest value, is precisely the way a trader builder would have proceeded and does, in my view, stamp this as a business transaction.

There is no doubt evidence of some reluctance on the part of Sam Ross to sell the Slater Ross building, and this appears from Mr. Kalmar's evidence at p. 160 of the transcript, as well as from the protracted negotiations over several months, some of which were caused by the requirement that the shares be purchased which S. Ross insisted upon and also by the procedure to establish the value of the shares. This reluctance and these lengthy negotiations, however, in my view, appear to have been due more to the appellant's concern with the danger of incurring taxation in this transaction and the taking of means to avoid same than with an unwillingness to part with an investment. The building background of the principals herein, the approach and offer to purchase made by Kalmar during the construction of the building in the fall of 1958 under the skilled supervision of both S. Ross and W. Slater, Kalmar's persistant and protracted negotiations during the year 1959 (which surely must have been given some encouragement) while the building was still in the process of construction, up to the actual purchase date, and S. Ross's insistance upon the shares of the company being purchased instead of the building itself, all indicate, and I must from the evidence come to this conclusion, a business venture and the transactions are therefore taxable.

Now although it is possible for a former builder in a proper case to dispose of a building without incurring taxation, the evidence that he has removed himself from that trade must be substantial to overcome the history of his former activities and I must say that the appellants have not been successful in doing this here.

When both S. Ross and his father, as well as Mr. Slater, relinquished the single house construction business to build apartment buildings, the evidence shows that the trend in Toronto at the time was changing from the former

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to the latter. The fact that the appellants have, on other projects, retained the apartment buildings so built, which would indicate a certain course of conduct of building for investment, does not necessarily eliminate the strong inferences which flow from the evidence in these appeals that as far as the Slater Ross project is concerned, it was dealt with by these experienced builders and dealers, S. Ross and W. Slater, as a trading asset and that, therefore, the profits derived therefrom are income and should be taxed. Indeed, whether S. Ross and W. Slater built by means of a construction company or as individuals or by means of an apartment company, they are still in the business of constructing buildings for sale if they build and sell upon completion as they have done in the case of and in the circumstances of the Slater Ross building even if, in respect to other projects, they have retained the buildings for rental revenue.

The profits realized by the other appellants, David Ross, Betty Slater, Ida Ross, Helen Ross, the non-active shareholders, who left the handling of the company's activities to Sam Ross and, in some measure, to W. Slater, and were guided by their judgment in this matter, are also income receipts. They can be in no different position than the more active members of this group. Indeed, if the transactions are business transactions, any profits derived therefrom by any of the members are taxable. It follows that as the appeal of Helen Ross is disallowed, the appeal of Gerald Ross is also disallowed.

The appeals are, therefore, dismissed with costs and the assessments maintained. As all these appeals were heard together, counsel for the respondent will be entitled to one set of counsel fee at trial only to be apportioned between the seven appellants in accordance with the amounts of their respective assessments.

BETWEEN:

DOMINION DAIRIES LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Toronto 1965 Dec. 9 Dec. 22

Revenue—Income tax—Income—Purchase of a dairy business, its goodwill and its going concern—Goodwill cannot be purchased as a separate item of a business inseparable from assets and liabilities of a business purchased as a going concern—Capital asset not an expense of a business—Capital payments—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(a)(b).

The appellant carried on at all material times the business of receiving, storing, processing, selling and distributing milk, cream, butter, eggs and other dairy products and allied items of merchandise.

By a written contract dated May 23, 1962 the appellant purchased from E. T. Stephens Investments Ltd., the business and goodwill of the Roselawn Dairy Division, including customers' lists for the sum of $344,000 referred to in para. 1(*d*) of said contract.

The appellant sought to charge $209,600 as an expense for the year 1962. The balance of $134,400, the appellant conceded was a capital cost being for goodwill.

Appellant submitted that the Minister erred in disallowing the deduction of $209,600 as an ordinary business expense, alleging that it was the cost of acquiring lists of customers and that such cost represented the price of a current or circulating asset made in the ordinary course of its business.

Held: That having regard to the negotiations that took place between appellant and the owners of Roselawn Dairy Division resulting in the purchase of that business as a going concern, and considering the whole of the evidence and the applicable law, the whole sum of $344,000 was paid for purchased goodwill and was an outlay of capital.

2. That goodwill cannot be purchased as a separate item of a business. It is intimately connected with and inseparable from the other assets and liabilities of a business which is purchased as a going concern.

3. That the expression "goodwill" when applied to a business, has a wide meaning and has been defined in its many aspects in judicial decisions and in accounting treatises which the Court adopted and followed.

4. That when a purchaser of a business as a going concern purchases the goodwill of such a business, he does not do so on any precise scientific basis.

5. That in any event, over a period of time, such purchased goodwill and the goodwill generated or kept by the purchaser in such business will become indistinguishable.

6. That the appeal be dismissed with costs.

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APPEAL under the *Income Tax Act*.

John G. McDonald, Q.C. and *H. L. Beck* for appellant.

M. A. Mogan and *John E. Sheppard* for respondent.

GIBSON J.:—This appeal is concerned with the 1962 income tax year of the appellant. The appellant seeks to deduct in computing its income for 1962 the sum of $209,600 being the sum allocated by the appellant of the purchase price paid by the appellant for the Roselawn Dairy Division of E. T. Stephens Investments Ltd. pursuant to a contract dated May 23, 1962 between the appellant and E. T. Stephens Investments Ltd., which purchase was closed on July 4, 1962. The sum of $209,600 is part of the sum of $344,000 which is referred to in para. 1 (*d*) of the said contract which reads as follows:

> (*d*) Lists of customers, records, information and data relating to customers as set forth in route books, drivers' record books and the like and goodwill—Price $344,000.

In other words the appellant seeks to charge $209,600 as an expense for the year 1962, and the balance of $134,400 only of the said sum of $344,000 as goodwill, which it concedes is a capital cost.

Pursuant to the said contract, the appellant completely bought out the Roselawn Dairy Division of the vendor and obtained a restrictive covenant from the vendor and certain of its officers not to go into the same business for a certain length of time in a certain area, as is more particularly set out hereunder.

The other assets of the business purchased at the same time were categorized in the contract under three other headings namely,

(*a*) *Plant Equipment, Cans, Cases and Bottles* (the contract describes the same in detail)

Price $100,000;

(*b*) *Automotive Equipment* (the contract describes the same in detail)

Price $100,000; and

(*c*) *Store and Merchandising Equipment* (the contract describes the same in detail)

Price $25,000.

The said restrictive covenant is contained in para. 9 of the contract and reads as follows:

9. The Vendor and the Executives and Roselawn Farms Limited each expressly covenant and agree with the Purchaser that for a period of three years from the time of closing each of them will not (without the consent in writing of the Purchaser in the case of the Vendor, and in the case of the Executives or either of them other than as an executive or employee of the Purchaser or a subsidiary company of the Purchaser) directly or indirectly, engage in or be interested in any milk, cream or dairy products business or business similar to that comprising the Roselawn Dairy Division in the Municipality of Metropolitan Toronto, or within 50 miles of the boundaries thereof, and will not during such period and within such area authorize the use of the name "Roselawn" in connection with any business of the type aforementioned. The Vendor and the Executives and Roselawn Farms Limited hereby, as from the time of closing the transaction herein contemplated, assign, transfer and set over unto the Purchaser all such rights and interests as they may have in and to the name "Roselawn" for use in connection with, or as part of, the name of the business purchased hereunder by the Purchaser.

Mr. F. L. Hart, President and General Manager of the appellant company negotiated the purchase of this business and gave evidence on this appeal. He said that he was only interested in the customers' lists and route cards and the right to hire the salesmen drivers of Roselawn Dairy Division to carry on with his company after the purchase. He said the appellant company had heretofore computed that it cost it $10 to have their own salesmen canvass and obtain a retail customer of milk, and $30 for a wholesale customer. He submitted that since these costs were permitted for the purposes of the *Income Tax Act* as an expense of doing business, that it was reasonable for the appellant to apply this $10 and $30 formula to the contract of acquisition of customers of Roselawn Dairy Division, and in doing so the said sum of $209,600 was computed, which sum, as stated, the appellant submits should be allowed as an expense for 1962. Mr. Hart says that the relationship of the milkman with the customer is the only goodwill he considered the appellant bought. He says in essence that what the appellant paid $209,600 for was an opportunity to do business in the locations and with the people that Roselawn Dairy Division had been doing business and to have the right to the contractual relationship with the former milk drivers of Roselawn Dairy.

Mr. Hart also stated that the appellant had heretofore purchased other dairy businesses on the same basis, and

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was in the stage of negotiating other similar purchases of businesses which may be completed in the future.

Mr. W. D. Bruce, Secretary Treasurer of the appellant company, gave evidence of how the sum $344,000 was dealt with in the accounts of the appellant company. He said the whole of the $344,000 on the closing of the transaction in July 1962 was debited to the goodwill capital account. Then, after the auditors of the appellant had examined the appellant's books in preparation of the year-end statement for the year 1962, there was an adjusting and amending entry made in the journal on March 3, 1963, as a result of which there was written-off to expense for the year 1962 the said sum of $209,600. The wording of this journal entry in part reads:

To write off the cost of customer lists acquired from Roselawn Dairy Division ..... $209,600.

Mr. Bruce said that the formula of $10 per retail stop and $30 per wholesale stop, above referred to in discussing the evidence of Mr. Hart, was the formula used in arriving at the figure of write off of $209,600. Mr. Bruce said the sum of $134,400 was left as a capital asset account, representing goodwill.

He said in his opinion he would add one other advantage obtained by the appellant from Roselawn Dairy Division as constituting part of the goodwill acquired, and that was the obtaining of the said above recited restrictive covenant of the vendor and certain of its officers not to engage in this business as referred to in the said recited covenant.

Mr. Bruce also conceded that a fifty-fifty division of the sum of $344,000 between the capital item goodwill and the write off as expense for the reasons given, might have been more reasonable.

On cross-examination it was determined from these witnesses that the sum of $344,000 was a negotiated figure and was the figure obtained by multiplying $261 by 1319. The 1319 figure represented daily cans of milk. Daily cans of milk times a dollar figure apparently is a formula used in this industry in negotiating the purchase of a business in this industry.

It was the submission of the appellant that it paid the said sum of $209,600 as a recurring expense and not as a once and for all payment; that it purchased transitory assets, that is assets which were not of an enduring nature

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and therefore not capital assets. (In this connection the appellant submitted in evidence that it had lost by the end of 1964 about 42% of the number of customers named on the customers' lists obtained from Roselawn Dairy Division). In brief, the appellant submitted that in essence these customers' lists, the route cards and the contractual right to obtain the driver milkman's services who had contact with the customers of Roselawn Dairy Division, constituted a purchase of an outlet for the appellant's product or an opportunity to do business, a purchase of a kind that the appellant had done before and proposes to do again in the future and as such the sum expended for such purchase was a proper deduction from income within the principles enunciated in *B.P. Australia Limited v. Commissioner of Taxation.*[1]

The respondent on the other hand says that the contract of purchase of Roselawn Dairy Division was the purchase of a business as a going concern; that the fact that the appellant has bought out other businesses as going concerns and proposes to do so in the future does not turn these payments into income payments but instead they were all capital payments and the payments for any similar purchases in the future will also be capital payments.

The respondent says that what the purchaser paid $344,000 for was goodwill and the formula that the appellant used in arriving at that figure was by multiplying $261 by 1319 daily cans of milk; and that the formula worked out by the appellant of $10 per retail stop and $30 per wholesale stop sometime after this purchase of the business is of no validity and is merely an *ex post facto* rationalization of what the appellant says it did in purchasing this business.

In my opinion it is beyond peradventure that what the appellant purchased by this contract above referred to was the business of Roselawn Dairy Division as a going concern; and in doing so, it purchased goodwill as an asset in this case.

It is therefore necessary to consider the purchased goodwill in this transaction.

It must be assumed that the appellant-purchaser acted on the premise that X percent would be a satisfactory

[1] [1965] 3 All. E.R. 209.

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return on the investment it was going to make in purchasing this business.

Having started with such a premise, then the appellant-purchaser must have made a judgment on how much it could afford to pay the vendors of this business as it then existed and still earn the said X percent on its investment.

Exhibit A-4 introduced in evidence by the appellant shows some of the basis of its assumptions and business judgment in purchasing this business.

This is an inter-office communication between the said Mr. F. L. Hart, President and General Manager of the appellant, Dominion Dairies Limited, addressed to a Dr. C. R. Roberts at the New York office of the holding company of the appellant.

The relevant excerpts from this letter are as follows:

Roselawn Farms Dairy is owned by the E. T. Stephens Investment Company. The family own large acreage in the north end of the City of Toronto in fact they are almost surrounded by a housing development and they operate 21 routes from a branch *on the farm*. They use two trailers to haul merchandise up to the branch at 3 o'clock in the morning, and from which they load their retail routes. These north routes average 2,700 pts (5 days).

I have suggested to John Stephens, the son, who operates the dairy, that I thought the Company would be willing to negotiate on a basis, such as 1,400 cans of milk per day at $350 per can which would total $490,000. The garage property at Geary Avenue for $75,000, the equipment and machinery in the processing plant for $50,000 (some of which would be used by us and some of which we would sell to the junk man) and $87,000 for the motor equipment. There are about 87 pieces automotive including the tractors and trailers.

The Stephens family to keep the Dufferin Street processing plant and after we gut it of everything salvageable in the way of equipment they can sell it or demolish it.

What I am suggesting comes to $702,000, John originally wanted $1,000,000 for the entire operation. He has $100,000 in a cash bond which would revert to the family, being no further need for it, and if the building is worth $82,000, the difference between my price and his is about $116,000.

It appears that on the basis of the conservative figures worked out by Quinn and Murray, we can make about $175,000 a year after taxes by this consolidation. In other words it would pay off in four years. I have an idea that because of the fact that we are buying assets rather than shares, this would be a pretty good deal. It would serve to strengthen our hold on the retail business in the western end of the City, and we would acquire 21 routes up at Richmond Hill, in a territory for which we have no license It puts us into a Loblaw store at Richmond Hill with Sani Seal milk which we cannot service at present. We figure we can place all of his wholesale on our present Sani Seal routes if we spread over all, or at the

worst we might need two or three trucks with a realignment of routes. On the retail it looks as if we might be able to consolidate so that we would eliminate 10 or 12 routes.

...

There is only one figure that I am less than sure of, and that is the $87,000 for the trucks, I want Verne Quinn to take a look at them and we may revise our figure downwards by up to 20%. As far as the garage property at Geary Street is concerned, I believe this property could be sold in the neighbourhood of the $75,000 figure, but I would like to think in terms of using it as an equipment depot, a machine shop for the repair of equipment and the main service garage for the Toronto area. Keeping only a service crew here at Walmer to handle batteries, tire changes and minor repairs. The Geary building has high ceilings and our boys think we can do a real job at this location. This garage bit, of course, is subject to a great deal of further discussion.

...

Subsequent to the preparation and sending of this memorandum, after negotiation with the vendor, Mr. Hart was able to purchase this business on the basis of the formula above referred to, namely, $261 x 1319 daily cans which works out to $344,000, instead of $350 per can, as referred to in the above quoted memorandum.

This sum of $344,000 as above noted, was, after the close of this purchase and sale in July 1962, entered in the books of the appellant company as a capital cost of the asset goodwill.

To characterize this purchased goodwill, a consideration of some of the legal principles concerning the same, is helpful.

It should be noted, for example, that goodwill cannot be purchased as a separate item of a business. It is intimately connected with and inseparable from the other assets and liabilities of a business which is purchased as a going concern. It modifies or adjusts such assets and liabilities. (See Lord Macnaghten in *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Limited*[1] where he said:

I now come to the second point It was argued that if goodwill be property, it is property having no local situation. It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will—of course under the conditions attaching to property of that nature.

Then comes the question, Can it be said that goodwill has a local situation within the meaning of the Act? I am disposed to agree with an

[1] [1901] A.C. 217 at p. 223 et foll.

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observation thrown out in the course of the argument, that it is not easy to form a conception of property having no local situation. What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyze goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such.

And see also Lord Davey in the same case at page 227 where he said:

The position taken up by the Attorney-General was a singular one, and somewhat embarrassing to persons who have to stamp their contracts. He admitted that, so far as the goodwill was attached to the business premises and thereby enhanced their value, he did not claim that an ad valorem stamp should be affixed in respect of that value. But I am not aware that you can split up goodwill into its elements in that way, and I see great difficulty in doing so. The term goodwill is nothing more than a summary of the rights accruing to the respondents from their purchase of the business and property employed in it . . .

It also does not affect the characterization or allocation of the capital cost of purchased goodwill because in any particular case the purchaser did not get all the benefit from the goodwill he thought he was going to get, or that the purchaser subsequently lost some of the benefit of goodwill by losing customers (as happened to the appellant in this case). (See Thurlow J. in *Schacter v. Minister of National Revenue*[1] where he said:

Nor in my view is the matter affected by the fact that goodwill in the case of an accountant and particularly one who practices alone is largely personal to the particular practitioner and scarcely capable of being sold with any assurance that the purchaser will obtain any benefit from it. No doubt one who pays for so tenuous an advantage takes a risk but there is nothing uncommon about professional men acquiring the undertakings of established practitioners with whatever goodwill can be retained in the transfer and I know of no reason why if they see fit, as appears to have occurred in this case, they cannot in such a transaction agree upon a consideration for such goodwill. The fact that in the result no goodwill

[1] [1962] Ex. C.R. 417 at p. 424 et foll.

may be acquired or that the benefits of the purchase may soon disappear appears to me to be irrelevant for the present purpose for in the test referred to in the cases cited what matters is the nature of the advantage sought rather than the benefit actually obtained.

The reason that it is desirable for the purchaser to obtain a restrictive covenant from the vendor of a business not to engage in the same business for such and such a length of time in such and such an area, (as the appellant did in this case) is that such a purchaser, when he pays substantial monies to such a vendor for the goodwill asset of the business, wishes to make sure he gets the full benefit of the goodwill he paid for, since he may not if he has not obtained such a restrictive covenant. (See Cotton L. J. in *Leggott v. Barrett*[1] where he said:

...Goodwill, possibly, in some of the later cases, has been a little extended, but undoubtedly the cases have established that the sale of goodwill does prevent a man from representing that he is carrying on the old business or that he is the successor of it, and in that way trying to get the customers of the partnership. But in *Churton v. Douglas* [Joh. 174] the judgment of the Vice-Chancellor quite concurs, I think, with the previous decisions, in assuming that the Defendant might, if he thought fit, have carried on business with the customers of the old firm, provided that he did not represent to them that his was the old business, or that he was the successor in business of the old firm. Therefore, to say that the Defendant should not be at liberty to deal with any customer whom he did not solicit to deal with him, is to give a forced interpretation to the words used. In my opinion that is not the fair meaning of a sale of goodwill.

And see also Lord Herschell in *Trego v. Hunt*[2] where he said:

The question whether a person who had sold the goodwill of his business was entitled afterwards to canvass the customers of that business came first before the Courts for decision in the case of *Labouchere v. Dawson* [L.R. 13 Eq. 322]. Lord Romilly M.R. answered in the negative. He was of opinion that the principles of equity must prevail, and that persons are not at liberty to depreciate the thing which they have sold. He considered that the defendant was not entitled personally, or by letter, or by his agent or traveller, to go to any one who was a customer of the firm and to solicit him not to continue business with the old firm but to transfer it to him; that this was not a fair and reasonable thing to do after he had sold the goodwill. He accordingly granted an injunction to restrain the defendant, his partners, servants, or agents from applying to any person who was a customer of the old firm prior to the date of the sale, privately, by letter, personally, or by a traveller, asking such customers to continue to deal with the defendant or not to deal with the plaintiffs.

[1] (1880) 15 C A. 306 at p. 315. [2] [1896] A.C. 7 at p 11 et foll.

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And see also Teetzel J. in *Foster v. Mitchell*[1] where he said:

> As stated in Lindley on Partnership, at p. 476, the expression "goodwill", when applied to a business, "is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it". Or, as put by Lord Macnaghten in Inland Revenue Commissioners v. Muller, [1901] A.C. 217, at pp. 223-4: "It is the benefit and advantage of the good name, reputation, and connection of the business; it is the attractive force which brings in custom; it is the one thing which distinguishes an old-established business from a new business as its first start." See also Trego v. Hunt, [1896] A.C. 7; and Hill v. Fearis [1905] 1 Ch. 466.
>
> The proposition that the terms of the partnership agreement in this case were sufficiently comprehensive to include the taking over of the defendant's goodwill without that item of his business being specifically mentioned, is abundantly supported by Jennings v. Jennings, [1898] 1 Ch. 378, where, in a compromise agreement settling a partnership action, A. was to retain the "assets", and it was held that, though not specifically mentioned, the goodwill of the business was included; and by In re Leas Hotel Co., Salter v. Leas, [1902] 1 Ch. 332, where it was held that the word "property" was sufficient to include goodwill in the business though not specifically mentioned. See also In re David and Matthews, [1899] 1 Ch. 378.

It is a fact also that when a purchaser of a business as a going concern purchases the goodwill of such a business as one of the assets, he does not do so on any precise scientific basis. There are accounting and merchandising rules and guides he may employ so as to enable him to exercise the best business judgment possible. Such a purchaser hopes to obtain the custom of the business he is purchasing and in every other way obtain all the economic advantages that such a business had. In this he may estimate correctly, in which event the cost of such purchased goodwill if he puts it on the balance sheet of his business will accurately set out its value at that time. But more often than not, some figure greater or lesser will probably be the correct figure.

In any event, over a period of time such purchased goodwill and the goodwill generated or kept by the purchaser will become indistinguishable.

The businessman's approach in purchasing goodwill as an asset of a business has been admirably characterized by certain author accountants. (See for example, Professional Accounting by John Parker and David Bonham, published by Sir Isaac Pitman (Canada) Limited, 1965 at page 110 et foll. which reads as follows:

[1] (1911-12) 3 O.W.N. 425 at p. 428 et foll.

VALUATION OF A BUSINESS

The valuation of a business entity involves in large measure both the value of its assets and its potential earning power. Particularly from the viewpoint of a prospective purchaser, the worth of a business is based primarily on earning power. But since earning power, to be meaningful, must be related to capital employed, asset values are essential to the process of business valuation. When the value of the entity is found to include intangibles, goodwill becomes an important part of the valuation process. Indeed, this aspect of the problem is largely analogous to valuing the enterprise itself. Because of the importance of goodwill, some general comments are in order before proceeding to the measurement of this asset.

GOODWILL

The true nature of goodwill has perhaps best been described in two leading English legal decisions:

> The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old places (Lord Eldon)
>
> Goodwill regarded as property has no meaning except in connection with some trade, business, or calling In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers and agreed absence from competition, or any of these things, and there may be others which do not occur to me. (Lord Lindley)

The goodwill shown in a financial statement usually arises on the purchase of a business through the acquisition of its net assets, or through the acquisition of a controlling interest in its shares. When consolidated financial statements are prepared, the excess of cost of the investment over the fair value of the subsidiary's net assets at date of acquisition is usually treated as goodwill.

In accounting theory, purchased goodwill is generally considered to be an asset that has a value at date of acquisition equivalent to its cost. Although goodwill may be built up by advertising, and through the general operational activities of a business, these costs are normally charged to expense when incurred. Except in the case of partnerships, the accounting recognition of goodwill is usually restricted to that acquired by purchase.

The subsequent accounting treatment of purchased goodwill permits showing this asset in the balance sheet with or without amortization. Goodwill can be viewed as the purchase of earning power in excess of a normal return on the investment. As long as operating results indicate the validity of this view, the alternative of amortizing or not amortizing is available. If goodwill is amortized, the charges to expense should be systematic, even though the period selected is often arbitrary. If a material distortion of net income is likely to result from amortization, a partial write-down of goodwill may be made by a charge to retained earnings When goodwill is not amortized on a systematic basis and when operating results begin to indicate a limitation in its usefulness, the cost of all or a portion of goodwill is usually written off to retained earnings This wide range of possible accounting treatments supports the commonly held view that goodwill is the most "intangible" of intangible assets.

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And at page 113:

The estimate of future earnings must disregard economies associated with any proposed merger, and any improvement in earnings expected to result from changes that might be introduced by the prospective owner. Since the goodwill belongs to the vendor, the main reason for measuring it is to determine an amount that the purchaser should be willing to pay for this asset. In theory, the purchaser should pay for goodwill whatever is necessary to ensure that the estimate of annual, future earnings will just equal a normal rate of return on the total investment. The emphasis, therefore, should be on future, maintainable profits reasonably attributable to the going concern which has been built up by the present owner.

In order to test for the presence of goodwill, it is necessary not only to estimate annual future earnings, but also to determine the fair value of capital employed. Since balance sheet valuations reflect asset costs adjusted according to the conventional rules of accounting, market values, instead of book values, should be used for determining capital employed. (Goodwill is sometimes recorded in the accounts as the difference between the book value of capital employed and the value indicated by the purchase consideration. This practice is obviously unsound, and its use can only result in a misstatement of goodwill).

See also An Income Approach to Accounting Theory (Readings and Questions) by Sidney Davidson, David Green Jr., Charles T. Horngren and George H. Sorter, published by Prentice-Hall Inc., Englewood, N.J., U.S.A., 1964 at page 367:

Before beginning the discussion of this particular point, however, it might be well to set forth the writer's general point of view with regard to goodwill. First of all, it should be noted that the general concept of goodwill has changed considerably over the past century. Whereas business goodwill was formerly considered to pertain almost exclusively to customer relations, the concept is now used in a much broader sense, in that it encompasses almost any intangible factor of economic value to an enterprise. In general, goodwill is looked upon as the economic advantage of friendly and harmonious relationships enjoyed by a business firm throughout the different phases of its operations. This advantage evidences itself in the form of earnings in an amount greater than that expected in a typical firm in the industry with a similar capital investment. The factors underlying goodwill may be considered to effect either greater total revenues or decreased unit costs. The former is commonly referred to as consumer or customer goodwill; the latter as industrial goodwill.

. . .

With respect to the problem of evaluating the goodwill of an enterprise, the technique generally resorted to is some sort of capitalization of earnings. The more acceptable methods of making the calculation assume a more or less definite term of existence for the excess earning capacity of the business. Some effort is made to determine what a "normal" rate of return in the industry might be, and this is matched against the estimated future earning capacity of the particular enterprise. The difference supposedly represents goodwill earnings. In this connection, it should be noted that future earnings are estimated on the basis of a projection of past earnings, adjusted to reflect a typical profit trend. It is generally recognized, however, that the amount actually paid for goodwill

in practice is seldom arrived at by a theoretically sound calculation. But regardless of the actual procedure used in determining the purchase price of goodwill, the payment represents some sort of estimate of the present value of future "super-profits" to be earned by the business.

The problem of whether or not purchased goodwill should be written off must necessarily be considered with regard to the varying circumstances under which it may appear. For example, the treatment called for where the amount appearing as goodwill on the balance sheet represents nothing more than the cost of an unfortunate investment in super-profits which failed to materialize would not be the same as that which would be indicated where the goodwill is grossly undervalued on the books. Between the two extremes there can be many intermediate situations.

See also Accounting—An Analysis of its Problems (Volume One/Revised Edition) by Maurice Moonitz and Louis H. Jordan published by Hold, Rinehart and Winston Inc., 1963 at pages 505-06:

. .It is commonplace in business affairs that businesses are bought and sold at amounts widely divergent from book values, even where the records have been kept by excellent bookkeeping procedures and the financial statements examined by the most competent auditors available...

. . .

The net effect of these factors, in the case of the successful business, is to *understate* the actual value of its proprietorship; in the case of the unsuccessful business, the limitations within which the accountant works serves to result in *overstatement* of the value of the enterprise taken as a whole. Goodwill can therefore be described, to use Canning's excellent phrasing, as the "master valuation account," and may assume either a debit or a credit aspect, depending upon whether the concern has a successful career ahead of it, or a dismal future. [John B. Canning, The Economics of Accountancy (New York: The Ronald Press, 1929), page 42.]

As a master valuation account, goodwill then adjusts or modifies virtually all the recognized assets and liabilities. It is therefore inaccurate, properly speaking, to refer to it as an asset, in the sense that cash, receivables, inventories, and fixed assets are referred to as assets. This distinctive characteristic of goodwill is widely recognized in the prevalent conception that goodwill cannot ordinarily be sold separately, as can the true assets, apart from the business as a whole. Since the amount of goodwill represents an unallocated (and, perhaps, unallocable) adjustment of all assets and debts, it becomes patently impossible to "acquire" the goodwill without acquiring the items it modifies or adjusts. For the sake of simplicity in expression, however, we shall follow the usual practice of referring to goodwill as an asset.

These legal authorities and accounting treatises, when read in the light of the facts of this case, clearly explain not only what the appellant did in purchasing this business but also its motivation in purchasing.

In the result therefore, in this case, having regard to the negotiations that took place between the appellant and the

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owners of Roselawn Dairy Division resulting in the purchase of that business as a going concern, and considering the whole of the evidence and the applicable law, I am of opinion that what the appellant paid the whole of the sum of $344,000 was for purchased goodwill, a capital asset, and that it is not possible in law in this case to treat any part of this sum in the manner in which the appellant seeks to do as expense during the year 1962.

The ratio of the decision of *B. P. Australia Limited v. Commissioner of Taxation*, in my opinion, is not applicable to the facts of this case.)

The appeal is therefore dismissed with costs.

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BETWEEN:

FEDERAL FARMS LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 40A(1)(2) and (3)—Production incentive—Company preparing and selling vegetables—Deduction for "manufacturing and processing corporation"—Whether preparation of fresh vegetables for market constitutes "processing".

Appellant company was in the business of preparing fresh vegetables for market and selling them. Over 50 per cent of its gross revenue was derived from handling and selling them.

The evidence showed that, in addition to the packaging of carrots and potatoes, the company's operations included such steps as washing, brushing, spraying, drying, sizing, culling and grading the vegetables.

In 1963 the company claimed a tax credit under the provisions of s. 40A, (enacted in 1962 and since repealed) on the ground that its activities constituted "processing" and that it was, therefore, a "manufacturing and processing corporation".

In the Minister's view the appellant was not a manufacturing and processing corporation within the meaning of section 40A(2) and at the most the activities of the appellant amounted to mere packaging and as such was disqualified by Section 40A(3)(*a*).

The Minister sought to confirm this view by expert testimony that there was a distinct division in the Canadian food industry between processing which was said to involve a change in the texture and structure of the product, and the growing, handling and marketing of produce.

Held: That the technical meaning attributed to the word "processing" by expert testimony should be rejected in favour of the ordinary or dictionary meaning of the word.

2. That these operations were a process or series of processes to prepare the product for the retail market.

3. That the appellant was therefore a "manufacturing and processing corporation" within the meaning of Section 40A(2).

4. Appeal allowed.

APPEAL from an assessment of the Minister of National Revenue.

W. D. Goodman for appellant.

C. R. O. Munro, Q.C. and *S. Hynes* for respondent.

CATTANACH J.:—This is an appeal from assessment to income tax levied by the Minister in respect of income for the 1963 taxation year of the appellant.

The appellant, in filing its income tax return for its 1963 taxation year, claimed a tax deduction pursuant to the provisions of section 40A of the *Income Tax Act* on the basis that it was a "manufacturing and processing corporation" within the meaning of subsection (2) of section 40A.

The Minister disallowed the appellant's claim for a tax deduction on the ground that the appellant's business activities were neither manufacturing nor processing of goods and that, consequently, the appellant was not a "manufacturing and processing corporation" within the meaning of subsection (2) of section 40A.

Section 40A was added to the provisions of the *Income Tax Act* by section 10 of chapter 8 of the Statutes of Canada, 1962, and was made applicable to any taxation year ending after March 1962. The section was repealed in 1963 by section 10(1) of chapter 21 of the statutes of that year as applicable to the 1964 and subsequent taxation years.

The provisions of section 40A pertinent to the present appeal read as follows:

> 40A. (1) There may be deducted from the tax otherwise payable for a taxation year by a manufacturing and processing corporation an amount determined by the following rules:

(The detailed rules for determining the amount of the deduction are then set out but are not reproduced here since they are not material to a consideration of the present appeal).

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(2) In this section,

(a) "manufacturing and processing corporation" means a corporation that had net sales for the taxation year in respect of which the expression is being applied from the sale of goods processed or manufactured in Canada by the corporation the amount of which was at least 50% of its gross revenue for the year, but does not include a corporation whose principal business for the year was

(i) operating a gas or oil well,

(ii) logging,

(iii) mining,

(iv) shipbuilding,

(v) construction, or

(vi) a combination of two or more of the classes set out in subparagraphs (i) to (v) inclusive;

(Paragraphs (*b*) to (*d*) are not reproduced herein).

(3) For the purpose of paragraph (*a*) of subsection (2)

(*a*) goods processed or manufactured shall be deemed not to include goods that have been packaged only; . . .

The narrow issue for determination in this appeal is whether certain activities carried on by the appellant in its 1963 taxation year from which it derived in excess of 50% of its gross revenue for that year, constituted processing or manufacturing within the meaning of section 40A as above quoted. Such activities were the preparation and sale of carrots and potatoes.

While the appellant handled other garden produce and engaged in other activities which might well constitute manufacturing and processing, the revenue therefrom in 1963 was much less than 50% of the appellant's gross revenue for that year. Therefore consideration herein is restricted to the appellant's sale and preparation of carrots and potatoes.

To determine whether the appellant's handling of carrots and potatoes constituted processing of goods thereby qualifying the appellant as a "manufacturing and processing corporation" entitled to a tax deduction under section 40A, it is necessary to examine the precise nature of the appellant's activities in these respects.

The appellant is a corporation incorporated pursuant to the laws of the Province of Ontario and carries on its business at Bradford, Ontario in the heart of the Bradford marshes, a particularly productive market gardening area. The appellant's letter head describes the business of the appellant as that of "growers, packers, processers and

shippers". Of the garden produce sold by the appellant 10% was grown by it and 90% was bought, for resale, from other growers.

With respect to the potato crop, the bulk of it was prepared as table stock.

On receipt from the growers the potatoes are emptied into large hoppers. From the hoppers the potatoes are then run over a conveyor belt, about 120 feet in length, with holes in it for the purpose of selecting the potatoes as to size and uniformity of shape. After sizing, the potatoes are next passed through washers and brushes to remove the soil adhering to their surface. Following washing and brushing the potatoes are then sprayed with a chlorine solution which, the appellant's witness testified, retards bacterial action thereby preventing rot and improving their keeping quality. After the spraying with chlorine solution, the potatoes are passed through a drying laundry, being a belt about 30 feet in length, running through a receptacle heated by a furnace with fans and a large bank of infra ray electrical bulbs. (The appellant's witness attributed some additional bacterial retardent effect to this operation.)

The potatoes are then manually sorted, culled and graded by persons employed for that purpose following which they are passed to a machine which bags them in 5, 10 and 20 pound bags. They are then shipped to retail stores.

In 1963 carrots were first in volume and contributed most to the appellant's revenue in that year with potatoes in second place. In subsequent years this order has been reversed.

Carrots were handled by the appellant in the same way that it handled potatoes except that the machinery required to handle carrots is more complex due to the shape of carrots. When received from the growers, the carrots are dumped into hoppers filled with water, then passed to a drum washer, being a cylindrical vessel with high pressure sprays. The carrots are next spray washed to flush off the dirty water and then passed to a roller apparatus which sizes the carrots into four sizes. The carrots are then passed on to a conveyor belt where they are hand sorted again and, when the vagaries of growth require, some of the carrots are trimmed, that is any off-shoots are cut off. Carrots which are trimmed are classed in a special grade.

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The carrots are then passed on to further conveyor belts for spraying, brushing and drying, as was done with table stock potatoes and lastly to a belt for weighing and packaging.

The appellant's premises, in which it conducts the operations described, are 120 feet in width by 400 feet in length. About two-thirds of the floor area, being approximately 40,000 square feet, is devoted to handling vegetables in the manner described and the remaining area is devoted to receiving and shipping facilities.

The items of equipment used to handle the carrots and potatoes in the manner above described were installed at an approximate total cost of $100,000.

The Minister called two witnesses, Mr. Long and Mr. Grant, both longtime employees of the Federal Department of Agriculture who are the chiefs of the Fresh Products Inspection Section and Process Products Section respectively of that Department.

Mr. Long was familiar with the appellant's plant having visited it in the course of his duties. He expressed the view that the purpose of washing vegetables is to improve their appearance and to enable them to be adequately graded. He agreed that the use of chlorine to wash the vegetables inhibited bacterial action on the product with a consequent preservative effect. He also attributed an inhibition of bacterial action to the drying treatment but felt its effect to be insignificant.

Both Mr. Long and Mr. Grant testified that there are two divisions of the food industry in Canada, one division being fresh fruit and vegetables which comprises the growing, marketing and handling thereof and the other being the processed field in which the produce is cooked, quick frozen, dehydrated or subjected to some chemical process.

In Mr. Long's view processing constituted a treatment which materially changed the texture and structure of the product.

Both Mr. Long and Mr. Grant testified that there are two recognized national associations, the Canadian Horticultural Council, devoted to furthering the interests of those engaged in the fresh fruit and vegetable side of the industry and Canadian Food Processors Association devoted to the furtherance of the interests of those engaged in food processing.

It is the golden rule of interpretation that words used in a statute are used in their ordinary sense unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the statute in which event the ordinary sense of the words used may be modified so as to avoid that absurdity or inconsistency, but no farther. I think it is sound to say that in the absence of a clear expression to the contrary words in the *Income Tax Act* should receive their ordinary meaning, but if it appears from the context in which they are used that they have a special technical meaning then they should be read with such meaning.

Here it is plain that section 40A of the *Income Tax Act* is dealing with manufacturing and processing corporations generally and that the words, "manufacturing" and "processing" as used in subsection 2(*a*) of section 40A are used in their ordinary unrestricted senses. If this were not the case and the words were not intended to be used in their unrestricted senses then it was obviously unnecessary to make a specific enumeration of those types of businesses in which certain corporations are engaged as being excluded from the meaning of the words, "manufacturing and processing corporation".

Section 40A of the *Income Tax Act* is dealing with matters affecting manufacturing and processing corporations generally. The section is not one passed with reference to a particular trade or business from which it follows that the words in question are to be construed in their common or ordinary meaning and not as having a particular meaning as understood by persons conversant with a particular trade or business. For this reason I do not accept the definition put forward by Mr. Long that processing connotes a material change being made in the texture and structure of the product.

While I am aware that dictionaries are not to be taken, in all instances, as authoritative exponents of the meaning of words as used in Acts of Parliament, nevertheless when words are used in their ordinary sense (as I have concluded they are in the section under which the present appeal is made) it is then appropriate that resort be had to recognized dictionaries for it is in these books that the ordinary meaning of a word is ordinarily to be found.

The word "process" is defined in the Shorter Oxford English Dictionary, Third Edition, as "To treat by a

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special process; e.g. to reproduce (a drawing, etc.) by a mechanical or photographic process".

In Webster's Third New International Dictionary published in 1964 the word "process" is defined as follows, "to subject to a particular method, system or technique of preparation, handling or other treatment designed to effect a particular result: put through a special process as (1) to prepare for market, manufacture or other commercial use by subjecting to some process (– ing cattle by slaughtering them) (– ed milk by pasteurizing it) (– ing grain by milling) (– ing cotton by spinning):

In Webster's Second New International Dictionary published in 1959 the following definition of the word "process" appears, "to subject (especially raw material) to a process of manufacturing, development, preparation for market, etc.; to convert into marketable form as live stock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking".

Other standard works consulted define "process" as "to treat, prepare, or handle by some special method".

The evidence of the appellant as to its operations convinces me that those operations were a process or series of processes to prepare the product for the retail market. There is no doubt that quite apart from the grading of the vegetables, a clean and attractive appearance is an important factor in marketing vegetables and especially so in the present day methods of retail marketing. Although the product sold remains a vegetable, nevertheless, it is not a vegetable as it came from the ground but rather one that has been cleaned, with improved keeping qualities and thereby rendered more attractive and convenient to the consumer.

The potatoes and carrots were, therefore, "processed" by the appellant within the ordinary and common meaning of the word "process" which I have concluded must be applicable in the present instance and within the meaning of the dictionary definitions of that word which are quoted above and which I have accepted as being the ordinary and common meaning of the word.

I do not consider that the operations of the appellant constitute packaging only and so precluded the appellant

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from qualifying as a manufacturing and processing corporation by reason of subsection 3(*a*) of section 40A. To my mind the term "packaging" applies to the appellant's ultimate operation in placing the vegetables in bag containers, but not to the antecedent steps of washing, brushing, spraying, drying, sizing, culling and grading.

In view of the conclusion which I have reached that more than 50% of the appellant's gross revenue in its 1963 taxation year resulted from the sale of carrots and potatoes processed by it in Canada, it follows that the appellant was a "manufacturing and processing corporation" within the meaning of subsection 2 of section 40A of the *Income Tax Act* and that the appellant was accordingly entitled to the tax deduction claimed by it pursuant to section 40A for its 1963 taxation year.

The appeal is, therefore, allowed with costs and the assessment is referred back to the Minister for reconsideration and reassessment in accordance with these reasons.

Toronto 1966

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Feb. 7

BETWEEN:

VINELAND QUARRIES AND CRUSHED STONE LIMITED . . . . . APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE . . . . . RESPONDENT.

Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 39(2), (3), (4), (5)—"Associated corporations"—Control by same group—Meaning of control—Indirect control—Control through intermediate companies—To control by corporation equivalent to control by individual who controls corporations.

The appellant was one of a group of three corporations which the Minister regarded as "associated corporations" within the meaning of section 39 of the Act.

The relationship among the three corporations was as indicated as follows:

Half the shares of the appellant were owned by a Mr. Sauder and the other half by Bold Investments (Hamilton) Ltd., all of whose shares were owned by a Mr. Thornborrow.

Half the shares of Sauder and Thornborrow Ltd. were owned by Mr. Thornborrow and the other half by McMaster Investments Ltd., all of whose shares were owned by Mr. Sauder.

The shares of Verben Tank Lines Ltd. were held equally by Mr. Sauder and Mr. Thornborrow.

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The Minister decided that the appellant, Sauder and Thornborrow and Verben were associated companies, being controlled by the same group of persons, namely Messrs. Sauder and Thornborrow, notwithstanding the interposition of the corporations controlled by one or other of them, as indicated.

Held: That "controlled" in section 39(4)(*b*) contemplated and included such a relationship as, in fact, brought about a control by virtue of majority voting power, no matter how that result was effected, that is, either directly or indirectly.

2. That it is not appropriate to end the inquiry after looking at the share registers of the appellant and Sauder and Thornborrow Limited.

3. That it is proper and necessary to look at the share registers of Bold Investments (Hamilton) Limited and Sauder and Thornborrow Limited to obtain an answer to the inquiry whether the appellant and the other two companies are controlled by the same "group of persons".

4. That the Minister was right in assuming, as he did when assessing the appellant, that the appellant company was controlled by Benjamin Sauder and Vernon Thornborrow and that Sauder and Thornborrow Limited was controlled by Benjamin and Vernon Thornborrow as was Verben Tank Lines Limited.

5. That accordingly the appellant company, Sauder and Thornborrow Limited and Verben Tank Lines Limited were associated corporations within the meaning of section 39(2) by virtue of subsections (4)(*b*) and (5) of section 39.

6. That the appeals are dismissed.

APPEAL from assessments of the Minister of National Revenue.

F. E. Labrie for appellant.

M. A. Mogan and *L. M. Little* for respondent.

CATTANACH J.:—These appeals are against assessments by the Minister under the *Income Tax Act* of the incomes of the appellant for its 1961 and 1962 taxation years.

Prior to the hearing the parties agreed upon a statement of facts which is reproduced hereunder:

AGREED STATEMENT OF FACTS

The Appellant and the Respondent hereby admit the several facts respectively hereunder specified but these admissions are made for the purpose of this appeal only and may not be used against either party on any other occasion or by any other than the Appellant and the Respondent. The parties reserve the right to object to the admissibility of any or all of the said facts on the ground that they are not relevant or material to any of the issues to be determined in this appeal:

1. In this agreed Statement of Facts the parties will refer to five different corporations and their names will be abbreviated as follows:

(a) VINELAND QUARRIES AND CRUSHED STONE LIMITED (hereinafter referred to as "Vineland");

(b) SAUDER AND THORNBORROW LIMITED (hereinafter referred to as "S. & T.");

(c) VERBEN TANK LINES LIMITED (hereinafter referred to as "Verben");

(d) McMASTER INVESTMENTS LIMITED (hereinafter referred to as "McMaster"); and

(e) BOLD INVESTMENTS (HAMILTON) LIMITED (hereinafter referred to as "Bold").

2. Vineland adopted the 31st day of December in each year as the end of its fiscal period, and its taxation years 1961 and 1962 are under appeal herein. All references with respect to the ownership of shares in any or all of the above five corporations will relate to the taxation years of Vineland which are under appeal herein: namely, the calendar years 1961 and 1962.

3 Vineland was incorporated under the laws of the Province of Ontario on the 13th day of December, 1957, having its head office in the City of Hamilton in the Province of Ontario.

4. At all relevant times, there were issued 2,400 preference shares of Vineland and 25,000 common shares of Vineland. The non-voting preference shares were registered in the name of and beneficially owned by Benjamin Sauder as to one-half (1,200) and Vernon Thornborrow as to one-half (1,200). During 1961 and 1962, the voting common shares of Vineland were owned as to one-half (12,500) by or for the benefit of Benjamin Sauder; and the remaining one-half (12,500) were owned by or for the benefit of Bold.

5. Bold was incorporated under the laws of the Province of Ontario on the 28th day of December, 1959 and, throughout 1961 and 1962, Bold was controlled by Vernon Thornborrow through his ownership of more than one-half of its voting share capital. During 1961 and 1962, all of the issued shares of Bold were owned by or for the benefit of Vernon Thornborrow.

6. S. & T. was incorporated under the laws of the Province of Ontario on the 27th day of December, 1950, having its head office in the City of Hamilton in the Province of Ontario.

7. At all relevant times, there were issued 4,000 voting common shares of S. & T. During 1961 and 1962, the voting common shares of S. & T. were owned as to one-half (2,000) by or for the benefit of Vernon Thornborrow; and the remaining one-half (2,000) were owned by or for the benefit of McMaster.

8. McMaster was incorporated under the laws of the Province of Ontario on the 12th day of February, 1959 and, throughout 1961 and 1962, McMaster was controlled by Benjamin Sauder through his ownership of more than one-half of its voting share capital. During 1961 and 1962, all of the issued shares of McMaster were owned by or for the benefit of Benjamin Sauder.

9. Verben was incorporated under the laws of the Province of Ontario on the 9th day of March, 1959, having its head office in the City of Hamilton in the Province of Ontario.

10. At all relevant times, there were issued 1,000 voting common shares of Verben. During 1961 and 1962, the voting common shares of

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Verben were owned as to one-half (500) by or for the benefit of Benjamin Sauder; and the remaining one-half (500) were owned by or for the benefit of Vernon Thornborrow.

11. Vernon Thornborrow referred to in paragraphs 4, 5, 7 and 10 above is one and the same person. Benjamin Sauder referred to in paragraphs 4, 8 and 10 above is one and the same person. Vernon Thornborrow and Benjamin Sauder are not related in any way and more particularly are not related persons within the meaning of the Income Tax Act, R.S.C. 1952, Chapter 148, as amended.

12. Vineland carries on the business of extracting gravel and crushed stone from quarries in Ontario for processing and sale.

13. S. & T. carries on the business of distribution and sale of fuel oil for domestic and commercial use.

14. Verben carried on the business of leasing tank trucks for the delivery of fuel oil. In terms of gallonage, about 95% of Verben's total business in 1961 and 1962 was derived from the leasing of tank trucks to S. & T. Verben did not employ any individuals in 1961 and 1962 other than Benjamin Sauder and Vernon Thornborrow.

15. By Notices of Assessment dated May 12, 1964, the Minister of National Revenue assessed income tax against Vineland for the 1961 and 1962 taxation years on the basis that Vineland was associated with Verben and S. & T. within the meaning of subsections (2), (3), (4) and (5) of Section 39 of the Income Tax Act, R.S.C. 1952, Chapter 148.

16. Attached hereto as Exhibit 1 and forming part of this Agreed Statement of Facts is a true copy of an agreement made the 15th day of December, 1960, between Benjamin Sauder, Bold and Vernon Thornborrow. The Appellant and the Respondent agree to admit Exhibit 1 as part of the evidence without formal proof upon the hearing of this appeal.

17. Attached hereto as Exhibit 2 and forming part of this Agreed Statement of Facts is a true copy of an agreement made the 15th day of December, 1960, between Vernon Thornborrow, McMaster and Benjamin Sauder. The Appellant and the Respondent agree to admit Exhibit 2 as part of the evidence without formal proof upon the hearing of this appeal.

18. Attached hereto as Exhibit 3 and forming part of this Agreed Statement of Facts is a true copy of an agreement made the 15th day of December, 1960, between Benjamin Sauder and Vernon Thornborrow. The Appellant and the Respondent agree to admit Exhibit 3 as part of the evidence without formal proof upon the hearing of this appeal.

19. Attached hereto as Exhibits 4(*a*) and 4(*b*) and forming part of this Agreed Statement of Facts are the financial statements of S. & T. for the taxation years 1961 and 1962 respectively. The Appellant and the Respondent agree to admit Exhibits 4(*a*) and 4(*b*) as part of the evidence without formal proof upon the hearing of this appeal.

20 Attached hereto as Exhibits 5(*a*) and 5(*b*) and forming part of this Agreed Statement of Facts are the financial statements of Verben for the taxation years 1961 and 1962 respectively. The Appellant and the Respondent agree to admit Exhibits 5(*a*) and 5(*b*) as part of the evidence without formal proof upon the hearing of this appeal.

THE PARTIES HERETO reserve the right to call such further and other evidence as Counsel may advise.

Appended to the Agreed Statement of Facts were exhibits 1, 2 and 3 being agreements between (1) Benjamin Sauder, Bold Investments (Hamilton) Limited and Vernon Thornborrow, (2) Vernon Thornborrow, McMaster Investments Limited and Benjamin Sauder, and (3) Benjamin Sauder and Vernon Thornborrow. Each of the three agreements is dated December 15, 1960.

The agreement being Exhibit 1, relates to the appellant company, the agreement being Exhibit 2, relates to Sauder and Thornborrow Limited and the agreement being Exhibit 3, relates to Verben Tank Lines Limited.

Also appended to the Agreed Statement of Facts are Exhibits 4(*a*) and (*b*) and Exhibits 5(*a*) and (*b*) being the financial statements of Sauder and Thornborrow Limited for its 1961 and 1962 fiscal years and the financial statements of Verben Tank Lines Limited for its 1961 and 1962 fiscal years respectively.

The three agreements are substantially identical to all intents and purposes. Each agreement contains a clause that no party thereto shall vote or cause to be voted as to cause any resolution to be passed or by-law enacted or business to be transacted by the Company to which the agreement relates except with the consent and approval of all parties thereto. If a breach occurs it is provided that the offending party shall be responsible in damages.

Each agreement also includes provisions respecting the purchase of shares held by the other natural party and provisions for cross-insurance.

The question for determination in respect of each appeal is whether the appellant is "associated" with Sauder and Thornborrow Limited and Verben Tank Lines Limited within the meaning of the word "associated" as used in section 39 of the *Income Tax Act* so as to authorize the Minister to assess the appellant by depriving it of the lower income tax rate on its first $35,000 of income in each of the years in question.

The pertinent provisions of section 39 of the *Income Tax Act*, as applicable to the 1961 and 1962 taxation years, read as follows:

39. (1) The tax payable by a corporation under this Part upon its taxable income for taxable earned in Canada, as the case may be, (in this section referred to as the "amount taxable") for a taxation year is, except where otherwise provided,

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(a) 18 per cent of the amount taxable, if the amount taxable does not exceed $35,000, and

(b) $6,300 plus 47 per cent of the amount by which the amount taxable exceeds $35,000, if the amount taxable exceeds $35,000.

(2) Where two or more corporations are associated with each other in a taxation year, the tax payable by each of them under this Part for the year is, except where otherwise provided by another section, 47 per cent of the amount taxable for the year.

...

(4) For the purpose of this section, one corporation is associated with another in a taxation year, if at any time in the year,

...

(b) both of the corporations were controlled by the same person or group of persons.

(5) When two corporations are associated, or are deemed by this subsection to be associated, with the same corporation at the same time, they shall, for the purpose of this section, be deemed to be associated with each other.

The Minister, in assessing the appellant as he did, acted on the following assumptions:

(a) one-half of the voting shares of the Appellant company were during 1961 and 1962 owned by or for the benefit of Benjamin Sauder; and the othe half of the voting shares of the Appellant company were during 1961 and 1962 owned by or for the benefit of Bold Investments (Hamilton) Limited;

(b) during 1961 and 1962, more than one-half of the voting shares of Bold Investments (Hamilton) Limited were owned by or for the benefit of Vernon Thornborrow;

(c) during 1961 and 1962, the Appellant company was controlled by a group of persons consisting of Benjamin Sauder and Vernon Thornborrow;

(d) one-half of the voting shares of Sauder and Thornborrow Limited were during 1961 and 1962 owned by or for the benefit of Vernon Thornborrow; and the other half of the voting shares of Sauder and Thornborrow Limited were during 1961 and 1962 owned by or for the benefit of McMaster Investments Limited;

(e) during 1961 and 1962, more than one-half of the voting shares of McMaster Investments Limited were owned by or for the benefit of Benjamin Sauder;

(f) during 1961 and 1962, Sauder and Thornborrow Limited was controlled by a group of persons consisting of Benjamin Sauder and Vernon Thornborrow;

(g) the Appellant company and Sauder and Thornborrow Limited were associated corporations as contemplated by Section 39(4)(b) of the Income Tax Act because they were both controlled by the same group of persons consisting of Benjamin Sauder and Vernon Thornborrow;

(h) one-half of the voting shares of Verben Tank Lines Limited were during 1961 and 1962 owned by or for the benefit of Benjamin Sauder; and the other half of the voting shares of Verben Tank Lines Limited were during 1961 and 1962 owned by or for the benefit of Vernon Thornborrow;

(*i*) the Appellant company and Verben Tank Lines Limited were associated corporations as contemplated by Section 39(4)(*b*) of the Income Tax Act because they were both controlled by the same group of persons consisting of Benjamin Sauder and Vernon Thornborrow.

The Minister contends that:

(1) the Appellant corporation and Sauder and Thornborrow Limited were associated corporations by virtue of paragraph (*b*) of subsection (4) of Section 39 of the Income Tax Act because both companies were controlled by the same group of persons consisting of Benjamin Sauder and Vernon Thornborrow.

(2) the Appellant corporation and Verben Tank Lines Limited were associated corporations by virtue of paragraph (*b*) of subsection (4) of Section 39 of the Income Tax Act because both companies were controlled by the same group of persons consisting of Benjamin Sauder and Vernon Thornborrow.

(3) Sauder and Thornborrow Limited and Verben Tank Lines Limited were associated corporations by virtue of subsection (5) of Section 39 of the Income Tax Act and by virtue of paragraph (*b*) of subsection (4) of Section 39 of the Income Tax Act because both companies were controlled by the same group of persons consisting of Benjamin Sauder and Vernon Thornborrow.

The appellant contends that it is not controlled by the same group of persons that controls Verben Tank Lines Limited and Sauder and Thornborrow Limited. Basically the contention of the appellant is (1) that it is controlled by Benjamin Sauder and Bold Investments (Hamilton) Limited, and not by Benjamin Sauder and Vernon Thornborrow (as alleged by the Minister,) even though the shares of Bold Investments (Hamilton) Limited are owned 100 per cent by Vernon Thornborrow, and (2) that Sauder and Thornborrow Limited is controlled by Vernon Thornborrow and McMaster Investments Limited and not by Vernon Thornborrow and Benjamin Sauder (as alleged by the Minister) even though the shares of that company are owned 100 per cent by Benjamin Sauder. There is no question, and it is readily conceded, that Verben Tank Lines Limited is controlled by Vernon Thornborrow and Benjamin Sauder.

The narrow question here involved is whether the Court may as a matter of law "look through" Bold Investments (Hamilton) Limited and McMaster Investments Limited and recognize that the voting control capable of being exercised by those two companies over the appellant corporation and Sauder and Thornborrow Limited respectively, is subject to the control of Vernon Thornborrow and Benjamin Sauder, respectively.

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In order for the Minister to succeed, the facts above recited must establish that the appellant corporation and Sauder and Thornborrow Limited are "controlled" by Benjamin Sauder and Vernon Thornborrow. If such is the case it follows that the three corporations, (1) the appellant, (2) Sauder and Thornborrow Limited and (3) Verben Tank Lines Limited are "associated" within the meaning of section 39(2) by virtue of subsections (4) and (5) of section 39.

This case turns on the meaning of the words "controlled by the same group of persons" in the context in which they are used in section 39(4)(*b*) of the *Income Tax Act*.

The President of this Court had recent occasion to consider the meaning of these very words in *Buckerfield's Ltd. v. M.N.R.*[1] where he said at page 302:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co. v. I.R.C.* ([1943] 1 A.E.R. 13) where Viscount Simon L.C., at page 15, says:
>
> > The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes.
>
> See also *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* ([1947] A.C. 109) per Lord Greene M.R. at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within section 6 of the *Income War Tax Act*.

In this same decision the President also determined that a "group of persons" can consist of as few as two persons.

However, such unequivocal definition of the word "controlled" in its context does not resolve the present issue. I am still faced with the problem of deciding whether control of Bold Investments (Hamilton) Limited by Vernon Thornborrow (the registered and beneficial owner of 100 per cent of the shares in that company) and the control of

[1] [1965] 1 Ex. C.R. 299.

McMaster Investments Limited by Benjamin Sauder (the registered and beneficial owner of 100 per cent of the shares in that company) vests the control of the appellant and Sauder and Thornborrow Limited in Benjamin Sauder and Vernon Thornborrow or whether the share registers of the appellant company and Sauder and Thornborrow Limited are conclusive in that they show Bold Investments (Hamilton) Limited and McMaster Investments Limited as being the owners of 50 per cent of the shares in the appellant and Sauder and Thornborrow Limited respectively and that therefore, these two companies together with Benjamin Sauder in the one instance and with Vernon Thornborrow in the other instance are the group of persons who have control.

I am not here concerned with the proposition that a corporation is a distinct legal entity separate from its shareholders, nor with any question of corporate capacity or power. I readily accept the undisputed proposition that no shareholder, even though he holds all the shares in a corporation, has any property, legal or equitable, in the assets of the corporation and the proposition that a corporation is not, as such, the agent or trustee for its shareholders.

The question here is who "controlled" the appellant and Sauder and Thornborrow Limited. Is it Benjamin Sauder and Vernon Thornborrow, or is it Benjamin Sauder and Bold Investments (Hamilton) Limited and Vernon Thornborrow and McMaster Investments Limited.

Were it necessary for me to answer this question uninstructed by authorities the solution which commends itself to me, would be to reply that it is Benjamin Sauder and Vernon Thornborrow. This is also the solution which appears to be dictated by the authorities.

In *British American Tobacco v. I.R.C.*[1] the question was whether one body corporate had a "controlling interest" in another body corporate. It was held that Company No. 1 can have a controlling interest in Company No. 3 by owning all the shares in Company No. 2 which in turn owns all the shares in Company No. 3. It was contended that in order that one company (or in this case a natural person) should have a "controlling interest" in another, it must be the beneficial owner of a requisite number of

[1] [1943] 1 All E.R. 13.

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shares in that other company, either in its own name or in the names of its nominees; and that if Company No. 1 owns all the shares in Company No. 2 which in turn owns all shares in Company No. 3, Company No. 1 has no interest, controlling or otherwise, in Company No. 3.

These contentions were rejected as unsound by each tribunal which in turn dealt with the matter. In delivering the decision of the House of Lords, Viscount Simon, L.C. said at page 15:

> It is true that in such circumstances company No. 1 owns none of the assets of company No. 2, and *a fortiori* owns none of the assets of company No. 3, and in that sense neither owns, nor has an interest in, company No. 3. But that is to treat the phrase "controlling interest" as capable of connoting only a proprietary right, that is, an interest in the nature of ownership. The word "interest", however, as pointed out by LAWRENCE, J., is a word of wide connotation, and I think the conception of "controlling interest" may well cover the relationship of one company towards another, the requisite majority of whose shares are, as regards their voting power, subject, whether directly or indirectly, to the will and ordering of the first-mentioned company. If, for example, the appellant company owns one-third of the shares in company X, and the remaining two-thirds are owned by company Y, the appellant company will none the less have a controlling interest in company X if it owns enough shares in company Y to control the latter.
>
> In my opinion this is the meaning of the word "interest" in the enactment under consideration, and, where one company stands in such a relationship to another, the former can properly be said to have a controlling interest in the latter. This view appears to me to agree with the object of the enactment as it appears on the face of the Act. I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connection got a controlling interest in the company.

It is apparent from the language of Viscount Simon that the words "controlling interest" were interpreted by him as being synonomous with the words "control of a company" and I am unable to attribute any different meaning to the word "controlled" as used in section 39(4)(*b*) of the *Income Tax Act*.

In the *British American Tobacco case* the "person" before Viscount Simon was an incorporated company, the British American Tobaco Co. Ltd., but it seems to me that the language quoted is equally applicable to the case where an individual person was, by having the requisite voting power in a company, able to determine all the ultimate decisions of that company.

I was then referred to *I.R.C. v. J. Bibby & Sons Ltd.*[1] which was also decided by the House of Lords. The words there to be interpreted were "the directors whereof have a controlling interest therein". The relevant facts in the *Bibby case* were that the directors of the company between them and in their own right held less than 50 per cent of the total voting shares; but three of the directors (who were brothers) in the capacity of trustees of a marriage settlement of their sister were the registered joint holders of further shares in the company. The total of the shares held by the directors in their own right and those held by three of the directors as trustees for their sister was more than a majority of the shares carrying voting rights.

In the *Bibby case* it was in the company's interest to contend that its directors had a controlling interest in it and accordingly it advanced the simple proposition that as the directors were the registered holders of a majority of the voting shares, they therefore, had a controlling interest in the company. For the Crown it was contended that the interest of the three directors who were trustees could not count because they did not have the beneficial interest in those shares and, therefore, could not vote them as they wished but must abide by their trust obligations.

The contention of the tax paying company prevailed in the Court of Appeal and in the House of Lords.

Lord Russell of Killowen, said at page 669:

> When the section speaks of directors having a controlling interest in a company, what it is immediately concerned with in using the words "controlling interest" is not the extent to which the individuals are beneficially interested in the profits of the company as a going concern or in the surplus assets in a winding up, but the extent to which they have vested in them the power of controlling by votes the decisions which will bind the company in the shape of resolutions passed by the shareholders in general meeting. In other words, the test which is to exclude a company's business from subsect. (9)(*a*) and include it in (9)(*b*), is the voting power of its directors, not their beneficial interest in the company.
>
> For the purpose of such a test the fact that a vote-carrying share is vested in a director as trustee seems immaterial. The power is there, and though it be exercised in breach of trust or even in breach of an injunction, the vote would be validly cast *vis-à-vis* the company, and the resolution until rescinded would be binding on it. The contention that upon the wording of sect. 13 the interest must be confined to beneficial interests appears to me to be but a repetition of the argument which was rejected by this House in the case of *British American Tobacco Co. v. C.I.R.* in relation to National Defence Contribution and the Finance Act, 1937.

[1] [1945] 1 All E.R. 667.

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It should be noted that Lord Russell states that he was following the principles laid down by the House of Lords in the *British American Tobacco case.*

Lord Simonds in his speech in the *Bibby case* said at pages 672 and 673:

> What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise of voting rights to carry a resolution at a general meeting of the company. Can the directors of the respondent company by the exercise of their voting rights carry such a resolution? Yes: for they are the registered holders of more than half the ordinary shares of the company. Therefore they have a controlling interest in the company.
>
> From this result the Crown seeks an escape by the contention that shares held by a director as trustee should not be included for the purpose of computing the controlling interest. In the appellants' argument in this House and in their formal reasons this absolute veto is qualified by the suggestion that, if the director has not only the legal ownership of shares but also a predominating beneficial interest in them, they may be brought into the count.
>
> My Lords, in my opinion the Crown's contention cannot be sustained. Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law. It is impossible (an impossibility long recognised in company law) to enter into an investigation whether the registered holder of a share is to any and what extent the beneficial owner. A clean cut there must be.

The contention of the appellant in the present case shorn of its refinements essentially amounts to the reasoning in the *Bibby case,* i.e. that the matter is concluded by reference to the share register; but this would be subject to the reasoning in the *British American Tobacco case* that where the registered shareholder is a body corporate it is permissible, for certain purposes, to look beyond the register and seek the individuals who themselves control that body corporate.

There is no conflict between the *British American Tobacco case* and the *Bibby case* in that both reject the test of beneficial shareholding interest.

In *I.R.C. v. Silverts, Ltd.*[1] and *S. Berendsen Ltd. v. I.R.C.*[2] Lord Evershed, M.R. was faced with the problem of reconciling the two decisions of the House of Lords in the *British American Tobacco case* and the *Bibby case,* or to put it more accurately a correct appreciation of the scope of those decisions. He had this to say in the *Silverts case* at page 709:

[1] [1951] 1 All E R. 703. [2] [1958] 1 Ch. Div. 1.

In neither case was the question the general one: "Who controls the company?" In the British American Tobacco case the question was whether (in the ordinary and proper sense of the words) company A held a controlling interest in company C, though the control was exercised, not directly but indirectly through the agency of company B. If the question were raised under some other taxing provision: "Has company B controlling interest in company C?" an affirmative answer to that question might be given consistently with the affirmative answer to the first question in the British American Tobacco case. So, in the Bibby case and in the present case, the question: "Have the directors a controlling interest in the company?" falls to be answered, aye or no, without regard to the possible question (if asked) whether some other person or body has (indirectly) a controlling interest in the same company.

The suggestion in the language of Lord Evershed, above quoted that company B can have a controlling interest in company C consistent with the finding in the *British American Tobacco case* that company A has a controlling interest in company C was what was held by Cameron J. in *Vancouver Towing Co., Ltd. v. M.N.R.*[1]. He held that regardless of the facts that the managing director, by reason of very extended powers conferred upon him by the articles of association had ultimate control of the appellant company and complete control over its board of directors as well as having an indirect control of the appellant company by owning the shares in a company which in turn held the majority of the shares of the appellant company, nevertheless, the appellant company also had a controlling interest.

In my view the word "controlled" in section 39(4)(*b*) contemplates and includes such a relationship as, in fact, brings about a control by virtue of majority voting power, no matter how that result is effected, that is, either directly or indirectly.

Here the inquiry is directed to whether Benjamin Sauder and Vernon Thornborrow control the appellant company and Sauder and Thornborrow Limited.

It would seem pointless to me to call a halt on finding in the share register of the appellant company and the share register of Sauder and Thornborrow Limited that in each instance 50 per cent of the shares are held respectively by Bold Investments (Hamilton) Limited and McMaster Investments Limited when an examination of the share register of Bold Investments (Hamilton) Limited and McMaster Investment Limited reveals that all (or nearly

[1] [1946] Ex. C.R. 623.

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all) the shares in those companies are held by Vernon Thornborrow and Benjamin Sauder respectively.

On the authority of the *British American Tobacco case*, I do not think it is appropriate to end the inquiry after looking at the share registers of the appellant and Sauder and Thornborrow Limited. It is proper and necessary to look at the share registers of Bold Investments (Hamilton) Limited and Sauder and Thornborrow Limited to obtain an answer to the inquiry whether the appellant and the two other companies are controlled by the same "group of persons". Where the registered shareholder in the first instance is a body corporate, you must look beyond the share register.

It therefore follows that the Minister was right in assuming, as he did when assessing the appellant, that the appellant company was controlled by Benjamin Sauder and Vernon Thornborrow and that Sauder and Thornborrow Limited was controlled by Benjamin and Vernon Thornborrow as was Verben Tank Lines Limited. Accordingly the appellant company, Sauder and Thornborrow Limited and Verben Tank Lines Limited were associated corporations within the meaning of section 39(2) by virtue of subsections (4)(*b*) and (5) of section 39.

The appeals are, therefore, dismissed with costs.

Toronto 1965

Dec. 15

1966

Feb. 15

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

INTER-PROVINCIAL COMMERCIAL DISCOUNT CORPORATION LIMITED ..... DEFENDANT.

Sales tax—Excise Tax Act, R.S.C. 1952, c. 100—Sections 48(4), 50(9), (10)—British North America Act, ss. 91(3) and 92(13)—Assignment of book debts of licensees to third party—Recovery of tax from assignee.

Book debts arising from transactions subject to sales tax were assigned by three licensed manufacturers to the defendant company.

The Minister demanded that the defendant pay the sales tax out of the amounts collected on the assigned debts under section 50(9) and (10) of the *Excise Tax Act*. The defendant refused to pay.

The defendant contended that subsections (9) and (10) of section 50 of the Act were *ultra vires* the Parliament of Canada since the legislation infringed the authority conferred upon the provinces by *The British North America Act*.

Held: That there should be judgment for the plaintiff against defendant for the amount of the sales tax and penalties.

2. That section 50(9), (10), in providing authority for the collection of tax imposed by the Act, were an integral part of legislation in relation to a matter within a class of subject specifically assigned to the Parliament of Canada and were accordingly *intra vires* the Parliament of Canada.

3. That once it is accepted that a tax upon the manufacturer who sells goods is valid, it is obvious that Parliament can incorporate in the taxing law a provision to make the assignee of the purchase price pay an amount equal to the tax.

4. That powers in relation to matters normally within the provincial field, especially property and civil rights, are inseparable from a number of the specific heads of section 91 of *The British North America Act*.

INFORMATION of the Deputy Attorney-General of Canada.

C. R. O. Munro, Q.C. and *D. G. H. Bowman* for plaintiff.

W. D. Goodman for defendant.

CATTANACH J.:—In this action the Crown seeks to recover the sum of $9,282.81 as monies payable under subsection (10) of section 50 of the *Excise Tax Act*, R.S.C. 1952, chapter 100 as amended, and the *Old Age Security Tax Act*, R.S.C. 1952, chapter 200, together with penalties provided by section 48(4) of the *Excise Tax Act* incurred by the defendant by reason of its default in payment of the above sum.

Prior to trial the parties agreed upon a Statement of Facts which is reproduced hereunder:

1. The Defendant is a company incorporated under the laws of the Province of Ontario and has its head office at the City of Toronto in the Province of Ontario.

2. At all material times Toronto Table (1961) Limited, Vend-Craft Gum Limited and G.M.T. Toys Limited were licensees pursuant to the provisions of the Excise Tax Act, R.S.C. 1952, c. 100.

3. The Defendant received from the said Toronto Table (1961) Limited, Vend-Craft Gum Limited and G.M.T. Toys Limited, assignments of book debts or of negotiable instruments of title to such debts, which debts arose out of transactions in respect of which a tax was imposed by the Excise Tax Act and by section 10 of the Old Age Security Act, R.S.C. 1952, c. 200.

4. By registered letter dated April 25, 1963, addressed to the Defendant, pursuant to subsection (9) of section 50 of the Excise Tax Act, the

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Minister of National Revenue demanded that the Defendant pay over to the Receiver General of Canada out of any moneys received by the Defendant after the receipt of the said letter, a sum equivalent to the amount of any tax imposed by the Excise Tax Act, upon the transactions giving rise to the debts assigned by the said Toronto Table (1961) Limited.

5. By registered letter dated August 1, 1963, addressed to the Defendant, pursuant to subsection (9) of section 50 of the Excise Tax Act, the Minister of National Revenue demanded that the Defendant pay over to the Receiver General of Canada out of any moneys received by the Defendant after the receipt of the said letter, a sum equivalent to the amount of any tax imposed by the Excise Tax Act, upon the transactions giving rise to the debts assigned by the said Vend-Craft Gum Limited.

6. By registered letter dated June 6, 1963, addressed to the Defendant, pursuant to subsection (9) of section 50 of the Excise Tax Act, the Minister of National Revenue demanded that the Defendant pay over to the Receiver General of Canada out of any moneys received by the Defendant after the receipt of the said letter, a sum equivalent to the amount of any tax imposed by the Excise Tax Act, upon the transactions giving rise to the debts assigned by the said G.M.T. Toys Limited.

7. After the receipt by the Defendant of the said letters referred to in paragraphs 4, 5 and 6 hereof, the Defendant received up to and including the 25th day of November, A.D. 1963, certain moneys on account of the said debts referred to in paragraph 3 hereof. Subject to the determination by this Honourable Court of the question stated in paragraph 10 hereof, the sums claimed to be owing by the Defendant to the Receiver General of Canada according to the demand contained in the said letters, out of moneys so received by it up to and including the 25th day of November, A.D. 1963, in accordance with subsection (10) of section 50 of the Excise Tax Act, are calculated as follows:

(*a*) Out of the moneys received by the Defendant up to and including the 25th day of November, A.D. 1963, on account of the debts assigned to the Defendant by Toronto Table (1961) Limited, the Defendant was required to pay to the Receiver General of Canada the sum of $2,220.70.

(*b*) Out of the moneys received by the Defendant up to and including the 25th day of November, A.D. 1963, on account of the debts assigned to the Defendant by Vend-Craft Gum Limited, the Defendant was required to pay to the Receiver General of Canada the sum of $4,508 65.

(*c*) Out of the moneys received by the Defendant up to and including the 25th day of November, A.D. 1963, on account of the debts assigned to the Defendant by G.M.T. Toys Limited, the Defendant was required to pay to the Receiver General of Canada the sum of $2,553.46.

8. The Defendant agrees, if this Honourable Court should determine that the question stated in paragraph 10 hereof is to be answered in the negative:

(*a*) that it is liable to the Plaintiff for the sum of $9,282.81 being the total of the amounts referred to in paragraph 7 hereof;

(*b*) that it is liable to pay to the Plaintiff the penalties provided by subsection (4) of section 48 of the Excise Tax Act as alleged in paragraph 9 of the Information herein;

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(c) that the said penalties, as computed until the 30th day of September, 1965, amount to $1,492.71 and that the said penalties further accrue at the rate of $\frac{2}{3}$ of one percent of the said sum of $9,282.81 in respect of each month or fraction of a month during which default in payment occurs after the 30th day of September, 1965; and

(d) that Judgment may be granted against the Defendant for the said amount of $9,282.81 together with the said penalties.

9. The Defendant was not in any way or degree party to any attempt to evade or avoid payment of tax by the assignors, and its refusal to pay the sums claimed was made *bona fide* and on the advice of its solicitors.

10. The Parties hereto agree that the sole question in issue between them for determination by this Honourable Court is as follows:

> "Are subsections (9) and (10) of section 50 of the Excise Tax Act *ultra vires* the Parliament of Canada as being beyond the powers conferred upon the Parliament of Canada by section 91 of the British North America Act, 1867, 30 and 31 Victoria, Ch. 3 and Amendments thereto?"

It has been readily conceded by counsel for both parties that all essential elements to render the defendant liable are present, assuming the constitutional validity of subsections (9) and (10) of section 50 of the *Excise Tax Act*. There were taxable transactions, that is the sales of goods manufactured or produced in Canada by Toronto Table (1961) Limited, Vend-Craft Gum Limited and G.M.T. Toys Limited, all of whom were licensed manufacturers; there were assignments to the defendant of the vendors' rights to the purchase moneys arising from such taxable transactions and demands, as contemplated by subsection (9) of section 50, were made to the defendant, as assignee, by the Minister to pay over a sum equivalent to the amount of the taxes out of the moneys received by the defendant on account of such debts after receipt of such notices. All such facts are asserted in the Agreed Statement of Facts.

Moreover, it will be observed from paragraph 10 of the Agreed Statement of Facts that it was also agreed that the sole question in issue between the parties for determination is whether subsections (9) and (10) of section 50 of the *Excise Tax Act,* are *ultra vires* the Parliament of Canada. Those subsections read as follows:

(9) When the Minister has knowledge that any person has received from a licensee any assignment of any book debt or of any negotiable instrument of title to any such debt, he may, by registered letter, demand that such person pay over to the Receiver General of Canada out of any moneys received by him on account of such debt after the receipt of such notice, a sum equivalent to the amount of any tax imposed by this Act upon the transaction giving rise to the debt assigned.

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(10) The person receiving any such demand shall pay the Receiver General according to the tenor thereof, and in default of payment is liable to the penalties provided in this Act for failure or neglect to pay the taxes imposed by Parts II to VI.

By section 30 of the Act there is imposed, levied and collected a consumption or sales tax on the sale price of all goods produced or manufactured in Canada. Every manufacturer or producer is required by section 34 of the Act to obtain a licence and by section 48 to make monthly returns of all taxable sales. The tax is one that is imposed upon and collected from the manufacturer who in turn, in the ordinary course of events, may be expected to recoup himself from his purchaser. It is, therefore, an indirect tax because the probability is that it will ultimately be borne by the consumer.

There is no question whatsoever that the imposition of such an indirect tax is within the exclusive legislative powers of the Parliament of Canada under the provisions of section 91 of the *British North America Act*, 1867. It is convenient at this point to quote from section 91 the portion thereof that is relevant to the matter in issue:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

...

3. The raising of Money by any Mode or System of Taxation.

...

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The contention of counsel for the defendant, as I understand it, is that if subsections (9) and (10) are justifiable Federal legislation at all, they can only be justified on the ground that they are necessarily incidental to the exercise

by the Parliament of Canada of the power conferred upon it by head 3 of the section 91 of the *British North America Act* above quoted, which he submits they are not, and, if such is so, then the legislation infringes the authority conferred upon the Provinces by section 92, head 13 to "exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,— '13. Property and Civil Rights in the Province'."

In support of such contention the defendant relied strongly on a decision of Dysart J. of the Manitoba King's Bench in *Northwest Mortgage Co. v. Commissioner of Excise*[1]. In that case section 169 of the *Excise Act* provided for the forfeiture to the Crown of an automobile illegally used by a person to transport liquor and the section also forfeited any interest in the automobile held by a person innocent of any wrong doing under the Act.[2] There was, however, a section of the Act whereby the innocent person might obtain an order exempting his interest from forfeiture upon proof of certain exculpatory facts.

Dysart J. had this to say at page 276:

> It is admitted, of course, that the Dominion has the power to enact all provisions which are necessarily incidental to effective legislation upon any subject falling within any of the classes expressly enumerated in s. 91: *A.-G. Ont. v. A.-G. Can.*, [1894] A.C. 189; *A.-G. Ont. v. A.-G. Can.*, [1896] A.C. 348; *A.-G. Can. v. Cain, A.-G. Can. v. Gilhula*, [1906] A.C. 542.
>
> It will be admitted also that the *Excise Act* would carry with it, as incidental thereto, the right to punish offenders against the Act, by all legitimate means, including forfeiture of their automobiles, or of their interest in automobiles, used in violations of the Act.
>
> But is is difficult to find justification for the forfeiture of property belonging to people who are entirely free and innocent of a violation of the Act. These people have their rights to property established by the Province, under its exclusive jurisdiction over "Property and Civil Rights"; s. 92 of the *B.N.A. Act*. If such confiscation of the property of persons can be justified as being incidental to the punishment of offenders, then it is difficult to understand where the limit must be drawn. If a man's car were stolen, for instance, and used in contravention of the *Excise Act*, the forfeiture would be maintainable,—but at the same time would be an outrage on justice. What essential difference is there between such a case and this present one?
>
> There is nothing in the principles of law or justice that can support this provision of the *Excise Act*, and while the right of the Dominion should be supported, in so far as its legislation is necessarily incidental to

[1] [1944] 3 D.L.R. 273.

[2] [1932] S.C.R. 134 *The King v. Krakowec, et al.*

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the enforcement of the *Excise Act*, it seems impossible to understand or to justify the punishment of innocent persons under pretence of enforcing the Act against guilty persons. I am not aware that this point has ever been raised, or strongly supported, or adjudicated upon, and therefore I feel at liberty to express my opinion of it. In my opinion, the legislation here in question affects the exclusive provincial property rights of innocent persons, and is *ultra vires* of the Dominion.

This decision was confirmed by the Manitoba Court of Appeal[1] but on grounds other than the constitutional issue upon which question the Court of Appeal expressed no opinion.

The view expressed by Dysart J. was, to all intents and purposes, overruled by the Supreme Court of Canada in *Industrial Acceptance Corporation Limited v. The Queen*[2]. Section 21 of a Federal statute, The *Opium and Drug Act*, 1929 provided for forfeiture of a vehicle used in connection with a narcotics offence where a conviction results, without any exculpation opportunity to innocent persons as was the case in the section of the *Excise Act* under review in *Northwest Mortgage Co. v. Commissioner of Excise* (*supra*). It was contended that section 21, insofar as it operated to forfeit the innocent person's interest in the motor car was *ultra vires* the Parliament of Canada as not being necessarily incidental to the effective exercise of the legislative authority of Parliament over the criminal law. Kerwin J. as he then was, had this to say at page 275:

> ...The mere fact that s. 21 of the Opium and Narcotic Drug Act affects property and civil rights is of no concern since in pith and substance it does not attempt to invade the provincial legislative field. It provides for the forfeiture of property used in the commission of a criminal offence and is, therefore, legislation in relation to criminal law.

The fallacy in the reasoning of Dysart J. in *Northwest Mortgage Co. v. Commissioner of Excise* (*supra*) and, as I see it, in the contention of the defendant herein, lies in failing to distinguish between legislation "affecting" property or civil rights in the Province and legislation "in relation to" property and civil rights. Powers in relation to matters normally within the provincial field, especially of property and civil rights, are inseparable from a number of the specific heads of section 91 of the *British North America Act* under which scarcely a step can be taken that do not involve them. In each such case the question is

[1] [1945] 1 D.L.R. 561. [2] [1953] 2 S.C.R. 273.

primarily not how far Parliament can trench on section 92, but rather to what extent property and civil rights are within the scope of the paramount power of Parliament. See *Gold Seal Ltd. v. A.G. Alta.*[1], *A. G. (Can.) v. C.P.R. & C.N.R.*[2] and *Tennant v. Union Bank*[3].

A first reading of subsections (9) and (10) of section 50 of the *Excise Tax Act* conveys the impression that this is somewhat uncommon and drastic legislation, but such impression is not borne out by a more mature consideration of the legislation. There is no question that the "matter" of raising money by any mode or system of taxation comes within a class of subjects declared by section 91 of the *British North America Act* to be within the exclusive legislative authority of the Parliament of Canada. It follows logically that the authority to levy and impose the tax must of necessity include the authority to collect the tax so imposed and to legislate effectively to secure that end. Once it is accepted that a tax upon the manufacturer who sells goods is valid, it is obvious that Parliament can incorporate in the taxing law a provision to make the assignee of the purchase price pay an amount equal to the tax so as to forestall attempts to frustrate collection of the tax by putting the proceeds of sales in the hands of a third person (innocent or otherwise) and so beyond the reach of the tax collector. (In so saying, I presume that subsection (9) of section 50 only operates when the taxpayer has not paid the tax and any payment under subsection (9) operates to extinguish the tax liability *pro tanto*).

This, in my opinion, is the precise purpose of subsection (9) of section 50 of the Act. Subsection (10) thereof provides a penalty for failure to comply with subsection (9) after notice as required therein has been given. If subsection (9) is *intra vires,* then so too is subsection (10).

I have been occasioned concern by the decision of Angers J. in *The King v. Imperial Tobacco Co. of Canada Ltd.*[4]. Angers J. there considered section 119 of the *Special War Revenue Act* 1927 R.S.C. c. 179 providing:

> Everyone liable under this Act to pay to His Majesty any of the taxes hereby imposed, or to collect the same on His Majesty's behalf, who

[1] 62 S.C.R. 424.
[2] [1958] S.C.R. 285.
[3] [1894] A.C. 31.
[4] [1938] Ex. C.R. 177.

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collects, under colour of this Act, any sum of money in excess of such sum as he is hereby required to pay to His Majesty, shall pay to His Majesty all moneys so collected, and shall in addition be liable to a penalty not exceeding five hundred dollars.

This section is re-enacted in the same terms as above quoted by section 61 of the *Excise Tax Act*.

He held it was not shown that section 119 came within the powers given by section 91 of the *British North America Act* or that it was ancillary to the exercise of some power set forth in said section 91 and accordingly, (except for the provision imposing the penalty of $500 or less), the section is *ultra vires* the Parliament of Canada.

On appeal to the Supreme Court of Canada[1], the decision of Angers J. was upheld on the ground that the respondent company had not infringed section 119. In view of such finding it was unnecessary for the Supreme Court to deal with the question of the validity of the section.

Since Angers J. was considering a different section, I do not consider myself bound to apply his decision in determining the validity of the provisions in issue here.

For the reasons above recited, I am of the opinion that subsections (9) and (10) of section 50 of the *Excise Tax Act* are an integral part of legislation in relation to a matter within a class of subject specifically assigned to the Parliament of Canada by section 91 of the *British North America Act*, to wit, head 3 thereof being the raising of money by any mode or system of taxation, and the subsections in question are accordingly *intra vires* the Parliament of Canada.

It follows that there shall be judgment for Her Majesty against the defendant in the sum of $9,282.81, and for the penalties provided by subsection (4) of section 48 of the *Excise Tax Act* computed to the date of this judgment, together with the costs of this action.

[1] [1939] S.C.R. 322.

BETWEEN:

DOMINION STORES LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Toronto 1965 Dec. 13, 14

1966 Feb. 24

Income tax—Income Tax Act, R.S.C. 1952, c. 184, ss. 12(1)(e), 85B(1)(a)(i)(c)—Deductions—Chain store company—Reserve for unredeemed trading stamps—Reseasonable amount.

Operator of a chain of retail food stores, the appellant distributed in its stores trading stamps free as an inducement to customers. These stamps had a redeemable value of 1½ per cent of the purchase price which entitled the customer to present to the company for redemption either by way of premiums or the company's merchandise.

In each of the years 1959 and 1960, the appellant company sought to deduct, under the provisions of section 85B(1), a reserve in respect of the trading stamps that remained unredeemed at the end of the year.

The Minister disallowed the deductions, ruling that no reserve could be granted under section 85B(1)(*c*) because no amounts on account of goods not delivered before the end of the year had been included in the company's income as required by section 85B(1)(*a*). The Minister argued that the stamps were issued free, as advertised, and the cost of their redemption was not deductible until that event took place.

Held: The appellant company was entitled to deduct a reasonable amount for each of the two years in question as a reserve in respect of goods that it was reasonably anticipated would have to be delivered upon the redemption of trading stamps after the end of the year. Such amount being the amount that the parties agreed was reasonable.

2. In fact a portion of each amount received from the appellant's customers was received on account of goods not delivered and a reserve was therefore permissible under s. 85B(1)(*c*).

3. The requirements of section 85B(1)(*a*) having been met, the company was entitled to the reserve provided by section 85B(1)(*c*).

4. Appeal allowed.

APPEAL from assessments by the Minister of National Revenue.

S. E. Edwards, Q.C. and *M. L. Ainsley* for appellant.

M. A. Mogan for respondent.

CATTANACH J.:—These are appeals from assessments to income tax levied by the Minister in respect of the appellant's income for its 1959 and 1960 taxation years.

The appellant company, the head office of which is in Toronto, Ontario, operates a chain of retail food stores

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throughout Canada, except in the Province of Newfoundland, the Yukon and Northwest Territories. Approximately 62 percent of appellant's gross revenue is derived from its business conducted in the Province of Ontario and approximately 20 percent is derived from its operations in the Province of Quebec.

As a matter of policy the appellant does not usually resort to the device of distributing trading stamps to attract and retain customers but, as an executive of the appellant company testified, the appellant was obliged to do so in the Province of Quebec and in those portions of Ontario bordering on Quebec in order to compete effectively with its business rivals. I would assume that the appellant had no inherent objection to the adoption of such trading stamp plans if it were demonstrated to it that such a plan would increase its trade.

The method of operating the trading stamp plans adopted by the appellant is this:

The appellant conducts its business on a cash basis exclusively. A customer on purchasing merchandise from the appellant is given trading stamps to the value of 1½ percent of the price paid for the merchandise purchased. For example if the price of the merchandise was $10, the customer would be given 100 stamps having a redeemable value of 15 cents, or 3/20 of a cent each. The customer is also supplied with a small booklet in which the stamps are to be pasted. The booklet, when completely filled, has a redeemable value of $2.25. When a customer has filled booklets of these stamps he may then present them at the appellant's retail store where the merchandise was purchased where he is given a choice of articles illustrated in a catalogue which may have been given to him previously or is available for his inspection. The appellant then exchanges the article selected by the customer for a certain number of completed booklets, the number of booklets required being listed in the catalogue.

In all advertising media, and upon the catalogues and booklets the trading stamps and articles received by a customer in exchange therefor are described as being "free"-"gifts" and "free gifts".

I should have thought that the appellant would recoup itself for the cost of printing the trading stamps and the

redeemable values thereof as well as sundry related administrative expenses, by appropriate increases in the prices of the merchandise sold to its customers. I should also have thought that the appellant would realize a profit by supplying articles in exchange for booklets of stamps. However, no satisfactory evidence was adduced upon either of the above points. An executive of the appellant company who was called as a witness could not say whether prices in those stores of the appellant in which a trading stamp plan was in vogue were increased to cover the cost of the stamp plan, nor did he know whether the premium articles given in exchange for stamps were purchased by the appellant at manufacturer's or wholesale cost and redeemed by it at the retail cost. The witness did say that prices varied from store to store in the appellant's chain in different areas and from store to store in the same areas, but that such variations in prices were attributable to so many factors that he was unable to attribute any part of the prices at which merchandise was sold to the introduction of a trading stamp plan. Neither could this witness state that a specific part of each sales dollar received by the appellant was allocated to an account for the redemption of trading stamps, or that a specific part of each sales dollar was allocated to the purchase price of the merchandise sold by the appellant. No such system of bookkeeping or segregation was set up although accounts were kept of the numbers and amounts of trading stamps issued.

It was positively established by evidence that when a customer made a purchase of merchandise in one of the appellant's stores where a trading stamp plan was in effect, he paid the asking price for the merchandise he received, he received or was entitled to receive trading stamps to the extent of $1\frac{1}{2}$ percent of the purchase price and he was entitled to present those trading stamps for redemption by the appellant. These were the conditions under which merchandise was sold by the appellant. If a customer did not wish to take the stamps he could not thereby obtain any reduction in the price of the merchandise that he wished to purchase. If the customer did not wish to take the stamps proffered to him, and did not take them, he would, in effect, be making a gift of them to the appellant.

It was a condition of acquiring trading stamps that a customer must purchase merchandise from the appellant. A

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person could not acquire stamps from the appellant except in connection with a purchase of merchandise in the manner I have described.

In addition to its trading stamp plan, the appellant also had in effect in some of its stores in some areas a variation thereof which was described as a "save-a-tape" plan. This plan worked in a manner identical to the trading stamp plan except that instead of trading stamps the customer was given cash register receipts in a specified colour which were also redeemable in the same manner and to the same values as trading stamps.

I should also add that a customer was given a further option by the appellant. A customer could exchange the trading stamps received by him (or the cash register receipts as the case might be) for the premiums listed in the catalogue or if the customer wished he might redeem the trading stamps for merchandise, that is groceries, sold by the appellant.

The appellant, in addition to distributing trading stamps in its own retail stores, also sold a much lesser quantity of trading stamps than it distributed itself to other retail merchants to disseminate or distribute among their customers. The customers of those other retail merchants were also entitled to present the trading stamps so received by them to the appellant to be exchanged for the premiums listed in the appellant's catalogue at the rates therein listed and the appellant also undertook to redeem those stamps.

The appellant also sold "gift certificates". These certificates were purchased from the appellant at a price equal to a face value printed thereon and were redeemable at any of the appellant's retail stores by the bearer for merchandise only, that is to say, the merchandise normally sold by the appellant but not for premiums listed in the gift catalogue. During the Christmas season the appellant also offered for sale turkey gift certificates which were for the same purpose as the gift certificates except that the merchandise to be received therefor was limited to turkeys.

Owing to the operation of trading stamp plans by the appellant in the conduct of its business, a problem arises in dealing with what are known as "unredeemed" stamps, that is to say, stamps that were distributed in the current accounting year or carried over from former years and that

remain unredeemed at the end of the year. The problem is what account, if any, should be taken of such unredeemed stamps in computing the profits from the appellant's business for the year.

During the taxation years 1957 and 1958 the appellant operated its trading stamp plan under the name of the "Blue Chip Premium Stamp Plan". This plan was discontinued by the appellant in its 1958 taxation year and in its income tax return for that year the appellant deducted a reserve in respect of Blue Chip stamps then outstanding which the Minister disallowed as a deduction.

The appellant, in its 1959 and subsequent taxation years, continued to operate a premium trading stamp plan designated as the "Horizon Stamp Plan".

During its 1958 and subsequent taxation years the appellant also operated the "Save-a-Tape Plan" which has been described above.

In the appellant's 1959 and 1960 taxation years now under review, the Minister did allow claims for reserves with respect to trading stamps sold by the appellant to other retail merchants, and the issuance of gift certificates and Christmas turkey certificates, in amounts he considered to be reasonable, but he disallowed the claims for the reserves with respect to the "Blue Chip Plan", the "Horizon Stamp Plan" and the "Save-a-Tape Plan" made by the appellant for those taxation years by notification under section 58 of the *Income Tax Act*, dated July 30, 1964, on the particular ground that,

> reserves for premium stamps and tapes supplied to customers claimed as deductions from income have been propertly disallowed in accordance with the provisions of paragraph (*e*) of subsection (1) of section 12 of the Act; that no part of the taxpayer's receipts from customers represents an amount received in the year in the course of business that is on account of goods not delivered before the end of the year or that, for any other reason, may be regarded as not having been earned in the year or a previous year within the meaning of subparagraph (i) of paragraph (*a*) of subsection (1) of section 85B of the Act and accordingly the taxpayer is not entitled to a reserve under paragraph (*c*) of the said subsection (1) of section 85B.

By such notification the Minister confirmed his prior assessments to which objections had been filed by the appellant. It is from these assessments that the appeals to this Court result.

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The provisions of the *Income Tax Act* pertinent to the present appeals read as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

12. (1) In computing income, no deduction shall be made in respect of

...

(*e*) an amount transferred or credited to a reserve, contingent account or sinking fund except as expressly permitted by this Part,

...

85B. (1) In computing the income of a taxpayer for a taxation year,

(*a*) every amount received in the year in the course of a business

(i) that is on account of services not rendered or goods not delivered before the end of the year or that, for any other reason, may be regarded as not having been earned in the year or a previous year,

...

shall be included;

...

(*c*) ... where amounts of a class described in subparagraph (i) or (ii) of paragraph (*a*) have been included in computing the taxpayer's income from a business for the year or a previous year, there may be deducted a reasonable amount as a reserve in respect of

(i) goods that it is reasonably anticipated will have to be delivered after the end of the year,

The issue is whether the appellant is entitled to deduct an amount as a reserve in respect of the trading stamps and cash register receipts which it had distributed among its customers and which had not been redeemed during the respective taxation years in question.

Upon the pleadings a further issue was raised as to whether, assuming the appellant is entitled to deduct an amount as such a reserve in computing its incomes for its 1959 and 1960 taxation years, the sums of $265,027.91 and $784,765.89, which were claimed by the appellant by its Notice of Appeal, are "reasonable" amounts as contemplated by section 85B (1)(*c*). As a result of an agreement made by counsel during the course of the trial the parties have

informed the Court that reasonable amounts for the two taxation years under appeal are as follows:

1959 -	Horizon and Blue Chip Reserve	$139,602.32
	Save-a-Tape Reserve	25,570.28
	Total	$165,172.60
1960 -	Horizon Stamp Reserve	$509,987.64

The appellant's principal contention is, in effect, that the manner in which the appellant conducted its business, which has been described above, falls within the precise terms of section 85B in that part of the purchase price received by the appellant in the course of each of its sales at a store where such a plan was in operation, was received on account of goods not delivered before the end of the year.

There is no question that the appellant is under a binding legal obligation to redeem trading stamps which it had issued under the plans that I have described when those stamps are presented to be exchanged for premiums in accordance with the terms of the respective plans under which they were issued. Counsel for the Minister readily concedes that such obligation is upon the appellant to redeem the trading stamps.

However, he submits that this obligation was voluntarily assumed by the appellant, that there was no evidence (as there was not) of an increase in price of the merchandise that the appellant sold in the normal course of its business to cover the cost of the premium plans when introduced and that there was no segregation or allocation of the revenue received to the merchandise sold, on the one hand, and to the trading stamps distributed on the other. He, therefore, suggests that the trading stamps were "free" as they were described in the appellant's advertising. On these grounds he submits that no amounts were received by the appellant in the years in question in respect of the trading stamps or the premiums to be given on their redemption. It would follow therefore that no amounts were included in computing the appellant's income and that a reasonable amount as a reserve was not permissible as a deduction under paragraph (*c*) of section 85B. In short, the contention on behalf of the Minister is, as I understand it, that the liability of the appellant to redeem the trading stamps

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issued by it cannot be related back to the period in which that liability arose, but rather any deductions should be brought into account when the trading stamps were actually redeemed and not before.

In my view the contention of the Minister cannot prevail.

The arrangement between the appellant and its customers is quite clear from the evidence. A customer paid the price demanded by the appellant when he purchased merchandise from the appellant. For this, he received the merchandise and in addition he received or was entitled to receive trading stamps which he was entitled to present to the appellant later for redemption either by way of premiums or the appellant's merchandise. The appellant was legally obligated to make this redemption. There was only one transaction and this was the only way in which the appellant would conduct its business at the particular stores. It does not follow that, because no specific amount is identifiable as being allocated to the cost of distributing and redeeming the stamps, the total amount is not attributable in part thereto. When two articles are sold together for one price without a price being put upon each separately, it does not follow that one article is free and that the price is attributable exclusively to the other article.

In my opinion, where the trading stamps and save-a-tape plans were in effect and trading stamps or premium tapes were issued to the appellant's customers, a portion of each amount received by the appellant from its customers was received on account of goods to be delivered on presentation of the trading stamps or tapes for redemption. All amounts received by the appellant in respect of such goods were included in the appellant's income in the year of receipt whether or not the trading stamps or tapes were redeemed in that year. Such amounts, with respect to trading stamps which remained outstanding at the end of each taxation year, were on account of goods not delivered before the end of the year. From this it follows that by virtue of section 85B the appellant is entitled to deduct a reasonable amount for each of the two years in question as a reserve in respect of goods that it is reasonably anticipated will have to be delivered upon the redemption of trading stamps or premium tapes after the end of the year.

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The parties hereto have agreed that such reasonable amounts are as set out above.

Having regard to the conclusion I have reached on the appellant's principal contention there is no need to discuss its alternative contentions.

The appeals are, therefore, allowed with costs and the assessments are referred back to the Minister for re-assessment so as to allow as a deduction,

(*a*) for the appellant's 1959 taxation year an amount of $165,172.60, and

(*b*) for the appellant's 1960 taxation year an amount of $509,987.64,

as reserves in those respective taxation years in accordance with section 85B of the *Income Tax Act*.

ENTRE:

LE MINISTRE DU REVENU NATIONAL ..... APPELANT;

ET

J. ÉMILE GROULX ..... INTIMÉ.

Montréal 1965

les 18 et 19 octobre

Ottawa 1966

le 7 mars

Revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 3, 6(1)(b) et 7(1)—Intérêts et capital fusionnés—Vente d'une ferme par versements sur prix de vente, sans intérêts—Versements reçus par le vendeur constituant une fusion de capital et d'intérêts.

En 1956, l'intimé a vendu sa ferme pour le prix de $395,000, payable $85,000 comptant et la balance: $310,000, payable en huit versements consécutifs, savoir: $15,000 le 15 janvier 1958; $25,000 le 1er juin 1959; quatre versements de $50,000 chacun les 1er juin 1960, 1961, 1962 et 1963 respectivement; et un versement final de $75,000 le 1er juin 1964.

Le contrat en question stipulait que la balance du prix de vente ne porterait pas intérêt si les versements susmentionnés étaient payés le ou avant leur date d'échéance; mais, à défaut, toute balance du prix de vente porterait comme pénalité un intérêt de 6 par cent l'an.

Selon le Ministre, le prix de vente convenu et stipulé excédait la valeur marchande de la propriété, comme l'attestent plusieurs autres transactions effectuées en général dans le même arrondissement.

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Le Ministre a prétendu que la clause conditionnelle du contrat, à l'effet de ne payer aucun intérêt, était contraire à la règle générale, en affaires, dans les transactions immobilières dont le remboursement du capital s'effectuait par versements périodiques.

Un expert évaluateur de la Couronne a soumis à la Cour, lors du procès, qu'après avoir fait une étude soignée de dix-sept ventes de fermes semblables, dans le même arrondissement, pendant la même période, il était d'opinion que la valeur marchande ou la valeur réelle de la ferme de l'intimé était de 12½ cents ($0.125) du pied carré, ce qui est considérablement plus bas que le prix de dix-huit cents ($0.18) le pied carré obtenu par l'intimé.

L'intimé s'objecta à la preuve présentée par l'expert évaluateur du Ministre sur ce point, pour la raison que les termes du contrat étaient formels et ne pouvaient être contredits, en droit, par une preuve verbale.

Toutefois, les parties se sont entendues pour fixer le quantum du revenu du contribuable à la condition que la Cour en vienne à la conclusion que l'article 7 peut recevoir son application en cette cause

Jugé: La Cour accepte la preuve verbale dans le but de décider si le prix de vente pourrait être considéré comme une fusion du capital et des intérêts en un seul montant malgré la forme et la teneur légale du contrat.

2. L'appelant a au moins établi une cause *prima facie* que la propriété de l'intimé a été vendue à un prix supérieur à sa valeur marchande et que l'intimé n'a pas réussi, comme il lui incombait, à prouver le contraire.

3. Le montant de $395,000, prix de vente convenu entre les parties, constituait en fait un paiement effectué en partie à titre d'acompte ou au lieu de paiement d'intérêt, tel que prévu par les mots qui terminent l'article 6(*b*). En conséquence, il s'ensuit que les dispositions de l'article 7 doivent être appliquées.

4. L'appel du Ministre est accueilli, avec dépens. Le dossier est référé au Ministre du revenu national pour que les cotisations du revenu imposable de l'intimé soient revisées conformément à l'entente signée par les parties.

APPEL d'une décision de la Commission d'appel d'impôt sur le revenu.

Alban Garon et *Antoine Chagnon* pour l'appelant.

A. Tourigny, c.r., H. P. Lemay c.r. et *J. M. Poulin* pour l'intimé.

KEARNEY J.:—Dans cette cause, il s'agit d'un appel de la part du Ministre de la décision de la Commission d'appel de l'impôt sur le revenu en date du 19 août 1964[1], annulant deux cotisations faites par lui (le Ministre) le 12 mai 1961 concernant les années taxables 1958 et 1959 du contribuable. En raison de ces cotisations, un impôt de $15,000 et

[1] 37 Tax A.B.C. 1.

$19,136.20 fut ajouté aux montants de $12,738.97 et $14,-348.09 que l'intimé a déclarés comme son revenu autrement taxable pour les années 1958 et 1959, respectivement.

Le Ministre, se basant sur les articles 6(1)(*b*) et 7 de la *Loi de l'impôt sur le revenu,* 1952 S.R.C., c. 148, en est venu à la conclusion que les deux cotisations faisaient partie de versements que le contribuable a retirés au cours des deux années en question en acompte du prix de vente de sa ferme et que ces versements étaient assujettis à taxation parce qu'ils constituaient un mélange de paiement en partie en acompte d'intérêt et en partie en acompte de capital, et non pas uniquement un paiement en acompte de capital tel que déclaré par l'intimé.

Ainsi qu'il appert plus particulièrement de l'avis d'appel et de la réponse de l'intimé, les principaux faits, les dispositions statutaires et les raisons sur lesquelles les parties s'appuient se résument brièvement comme suit:

L'intimé a vendu à Thorndale Investment Corporation (ci-après quelques fois appelée «l'acheteur») de la cité de Montréal, par acte notarié en date du 19 juillet 1956 et produit de consentement comme exhibit I-1, une ferme (ci-après quelques fois appelée «la propriété») comprenant 2,226,359 pieds carrés, avec bâtisses y érigées, située sur l'Île de Montréal, dans une partie de la paroisse de St-Laurent, connue sous le nom de Bois-Franc, entre les aéroports de Dorval et Cartierville, en considération de $395,000 ou l'équivalent de $0.17 77/100 le pied carré.

En vertu des conditions principales de la vente susdite, l'acheteur était obligé de payer $85,000 comptant et la balance de $310,00 en huit versements consécutifs, à savoir: $15,000 le 1er janvier 1958; $25,000 le 1er juin 1959; quatre versements de $50,000 chacun les 1er juin 1960, 1961, 1962 et 1963 respectivement; et un versement final de $75,000 le 1er juin 1964.

Le contrat en question (ci-après appelé «le contrat» ou «l'acte») stipulait que la balance du prix de vente ne porterait pas d'intérêt si les versements susmentionnés étaient payés le ou avant leur date d'échéance mais que dans le cas de défaut toute balance du prix de vente porterait comme pénalité un intérêt de 6% l'an.

La partie pertinente de l'article 6 précité se lit ainsi:

6. (1) Sans restreindre la généralité de l'article 3, doivent être inclus dans le calcul du revenu d'un contribuable pour une année d'imposition

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(*b*) les montants reçus ou à recevoir dans l'année (selon la méthode que suit régulièrement le contribuable dans le calcul de ses bénéfices) à titre d'intérêts, ou à compte ou au lieu de paiement, ou en acquittement d'intérêts.

Quant à l'article 7, il décrète ce qui suit:

7. Lorsqu'un paiement effectué en vertu d'un contrat ou autre entente peut raisonnablement être considéré en partie comme un paiement d'intérêt ou autre paiement à titre de revenu et en partie comme un paiement à titre de capital, la fraction du paiement qui peut raisonnablement être considérée comme paiement d'intérêt ou autre paiement à titre de revenu est incluse dans le calcul du revenu du bénéficiaire, sans égard à la date où le contrat ou l'entente a été conclu, à sa forme ou à son effet juridique.

Pour en arriver à ses conclusions, l'appelant s'est appuyé sur les hypothèses qui suivent:

a) la propriété en jeu fut vendue à un prix supérieur à sa valeur marchande, tel qu'il appert plus particulièrement du rapport d'évaluation Exhibit A-1 préparé par Rodolphe Lemire, évaluateur en immeuble dûment qualifié, entendu de la part de l'appelant;

b) la stipulation ayant trait au non-paiement d'intérêt était contraire à toute pratique bien reconnue en affaires concernant les transactions immobilières où une balance de prix de vente est payable par versements garantis par hypothèque. Dans des circonstances semblables, un acheteur est d'ordinaire requis de payer intérêt sur toute balance de prix non payée;

c) le fardeau de réfuter ces allégations incombait à l'intimé, ce qu'il a vainement tenté de faire.

Les procureurs de l'intimé, en sus de nier que la vente de la propriété ait été effectuée à un prix supérieur à sa valeur marchande, ont déclaré que le Ministre, en supposant ce fait, se serait appuyé sur une prétendue preuve que la valeur marchande de la propriété était de $0.12½ le pied carré, mais que ladite preuve était basée sur un principe erroné et doit être rejetée.

Relativement à l'intérêt, les procureurs de l'intimé, tout en admettant que dans le cas de transactions immobilières semblables à celle qui nous intéresse l'acheteur est ordinairement requis de payer un intérêt, ont déclaré que dans la présente cause il existe des circonstances spéciales justifiant

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la Cour de considérer comme normale et raisonnable la stipulation que nul intérêt ne serait payable excepté dans le cas de défaut.

Dans leur argument écrit et oral, les procureurs de l'intimé ont signalé les faits et les circonstances spéciales ci-après énoncés, lesquels, d'après eux, sont suffisants pour justifier la Cour de considérer comme normal le non-paiement de l'intérêt, tel que mentionné dans le contrat:

En 1956, une offre de $350,000 lui est faite. Il la refuse, exigeant $450,000. Après négociations, les acheteurs offrent $395,000 mais exigeant que la balance de prix de vente ne porte pas d'intérêt sauf dans le cas de défaut.

Il est soumis que par suite de son acceptation de la clause ne comportant aucun intérêt, l'intimé a réussi à conclure les négociations d'une façon satisfaisante; que, ce faisant, il se départit de bien peu puisque sa ferme ne produisait pas et que le produit de la vente aurait pour effet de l'aider à corriger cette situation; enfin, que ceci fut la seule raison qui l'incita à sacrifier l'intérêt. De plus, il faut remarquer que les parties ont agi de bonne foi et loyalement: il n'y eut ni collusion ni tentatives de dissimulation; en outre, le contrat fait foi de son contenu et ne peut être ni modifié ni contredit au moyen d'une preuve verbale.

Je dois faire remarquer que, suivant la pratique courante dans des cas semblables à celui qui nous occupe, le procureur de l'intimé fut requis de procéder à la place de l'appelant. Avant de faire sa preuve, cependant, M^e^ Tourigny, l'un des procureurs de l'intimé, a demandé la permission de la Cour pour entendre deux témoins, nommément le vendeur (l'intimé) et le représentant de l'acheteur, (M. Feinstein) mais sous réserve de sa propre objection relativement à l'illégalité d'une preuve verbale pouvant varier ou contredire les termes d'un contrat par écrit; le procureur de l'appellant a consenti à cette demande et j'ai permis au procureur de l'intimé d'entendre ces témoins sous réserve de son objection.

Le premier témoin de la part de l'intimé fut l'intimé lui-même et il a été rappelé en contre-preuve en dernier lieu.

M. Morris Feinstein, qui agissait pour l'acheteur durant toutes les négociations, devait être entendu après le témoignage en chef de l'intimé; cependant, en raison du fait qu'il n'y avait aucun sténographe de langue anglaise disponible, le témoignage de M. Feinstein fut temporairement remis à

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plus tard. Le procureur de l'appelant a alors fait entendre M. Rodolphe Lemire à titre d'évaluateur expert, qui fut le seul témoin entendu de la part du Ministre. Comme on le verra tantôt, le procureur de l'intimé a soulevé la même objection ci-haut mentionnée lorsque le procureur de l'appelant voulut entendre le témoignage de M. Lemire. J'ai réservé aussi cette dernière objection et j'aurai plus tard l'occasion de me prononcer à la fois sur les mérites de ses deux objections. M. Feinstein donna alors sa déposition en anglais.

Je me propose de considérer la preuve des témoins dans l'ordre où ceux-ci ont témoigné, mais avant de le faire il faut noter que dans le but d'abréger les procédures, les procureurs des parties ont signé une admission des faits, laquelle a été produite au dossier le 26 octobre 1965 et se lit comme suit:

1. Les parties aux présentes ont convenu de reproduire la partie suivante du témoignage de monsieur Rodolphe Lemire, agent d'immeubles, donné devant la Commission d'Appel de l'Impôt, comme preuve au dossier de cette cause:

P. 22 (Transcription des notes des témoignages donnés devant la Commission d'Appel de l'Impôt)

Par Me A. Tourigny, C.R.:

Je posais la question au témoin, justement à cause de l'objection que j'ai mise, parce que si on prend votre définition, la valeur réelle, vous pourriez expliquer pourquoi, dans le plan, vous avez une valeur, nous avons une vente du lot cent dix (110) à quinze cents ($0.15) c'est tout dans le même quadrilatère.

P. 23 (Transcription des notes des témoignages donnés devant la Commission d'Appel de l'Impôt)

Par Me A. Tourigny, C.R.:

Q. Est-il à votre connaissance que Crosstown Realties a vendu un million de pieds (1,000,000) pour le prix de cent cinquante-trois mille neuf cent soixante-dix-neuf ($153,979) dollars, soit quinze cents ($0 15) le pied, en mil neuf cent cinquante-sept?

R. En mil neuf cent cinquante-sept (1957), c'est après. Je n'ai pas tenu compte des ventes après mil neuf cent cinquante-sept (1957), en mil neuf cent cinquante-six (1956).

2. Les parties ont aussi convenu de l'exactitude des montants mentionnés au paragraphe 4 de l'Avis d'Appel, à savoir les montants de $15,000. pour l'année 1958 et $19,136.20 pour l'année 1959, comme des versements à titre d'intérêt dans le cas où la Cour déterminerait que dans le prix de vente de la propriété décrite dans le contrat produit au dossier de cette cause comme pièce I-1, il y a une fraction du prix de vente qui peut raisonnablement être considérée comme paiement d'intérêt, l'intérêt étant calculé au taux de 5%.

Lorsque M. Groulx fut appelé pour la première fois, son procureur l'invita à prendre connaissance de l'exhibit I-1, ce que le témoin fit, et ce dernier affirma alors qu'il était bien le vendeur y mentionné; ce qui suit est un bref résumé de son témoignage.

Il a acquis la propriété de son oncle en 1936. Il a cultivé sa ferme jusqu'en 1952 mais décida de ne plus la cultiver vu que, cette année-là, il l'avait fait à perte. Il y avait, outre les dépendances, une grande maison, située sur partie du lot 124, qu'il continua à habiter, et lorsque la propriété fut vendue, en 1956, il s'est prévalu du privilège d'occuper cette maison gratuitement jusqu'au 1er janvier 1958, tel que stipulé dans le contrat susdit. En 1950, les gens ont commencé à s'enquérir si sa ferme était à vendre et en 1951 il reçut des offres de $90,000 et plus. Celles-ci n'étaient pas suffisamment élevées pour l'intéresser. Durant 1953, il eut connaissance que l'on commençait à vendre d'autres fermes dans le voisinage au prix de $1,000 l'arpent et, plus tard, à raison de $1,500, $2,000 et $3,000 l'arpent. D'après lui, le montant de $1,000 l'arpent équivaut à un prix d'à peu près $0.02⅔ le pied carré.

Requis de dire s'il n'avait jamais mis un prix sur la propriété, il répondit qu'en 1955 il avait confié, mais apparemment sans succès, la vente de sa propriété à un agent d'immeubles à un prix de $0.15 le pied carré.

Ici, il vaut la peine d'interjeter que, comme on le verra plus tard, la vente d'un lot (n° 116) faite le 6 juin 1955 (Voir la charte faisant partie de l'exhibit A-1 auquel il est ci-après référé) plus grand que la ferme Groulx (lot n° 124 marqué en vert sur la charte précitée) et aussi favorablement situé a été effectuée au prix de $0.07 86-100 le pied carré. Il est vrai que le prix du lot n° 116 était payable au comptant mais il n'est quand même pas surprenant que l'intimé, au cours de l'été 1955, n'ait pas réussi à vendre sa propriété, surtout à un prix aussi élevé que celui qu'il demandait.

En juillet 1956, lorsqu'il vint en contact avec l'acheteur Thorndale Investment Limited, le témoin déclara qu'il n'accepta pas la première offre que lui fit l'acheteur. L'intimé croit qu'il a en premier lieu mentionné un prix de $0.20 le pied carré. Ici son procureur lui suggéra de n'en pas parler en termes de cents par pied carré mais bien en termes du prix en dollars pour la propriété entière, ajoutant

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que, selon ses propres calculs (le procureur), ce montant de $0.20 représentait à peu près l'équivalent de $450,000. Le procureur de l'appelant se dit alors désireux de fournir des chiffres plus exacts et produisit l'exhibit A-2, qui se lit comme suit:

2,226,359 pieds carrés à		$12\frac{1}{2}¢$	$278,294.87
2,226,359	" "	15¢	$333,953.85
2,226,359	" "	20¢	$445,271.80

Le procureur de l'intimé continue:

Q. Vous avez demandé quinze sous (.15) du pied à Thorndale?
R. Si je me rappelle bien c'est ça.[1]
Q. Quel est le montant d'après votre calcul, que vous avez demandé, au lieu de dire ça en pieds, quel est le montant que vous avez demandé à Thorndale?
R. Quatre cent mille dollars ($400,000), si je me rappelle bien.
Q. Thorndale n'a pas accepté évidemment...est-ce qu'ils sont revenus à la charge?
R. Oui, si je me rappelle bien, ça s'est fait dans l'espace de deux (2) jours.

Au dire du témoin, au moment de la vente en question, il ne restait plus que deux fermes dans la région du Bois-Franc qui n'avaient pas été vendues, dont l'une était voisine de la sienne et appartenait à la succession Pitfield.

Le témoin ajoute que les fermes où est située la sienne ont commencé à se vendre d'une façon active au début des années 1951, 1952 et 1953.

Q. ...Ce contrat Exhibit I-1 mentionne un prix de $395,000?
R. Oui, oui.
Q. C'est le prix évidemment auquel vous en êtes arrivé après ces négociations avec Thorndale?
R. Oui.
Q. Nous remarquons, au base de la page 7 dudit contrat la phrase suivante: «the said balance of price shall not bear any interest, if the said instalments are paid on or before their due dates». Pourriez-vous dire au Tribunal les circonstances qui ont amené la rédaction de cette clause par laquelle il est stipulé entre l'acheteur Thorndale Investment Corporation et le vendeur Émile Groulx, qu'il n'y aurait pas d'intérêt payable sur la balance de prix de vente?
R. C'est là que nous avons fait du «horse-trading», comme on dit, il est plus facile de baisser que de monter un prix. J'avais demandé

[1] En toute justice pour le témoin, je crois que l'on peut dire qu'il a mal interprété cette question, ayant probablement compris qu'on lui demandait combien l'acheteur était prêt à payer. Plus tard, en transquestion, il se corrige et explique que $0.15 le p.c. est une offre qu'il aurait été satisfait d'accepter en 1955 mais qu'il n'a jamais mentionné une telle offre à Thorndale.

un certain prix, on a baissé à $400,000, l'acheteur trouvait ça trop cher et moi je tenais à $400,000. J'ai consenti une réduction de $5,000, un cadeau que je leur ai dit que je faisais et c'était pas suffisant; alors, comme je n'avais pas de revenu sur ma terre et je payais des taxes j'ai décidé de laisser sacrifier l'intérêt pour conclure une vente...

Q. C'est tout, monsieur Groulx, merci.

Contre-interrogé par le procureur de l'appelant, le témoin signale que le contrat lui donnait le droit de demeurer sur la ferme jusqu'au 1er janvier 1958 pour lui donner le temps de trouver une nouvelle résidence.

En vertu du contrat en question, il avait également le droit d'enlever des lieux certaines bâtisses, nommément le poulailler et autres dépendances.

Q. Vous n'avez enlevé aucun bâtiment?

R. Oui, j'ai enlevé le hangar ou remise servant aux machines aratoires qui étaient dans le champ... je dirais environ deux, deux ou trois arpents de la maison.

Q. Maintenant, monsieur Groulx, vous avez dit tantôt que vous ne retiriez pas beaucoup de revenus de cette propriété-là, mais vous retiriez un certain loyer?

A cette dernière question, l'intimé répond qu'il a loué certaines pièces de sa maison à raison de $60 ou $65 par mois, mais qu'il payait le chauffage et la consommation de l'électricité.

Requis de dire si au moment de la vente, en 1956, il avait calculé quel montant, à un taux de 5 par cent, la stipulation de non-intérêt pouvait représenter, il répondit:

«Non».

Q. Lorsque vous avez accepté ce prix de $395,000 avec stipulation que le solde du prix de vente échelonné sur 8 ans ne porterait pas intérêt est-ce que vous avez songé à cette question d'intérêt?

R. C'est à dire que j'ai pensé qu'en recevant pas d'intérêt que j'étais pas pire que je l'étais avant de la vendre parce que ma terre, l'exploitation de ma terre, quand je l'exploitais, j'ai perdu de l'argent et donc j'en faisais pas...

Q. Dans les discussions entre Thorndale Investment Corporation et vous, qui a suggéré en premier lieu cette clause qui contenait une stipulation de non-intérêt?

R. C'est moi.

Q. Est-ce que vous avez eu l'occasion d'avoir plusieurs transactions d'immeubles dans le passé?

R. Bien plusieurs...quelques-unes, j'en ai eu...une...deux...trois... quatre...cinq...six...lots vacants, des lots en ville, dans la ville ici.

A la question de savoir si d'après son expérience les balances de prix de vente dans les cas semblables à celui-ci

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portent généralement intérêt, il a d'abord dit qu'il ne le savait pas, mais il a déclaré plus tard qu'il croyait qu'ordinairement cela devrait porter intérêt mais que ça dépend des circonstances.

Ré-examiné par son procureur, Me Tourigny, qui lui demande:

Q. Vous avez dit, à une question de mon savant ami—je ne sais pas si vous aviez bien compris—il a demandé: celui qui avait suggéré de ne pas mettre d'intérêt; avez-vous dit que c'était vous ou que c'était?

R. J'ai dit que c'était moi.

Le procureur de l'appelant lui a posé les questions additionnelles ci-après:

Q. Est-ce qu'il est bien exact que la seule raison—vous avec donné comme raison d'accepter cette clause de stipulation de non-intérêt—que vous aviez en main une terre qui ne rapportait pas ou peu; est-ce que c'est uniquement la seule raison qu'il n'y ait pas de stipulation d'intérêt dans le contrat de vente?

R. C'est la seule raison, oui. J'exploitais pas quelque chose que j'avais, qui me coûtait de l'argent, qui rapportait rien...

Q. Etiez-vous passablement au courant des conditions de vente des autres propriétés situées dans la région adjacente à la vôtre durant 1955-1956?

R La seule chose que je sais, c'est que j'ai entendu dire, c'est qu'un tel avait vendu à un certain prix. J'ai jamais été après pour savoir si il disait la vérité ou non. Mon expérience personnelle, mon dieu seigneur! J'ai vendu des terrains ici à Montréal, j'ai constaté que je les avais vendus $250,000 chacun meilleur marché que le prix du marché; ca vous montre à peu près...ensuite de ça j'ai vendu une autre parcelle de terrain à $1,000 l'arpent....

Q. La question que je vous pose a trait aux ventes dans la région immédiatement adjacente à cette propriété-là.

R. La vente de partie 183 ou 184 a été vendu à $1,000 l'arpent et c'était dans le voisinage de ma ferme.

Monsieur Rodolphe Lemire, président de Yorkshire Realty Limited, fut alors appelé de la part de l'appelant. Requis de dire quelle est son expérience dans le domaine de l'évaluation ou vente d'immeubles, le témoin répondit:

R. Je suis courtier en immeubles à Montréal depuis 1932 ou 33; ai été le président de la chambre d'Immeubles de Montréal en 1956 et je ne sais pas si je devrais le dire, je n'aime pas me vanter, mais c'est moi qui ai fait le développement de la Place Ville-Marie à Montréal. Et je suis membre de plusieurs associations d'évaluateurs.

On lui demanda de produire comme Exhibit A-1 un rapport relativement à son évaluation de la ferme Groulx en 1956 et de faire une comparaison avec la présente vente

quant au prix et à la condition de paiement des 17 ventes énumérées dans son rapport. Le procureur de l'intimé s'est immédiatement objecté à cette preuve parce qu'elle pourrait être de nature à varier ou contredire les termes du contrat Exhibit I-1, lequel constituait un contrat par écrit dûment valide et qui engageait les parties. J'ai permis la production du rapport d'évaluation précité, lequel fut produit comme pièce A-1, et j'ai aussi permis à M. Lemire de continuer son témoignage, le tout sous réserve de l'objection plus haut mentionnée.

J'ai examiné la transcription de toute la preuve verbale faite en cette cause et je me propose maintenant d'en venir à une décision quant à l'objection faite par le procureur de l'intimé au sujet du témoignage de messieurs Groulx et Feinstein ainsi qu'à celui de M. Lemire.

Pour ce qui est de la preuve offerte par M. Lemire, en réplique à cette objection le procureur de l'appelant a déclaré ce qui suit:

> Nous n'attaquons pas du tout la convention. Si on avait voulu l'attaquer on se serait servi de la procédure d'inscription en faux et on aurait suivi les modalités prescrites au code de procédure civile. Là on est prêt à admettre que ce contrat réflète les intentions des deux parties et qu'il n'y a pas de contre-lettre. On n'attaque pas en faux le document mais nous prétendons qu'en vertu de l'article 7 on a le droit d'expliquer cette convention sous d'autres points de vue que le point de vue légal. Actuellement je tente de prouver l'allégué numéro 3 contre lequel mes confrères auraient pu s'objecter dans les procédures écrites; et ils ne l'ont pas fait.

Comme il arrive assez fréquemment dans un procès *de novo* une nouvelle preuve fut faite de la part de l'intimé, laquelle n'était pas comprise dans la preuve produite devant la Commission d'appel de l'impôt sur le revenu; cette preuve comprend le témoignage de l'intimé et celui de M. Feinstein. C'est la première fois, à ma connaissance, qu'une cause basée sur l'article 7 de la Loi est soumise à cette Cour; en outre, la Commission d'appel de l'impôt sur le revenu a rarement eu à interpréter cet article. Je crois que la première décision là-dessus fut rendue par feu M^e^ Fabio Monet, c.r. (alors président de la Commission) dans *Baril, v. Ministre du Revenu national*[1]. Parlant de l'alinéa en question, le président, à la page 224, dit:

> The wording of this section of the Act is clear and the fact that mention is made in a deed of sale that no interest shall be payable by the purchaser to the vendor in respect of any outstanding balance does not

[1] [1957] D.T.C. vol. 11, 224

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constitute a bar to the Minister of National Revenue or the courts to hold that any amount received by the vendor from the purchaser in respect of the outstanding balance is in part a payment of interest and in part a payment of a capital nature if, from the context of the contract or other evidence adduced, it could reasonably be assumed that it is so.

Le président continue:

I am inclined to believe that the appellant's share was worth substantially more than the amount for which he sold it and, therefore, I am of the opinion that the sum he received therefor in 1954 cannot be reasonably regarded as being in part a payment of interest and in part a payment of a capital nature: the said sum was a payment of a capital nature only.

Pour les raisons susmentionnées, la Commission en est venue à la conclusion que l'appelant avait vendu ses droits dans une succession moyennant une somme de $50,000 en vertu d'un acte notarié spécifiant que le prix de vente serait payable par versements hebdomadaires de $100 sans intérêt et qu'il était justifié de refuser le paiement d'une cotisation de $1,372 imposée par le Ministre.

La seconde occasion s'est présentée dans *Carter v. Ministre du Revenu national*[1] où Me W. O. Davis, à la page 191, dit:

This appeal is one of the extremely few appeals which have arisen under Section 7(1) of the Income Tax Act. In a consideration of it, the question of whether the payments under the mortgage in question can be regarded as payments of principal, or interest, or both principal and interest, is a question of fact to be determined after consideration of all the surrounding circumstances, and not merely from the form of the contract or document under which the payments are made.

L'appel du contribuable a été maintenu *inter alia* parce que la preuve avait établi que le prix de vente n'excédait pas la valeur marchande de la propriété.

Dans une cause de *Herb Payne Transport Limited v. Minister of National Revenue*[2], il fut décidé par l'hon. Juge Noël qu'une preuve semblable à celle dont il s'agit ici est admissible. Dans la cause susdite, la Cour invoqua les dispositions du paragraphe 20(6)(*g*), lesquelles, sous certains rapports, ont quelque analogie avec le paragraphe 7; elles se lisent comme suit:

20.(6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:

(*g*) where an amount can reasonably be regarded as being in part the consideration for disposition of depreciable property of a taxpayer

[1] 37 Tax A.B.C. 174. [2] [1964] Ex. C.R. 1 at 7.

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of a prescribed class and as being in part consideration for something else, the part of the amount that can reasonably be regarded as being the consideration for such disposition shall be deemed to be the proceeds of disposition of depreciable property of that class irrespective of the form or legal effect of the contract or agreement; and the person to whom the depreciable property was disposed of shall be deemed to have acquired the property at a capital cost to him equal to the same part of that amount;

Le savant juge, à la page 7 (*supra*) dit:

These values would, therefore, under the circumstances, be open for determination under s. 20(6) (*g*) of the *Income Tax Act* which, as we have seen, specifically states that: "the part of the amount that can reasonably be regarded as being the consideration for such disposition shall be deemed to be the proceeds of disposition of depreciable property of that class irrespective of the form or legal effect of the contract or agreement";

The above rule appears to be mandatory and would apply to any case where a disposal of depreciable property occurs. It also, in my opinion, would have the effect of permitting evidence with respect to the reasonableness of the consideration for such depreciated property to be adduced notwithstanding the ordinary rules of evidence which, as suggested by counsel for the respondent, might apply here to prevent contradiction by oral evidence of the terms of a "written document".

Voir aussi, au même effet, le jugement récent de l'honorable Juge Thurlow dans *Klondike Helicopters Limited v. Ministre du Revenu national*[1], confirmant les vues énoncées par l'honorable Juge Noël dans la cause *Herb Payne, supra.*

Le procureur de l'appelant a cité *Vestey v. commissioners of Inland Revenue,* entendue par la Haute Cour de Justice (Chancery Division) sous forme d'exposé de cause et dans laquelle l'honorable Juge Cross a confirmé le jugement des commissaires; les deux jugements sont rapportés dans Reports of Tax Cases, vol. 40, 1959-63, pp. 112 et 116 respectivement. La question en jeu était de savoir si des paiements annuels de £44,000 échelonnés sur une période de 125 ans en acquittement du prix de vente d'actions constituaient une annuité dont on devait tenir compte dans le calcul du revenu total du contribuable—ou, alternativement, si ces versements devaient être différenciés à titre de capital et d'intérêts. Les Commissaires ont décidé que le montant devait être réparti de la sorte et la Haute Cour a abondé dans le même sens.

[1] [1965] C.T.C. 427.

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Le procureur de l'appelant a signalé plus particulièrement l'extrait suivant de la décision des Commissaires, à la page 114 du volume susdit:

> It is first necessary to decide whether we are bound to confine our attention to the words of the agreement and the related transfer of shares, and not have regard to any surrounding circumstances.
>
> It appears clear to us on the authorities that we are not only entitled but are bound to consider such of the surrounding circumstances as are proved and admitted in evidence; not in order to vary the legal effect of the agreement and transfer nor to decide the matter by doctrine (now exploded) of the 'substance' of the matter, but in order to ascertain the true nature of the transaction comprised in the agreement. . .

Pour les raisons susmentionnées, je considère que le témoignage de MM. Groulx et Feinstein et l'exhibit A-1, le témoignage de M. Lemire, concernant la valeur marchande de la propriété ainsi que la pratique du commerce quant au paiement d'intérêts sont admissibles pour décider si le prix de vente peut raisonnablement constituer un paiement qui fusionne l'intérêt et le capital, sans égard à la forme ou à l'effet légal du contrat. Par conséquent, je dois rejeter les objections du procureur de l'intimé.

Maintenant, pour résumer le témoignage de M. Lemire, je citerai les passages ci-dessous de son rapport d'expertise, soit l'exhibit A-1, préparé à la demande du Ministre:

> Monsieur Groulx a vendu à Thorndale Investment Corporation les parties de lots n^{os} 124 et 125 de la Paroisse Saint-Laurent (lesquels lots sont colorés en vert sur le plan annexé à notre rapport), ayant une superficie totale de 2,226,359 pieds carrés, pour la somme de trois cent quatre-vingt-quinze mille dollars ($395,000), soit $0.17742 du pied carré, tel qu'il appert dans l'acte de vente passé devant Maître Frédérick Kirkland Stevenson, notaire, en date du 19 juillet 1956, et enregistré à Montréal, le 25 juillet 1956, sous le n° 1217060, dont copie est annexée à notre rapport.
>
> Nous avons fait plusieurs recherches au bureau d'enregistrement et avons noté dix-sept (17) ventes durant les années 1955 et 1956 dans le quadrilatère entre le Chemin Bois Franc, le Chemin de Côte Vertu, le Boulevard Métropolitain et l'aéroport de Cartierville, tel que souligné en rouge sur le plan ci-annexé. Sur ce même plan, vous pourrez voir les dix-sept (17) ventes dont nous faisons mention plus haut. La liste de ces dix-sept (17) ventes, avec tous les détails se rapportant à chaque vente est également annexée à notre rapport.
>
> Notre examen des ventes nous révèle que les prix varient entre $0.0622 et $0 126 le pied carré.
>
> Pour établir une valeur moyenne nous avons additionné le prix par pied carré de toutes les ventes en excluant celles en bas de $0 09 cents du pied carré, que nous croyons ne représentent pas la valeur réelle du terrain au pied carré à cette époque, nous obtenons une moyenne de $0.11½ cents du pied carré, voir détails ci-après:—

Vente	n°	2	$0.12
"	"	3	0.12
"	"	5	0.126
"	"	10	0.1085
"	"	13	0.108
"	"	14	0.125
"	"	16	0 123
"	"	17	0.0948
		Total	$0.925 ÷ 8=$0.115 p.c.

Cependant, nous croyons juste et équitable, en considération du fait que les parties de lots n^{os} 124 et 125 sont bornés au nord par le Chemin Bois Franc, au sud, par un chemin public, et à l'ouest à proximité de la Montée de Liesse, et qu'il y a lieu d'y ajouter $0.01 cent le pied carré, portant la valeur moyenne réelle à $0.1250, ce prix ayant été payé pour la terre n° 188, située au sud et en ligne avec les terrains qui nous concernent. (Voir vente n° 14 à la liste des ventes et au plan.)

Il n'y a aucun doute que la valeur réelle des parties de lots n^{os} 124 et 125, à la date de l'acte de vente, le 19 juillet 1956, est de $.01250 le pied carré, sans tenir compte de la maison et des dépendances y érigées.

Il nous faut donc conclure que la vente de Monsieur Émile Groulx à Thorndale Investment Corporation fixant le prix à $0.17742 le pied carré, démontre que ce prix est supérieur à la valeur réelle du terrain à cette époque, soit $0.1250 tel qu'évalué plus haut.

YORKSHIRE REALTIES LIMITED
Par: J. R. Lemire, Président.

Dans son témoignage, M. Lemire a déclaré que, si la propriété avait été vendue à raison de 12½ c. le pied carré, ce qui, d'après lui, était sa valeur marchande, son prix de vente se serait élevé à $278,294.48. Si elle avait été vendue à 15c. le pied carré, les chiffres en résultant auraient été de $333,953; de $435,271 à 20c. le pied carré.

Quant aux conditions des 17 ventes indiquées dans l'exhibit A-1, à l'exception de trois ou quatre qui ont été faites au comptant, chacun des 13 autres lots furent achetés à tempérament, le solde du prix portant intérêt de 5 ou 6 pour cent l'an durant cinq ans. Le témoin a déclaré que pendant ses 30 ans d'expérience dans le commerce d'immeubles à Montréal il avait vendu des propriétés pour plusieurs millions de dollars «et dans aucun cas une vente n'a été faite—s'il y avait une balance de prix de vente—sans intérêt; ça c'est mon expérience personnelle.

En 1956, les terres se vendaient généralement ⅓ comptant. Le taux d'intérêt était de 5 ou 6 pour cent.»

Il a ajouté:

Le «boum» de l'immeuble si je peux dire, a débuté en 1942; à ce moment-là les fermes se vendaient un tiers comptant, mais depuis quelques années, dans les petites municipalités, les taxes scolaires ont

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augmenté, les taxes municipales aussi, les municipalités sont portées à évaluer les fermes, pas à la valeur qu'elles ont été vendues mais à un prix beaucoup supérieur à leur évaluation...Ah oui, je veux ajouter que maintenant les fermiers ne veulent plus vendre de terre à terme parce qu'ils ont peur que s'ils vendaient un tiers ou quarante pour cent (40%), au cas où ils ne seraient pas payés ils reprendraient leur terre et l'évaluation resterait à un prix beaucoup supérieur au montant de la vente, à la date de la vente

Contre-interrogé par M^e^ Tourigny, qui lui demande:

Q Monsieur Lemire, vous venez de nous dire que dans votre expérience vous n'avez jamais vu de terre vendue sans intérêt, d'une balance de prix de vente sans intérêt?

Le témoin répond:

Pardon, j'ai dit. toutes les ventes, tels propriétés, cottages, etc , etc ...

Le contre-interrogatoire continue:

Q Avez-vous déjà eu des cas comme celui de monsieur Groulx où un fermier, rendu à une certain âge, était sur une terre qui ne rapportait rien depuis 4 ans, avez-vous déjà vu ça dans votre expérience?

R. Votre question est difficile à répondre, parce que si je regarde monsieur Groulx qui a 73 ans, on ne demande jamais l'âge du vendeur ou de l'acheteur.

Q. Non, mais oubliez l'âge; si vous avez une terre improductive de capital ou d'intérêt pendant 4 ans, est-ce que vous ne pourriez pas considérer comme normal de ne pas charger des intérêts parce que la terre ne rapporte rien; donc le capital qui va commencer à être payé va commencer à rapporter, est-ce que ça ne serait pas normal?

R Non, je ne le crois pas.

Q Vous ne croyez pas?

R. Non

Q Pourquoi?

R. Parce que s'il y a une vente consommée à $300,000, il y a $50,000 comptant, la balance, normalement, ça porte intérêt— . . . . . .

R Ce n'est pas à moi à déclarer ça à la Cour.

Q Je vous demande, comme expert, si ce n'est pas une possibilité normale?

R C'est pas mon expérience.

Quant à la série de ventes énumérées dans le rapport exhibit A-1, M^e^ Tourigny demanda à M. Lemire si ce n'était pas vrai que la vente n° 5 avait été faite au prix de .126c et la vente n° 12 à .622c, ajoutant que ceci démontre

que le marché pouvait doubler dans une période d'un an. Le témoin, tout en admettant les deux montants ci-dessus comme prix de vente, explique que la vente n° 5, de janvier 1956, précédait celle qui nous concerne, alors que la vente n° 12 avait été conclue peu après celle-ci, à savoir, le 6 août 1956, et n'avait rapporté que la moitié du prix de la vente n° 5.

Q. Dans la même période d'un an, ça a varié du double?

R. La preuve est là, la vente est là, ce n'est pas moi qui l'invente.

Q. Alors, comme grand expert je vous demande: avez-vous déjà vu des terrains se vendre les uns à côté des autres dans l'espace de quelques jours avec des prix différents?

R. Oui.

Q Je note à votre rapport—conclusion de votre rapport: «il nous faut donc conclure que la vente de M. Émile Groulx à Thorndale Investment, fixant le prix à .17742 le pied carré, démontre que le prix est supérieur à la valeur réelle du terrain à cette époque, soit .12½ telle qu'évaluée plus haut.» La valeur réelle c'est l'ensemble des ventes dans le quadrilatère mentionné là.

Q. Ce n'est pas la définition de la Cour Suprême?

R. Qu'est-ce qu'elle a dit, la Cour Suprême?

Q. Si vous avez un grand terrain, disons 50 terrains: 48 ont été vendus, il en reste deux. Ils en ont besoin pour la transaction qu'ils veulent faire. Est-ce qu'ils ne paieront pas plus cher?

R. Ils vont payer plus cher.

Q. Et ça pourra être une valeur réelle si les parties s'entendent?

R. Ça m'est arrivé ça.

Q. Vous avez entendu monsieur Groulx tout à l'heure dire qu'il restait seulement deux terres, les deux terres de Pittfield...

R. Oui.

Q. Est-ce qu'il n'avait pas le droit de demander le prix qu'il voulait?

R. Ah oui, ah oui.

Le témoin a déclaré que la raison pour laquelle il n'avait pas tenu compte dans son rapport des neuf ventes aux prix les plus bas, c'est parce qu'il voulait, dans son évaluation, se montrer généreux envers l'intimé.

R. Parce que j'ai été très généreux dans mon évaluation, d'enlever ces ventes-là.

Q. Avez-vous évalué la bâtisse?

R. Non, je l'ai vue seulement de l'extérieur, mais la bâtisse, on m'a demandé, au département, de ne pas en tenir compte; généralement la bâtisse est comprise dans la vente d'une terre.

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Q. Vous avez déjà entendu des gens dans votre métier dire que la valeur réelle était le prix qu'une personne paie lorsqu'elle n'est pas obligée d'acheter et qu'elle achète d'une personne qui n'est pas obligée de vendre; vous avez entendu ça?

R. Oui.

Q. Est-ce que vous ne savez pas que la Cour a déjà décidé que ça pouvait être ça une valeur réelle?

R. Non non, je ne suis pas au courant....

Le témoignage de M. Lemire se continue comme suit:

Q. Mais vous savez que ça existe dans le commerce, que la valeur réelle, que c'est le prix, quoi, si je veux acheter votre maison et que vous voulez me la vendre, ça va être la valeur réelle?

R. Non monsieur.

. . . .

Q. Comment avez-vous appelé cette valeur-là?

R. ...C'est pas la valeur réelle, Votre Seigneurie, me permettez-vous de citer un exemple? On parle de valeur réelle: sur la rue Ste-Catherine près de l'Université, des Anglais d'Angleterre ont acheté une propriété qu'ils ont payée six cent cinquante mille dollars ($650,000), le plus gros prix jamais payé sur la rue Ste-Catherine, pourquoi ont-ils payé ce prix-là? Parce qu'en Angleterre il y a la commission d'échange et ces gens ont voulu construire un magasin de chaussures et ils avaient besoin d'un autre deux cent mille dollars ($200,000) pour construire leur magasin et ils ont fait accepter ce prix-là par la commission d'échange en Angleterre...après, la ville de Montréal va nous arriver après et considérer ça comme une valeur réelle? Ce n'est pas une valeur réelle.

Q. La valeur marchande est la valeur réelle?

R. Oui...excepté, si dans une propriété de rapport le revenu est un facteur, il faut tenir compte...

Quant à la condition de la ferme Groulx et des autres fermes dans le voisinage, M. Lemire déclare qu'elles étaient «non cultivées» quand ils les ont examinées en 1963. Il n'était pas au courant que c'était depuis 1952 que l'intimé avait cessé de cultiver sa terre et il ignorait la date à laquelle les autres propriétaires avaient aussi eux-mêmes cessé de cultiver leurs terres.

Ré-examiné il fut demandé au témoin:

Q. Une autre question, monsieur lemire: on a parlé tantôt, on vous a donné une définition de la Cour Suprême à l'effet que pour établir la valeur réelle d'une propriété il fallait se placer dans la situation où un acheteur n'est pas obligé d'acheter et un vendeur qui n'est pas obligé de vendre. En prenant pour acquis ce concept-là comme

juste, est-ce que ça modifierait votre opinion quant à la valeur du terrain de monsieur Groulx?

R. ...

Q. Un acheteur qui n'est pas obligé d'acheter et un vendeur qui n'est pas obligé de vendre; si on vous consultait là-dessus?

R. Ça ne détermine pas la valeur réelle.

Q. Non, mais...monsieur Lemire, si vous prenez pour acquis que c'est le concept-là établi par la Cour Suprême est juste...?

R. C'est établi par la Cour Suprême?

Q. Je vous pose la question: prenez ça comme point de départ, que c'est établi comme juste par la Cour Suprême, étant donné ce concept, est-ce que ça modifierait votre idée de la valeur du terrain de monsieur Groulx?

R. Non.

M. Morris Feinstein, témoin de l'intimé, a déclaré être l'un des directeurs de Thorndale Investment Corporation, qui l'avait chargé de négocier l'achat de la ferme en question, et que, depuis cinquante ans, il avait eu l'occasion d'acheter et de vendre un bon nombre de fermes.

Q. When you discussed the sale price of Mr. Groulx's property, was there ever any mention of interest before you arrived at a certain price?

A. No, because Mr. Groulx originally wanted for the farm $450,000.

...

Q. And how much were you offering at that time?

A. I think we arrived to a price close to $400,000 "to be paid over a period of 6 or 8 years, I don't remember again."

Q. But you were paying $85,000 cash?

A. $85,000 cash, and the balance after, and in case I am late in payment, I have to pay 5 per cent or 6 per cent, I don't remember, on the late payments.

Q. And if you were paying in advance, you were to have 5 per cent discount?

A. Yes. I didn't pay in advance.

Q. Now, in your experience, Mr. Feinstein, did you ever buy any other properties without interest like that?

A. Sometimes, yes.

Q. Did you sell some without interest sometimes?

A. Yes,...In 1959, I think it was, we sold a farm with 10 years to pay with no interest.

En réponse à la question de savoir s'il a eu connaissance de ventes de propriétés qui dans une courte période attestaient une grande différence de prix, le témoin répondit:

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«Well, it happens every day of the week.» Requis de citer un cas en particulier, il dit:

> British Petroleum, B P. purchased eleven (11) farms in one (1) day in Ville D'Anjou, Montreal Trust did the purchasing, Mr. Deelday. They purchased eleven (11) farms in one day. The prices ran between eight cents (8) to twenty-five cents (25)
>
> Q. In one day?
>
> A. In one day I was the only person who sold it at eight cents (8¢)!
>
> Q. So you remember!
>
> A So I remember! My neighbour next door sold it at twenty-five cents (25¢)...
>
> ...
>
> A. As a matter of fact, on Friday this week I have worked to sell farm number four hundred and forty (440) in Ville D'Anjou, it was sold at one dollar and thirteen cents ($1.13) a foot, and farm number four hundred and forty-two (442), it is right next door, a little lower, I purchased it at fifty-five cents (55) and sold it for sixty-five cents (65), all in a period of two (2) weeks
>
> Q. So you heard Mr. Lemay's testimony yesterday, stating that the real value of a property, to arrive at that, he was taking a certain number of properties and was dividing to get the real value? Do you agree with that?
>
> A. I personally wouldn't because you would have one price and one foot away another price, and then when the man purchased a farm, what for does he need it? The fellow might have a specific reason for purchasing the farm and you pay more than the next man
>
> Q Now, would you agree also that if a farm is not productive, that the man would sell for a price bigger than if the farm has been without any revenue since four (4) or five (5) years?
>
> A. Right

En transquestion le témoin déclare qu'il est d'accord pour dire que, généralement, le taux d'intérêt en 1956 était de 5 pour cent; et il cite un exemple:

> A. ...I have purchased about thirteen hundred (1300) arpents in Verchères. This section is completely dead now. We cannot move our land and we decided to give it back to the farmers and so I went back to the farmers and said "Look, if you waive your five per cent (5 per cent) I will keep the farms and give you a small down payment in the end in capital. In the meantime, I am paying the taxes and you are living there, and I am not asking you to move. You are still using the farms, and I get extensions on every single—all the farms That is about fifteen (15) farms for that, give the five per cent (5 per cent and give me a five (5) year extension". It all depends on location and circumstances.
>
> Q. Now, was it instead of accepting paying four hundred and fifty thousand dollars ($450,000) that you accepted this four hundred thousand dollars ($400,000) without interest?

A I cannot tell you exactly. It is eight (8) or nine (9) years after, but I mentioned it after and Mr Groulx insisted on four hundred and fifty (450) and I started, I think, with three hundred and fifty (350), that was my answer originally, and Mr. Groulx suggested four hundred (400) or three hundred and ninety-five (395) and when we came to three hundred and ninety-five (395), he said, "I will do you a good turn and not charge you interest" That was the situation, and on that basis I purchased it You see, the man had his home there, he lived there on the land, and had a beautiful house there, and so his condition was not upset I still give him the right to use the land and to use the barn, everything else, so it didn't change his position at all.

Q Were you able to make a quick turnover on him?

A No, because right after that the slump came, the business dropped off a few years, but I had a chance to sell it, but I didn't want to sell it because I am waiting for service. Once they made the service, it is worth much more money than it is not serviced.

Q When you made your first offer, you said you made a first offer, a first proposition to Mr. Groulx in the amount of three hundred and fifty thousand dollars ($350,000)?

A. Right

Q. But you must have talked about this for some time You must have based yourself on something?

A Oh, based myself only on one thing, that I wanted to purchase the farm We decided Ville D'Anjou or St. Laurent, we go down there, and we might pay you one (1) farm fifteen cents (15c) and another seventeen cents (17c.), and another eleven cents (11c). It doesn't matter. We decided to go into that district, because we decided that at a future date we went and purchased and once I was ready to buy that farm if Mr Groulx insisted, you may get another $25,000, but he came down to 395, so it was purchased for 395.

Q I see.

A. This is not like a bottle of milk, which is a standard price.

Le témoin déclare s'être activement occupé de l'achat et de la vente de terrains, mais qu'il n'a jamais eu d'expérience dans le domaine de l'évaluation immobilière.

Il est à sa connaissance que très peu («very small») de ventes à tempérament se transigent sans que la balance du prix porte intérêt.

Q. But generally you pay interest on the purchase price when the full amount is not paid cash?

A Yes.

Ici, M° Tourigny intervint pour dire:

We are ready to agree that normally if there is no special circumstances, that we are paying interest There is no difficulty about that. We would not be here if that was only the question involved.

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Q. ...Do you take into account the factor of interest, or does it have for you no importance?

A. No. We take into account the question of interest rates which we will have to pay, but not so much as I am concerned personally, because when I buy land I do so with the intention of 3 to 4 weeks after I am going to Europe, so I don't look into 10 years from now.

Le témoin prétend que le paiement au comptant est ce qui importe le plus aux acheteurs, et moins ceux-ci ont à payer, et plus la dimension du terrain est grande, plus il est facile d'en disposer.

Q. But you would not have paid the same price if there had been an interest of 5 per cent?

A. That is hard to say.

Tout en admettant que l'intérêt était un facteur, M. Feinstein estime que ce n'est sûrement pas là le facteur le plus important.

Le témoin a aussi déclaré qu'il n'avait jamais pensé profiter de l'escompte de 5 pour cent, parce qu'il aurait pu faire autre chose avec l'argent et obtenir un rendement supérieur à 5 pour cent.

Ré-examiné par Me Tourigny, il lui fut demandé:

Q. In 1956, did you think the Trans-Canada road was coming on that place, and that the development of Côte de Liesse was coming up?

A. Yes, I purchased more than this one. I have got a few more.

Rappelé en contre-preuve par Me Tourigny, l'un de ses procureurs, M. Groulx décrit la maison qu'il y avait sur la propriété, laquelle contenait 14 chambres, et dit qu'en 1956 elle valait au minimum $40,000, mais qu'aujourd'hui elle a une valeur de $100,000. Il ajoute que les dépendances, valant au «bas mot» $15,000, comportent un garage pour trois automobiles, une écurie et un poulailler.

Transquestionné, le procureur de l'appelant lui demande si Thorndale avait payé tous les versements dus. Il répondit qu'ils étaient en retard depuis 1960 ou 1961.

Q. Ils ont été en retard mais ils ont payé depuis ce temps-là?

R. Je reçois de l'argent à tous les ans mais pas le montant ...excepté que j'en ai pas reçu l'année dernière.

Il dit qu'il a chargé 6 pour cent à titre de pénalité sur les arrérages.

Ici, M^e^ Tourigny intervient:

> Si ça peut aider mon confrère, je dois dire que M. Groulx m'a confié la réclamation; et si nous n'avons pas pris l'action pour reprendre la propriété c'est pour ne pas être obligé de payer les taxes, si ça peut vous aider.

Compte tenu d'un montant de $85,000, l'intimé a reçu à ce jour environ $200,000.

Au sujet de sa maison, il dit qu'elle a été construite en 1890 et modernisée en 1943; qu'en 1955 ou 1956 il a dépensé près de $300 par année pour taxes municipales et scolaires; en 1962, ces taxes ont monté à $4,000 et en 1963 et 1964 elles dépassaient $7,000.

En transquestion, le témoin a dit qu'en sus du montant de $700 perçu annuellement de son locataire il évaluait sa propre occupation à $75 ou $100 par mois.

Le témoin ne se souvient pas du montant pour lequel la maison et ses dépendances étaient assurées.

Q. Vous n'avez pas d'idée si c'était de l'ordre de $40,000 ou de l'ordre de $15,000?

R. ...

Q. Vous ne savez pas si c'est plus proche de 15 que de 40?

R. Je ne me rappelle pas.

Q. Vous n'avez pas d'idée?

R. Non.

Q. Est-ce que vous vous souvenez qu'il y a une clause dans le contrat qui parle d'assurance?

R. Non.

Q. Je vais vous lire la clause qui parle d'assurance, pour vous aider à rafraîchir votre mémoire; on dit dans le contrat, à la page 9...«en anglais»...le $17,000, est-ce que ça a été pris dans l'air ou vous êtes-vous basé sur quelque chose?

R. Ça été pris dans l'air.

Q. Dans l'air?

R. Probablement basé sur le montant que j'avais antérieurement, je sais pas.

Il a fait creuser trois puits de plus de 100 pieds de profondeur; «ils ont coûté de l'argent.»

En ré-examen son procureur lui demande:

Q. Je vois dans le contrat que vous aviez le droit d'habiter la maison, mais vous n'aviez pas le droit de la démolir?

R. Oui.

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Q Et comme question de fait, M. Groulx, quand vous avez laissé cette maison-là, vous, vous êtes déménagé à St-Eustache-sur-le-Lac?

R. Exactement

Ceci termine une récapitulation sans doute trop longue de la preuve et peut-être aussi, sans nécessité, trop détaillée.

En considérant l'applicabilité de l'article 7 aux faits de la présente cause, il est important de rechercher une voie d'approche satisfaisante. Je pense que l'on peut trouver des jalons d'une grande utilité dans les observations de l'honorable juge Cattanach dans *Minister of National Revenue v. Pillsbury Holdings Ltd.*[1], alors que la question en litige était celle de savoir si la renonciation à l'intérêt payable par un emprunteur, actionnaire dans la compagnie prêteuse, constituait un bénéfice en faveur de celui-ci au sens de l'article 8(1)(*c*) de la dite Loi.

Le savant juge, dans la cause précitée, a fait les commentaires ci-dessous:

> The relevance of this pleading appears from the decision of the Supreme Court of Canada in *Johnston* v. *Minister of National Revenue,* [1948] S C R 186, per Rand J., delivering the judgment of the majority, at p 489:
>
> > "Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant."
>
> (For the word "appellant" in that quotation, may be substituted "respondent" for the purpose of this appeal) The respondent could have met the Minister's pleading that, in assessing the respondent, he assumed the facts set out in paragraph 6 of the Notice of Appeal by:
>
> (*a*) challenging the Minister's allegation that he did assume those facts,
>
> (*b*) assuming the onus of showing that one or more of the assumptions was wrong, or
>
> (*c*) contending that, even if the assumption were justified, they do not of themselves support the assessment
>
> (The Minister could, of course, as an alternative to relying on the facts he found or assumed in assessing the respondent, have alleged by his Notice of Appeal further or other facts that would support or help in supporting the assessment...)

Comme je l'ai déjà dit, nous avons ici à traiter plus particulièrement de deux questions de fait. Premièrement,

[1] [1965] Ex. C.R, Part III, vol I, p 676

le Ministre était-il justifiable de prétendre que, si le contribuable avait suivi en l'occurrence une pratique bien reconnue dans le monde des affaires, la balance de $310,000, payable par versements, aurait porté intérêt au taux de 5 pour-cent ou 6 pour-cent jusqu'à ce que cette dette fût entièrement payée?

La réponse affirmative à cette question ne fait aucun doute, puisqu'elle n'est pas contestée. Au surplus, je suis d'opinion que la preuve établie par l'appelant démontre que c'est presque toujours la pratique dans les cas analogues pour toute balance de prix garantie par hypothèque de porter intérêt à 5 pour-cent.

Par voie de défense, l'intimé prétend que, nonobstant l'admission qu'en règle générale les taux d'intérêt ci-haut mentionnés s'imposent, il s'agit ici d'un cas d'espèce comportant une circonstance spéciale et que, par conséquent, elle mérite considération exceptionnelle. A l'appui de cette prétention, l'intimé déclare qu'il n'a pas suivi la coutume de charger l'intérêt parce que sa ferme ne produisait rien.

La seconde question à résoudre est celle de savoir si la preuve laisse croire que la propriété a été vendue à un prix supérieur à sa valeur marchande.

Le procureur de l'appelant a admis que la méthode employée par M. Lemire pour établir que la propriété a été vendue à une valeur supérieure à sa valeur marchande lui paraît peut-être boiteuse à certains points de vue, parce qu'il a procédé sur la base de son expérience et ne connaissait pas la définition «valeur marchande» donnée par la Cour suprême. Toutefois, il a soumis que ceci ne voulait pas dire que ses évaluations étaient erronées. En tout cas, les directives indiquées par la Cour suprême ne m'interdisent pas d'analyser, au meilleur de mes capacités, le témoignage de M. Lemire afin d'en déduire des indices valables de la valeur réelle de cette propriété. De plus, je considère, dans les circonstances, que c'est notre devoir d'agir ainsi.

En appel d'un jugement rendu par la Cour suprême du Nouveau-Brunswick dans *The King v. Jones*[1], où il s'agissait de taxation et du principe applicable à l'évaluation de

[1] [1950] S C R. 220, 289

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certaines terres boisées, dans les notes de l'honorable juge Rand, parlant pour la Cour, on trouve, entre autres, les observations suivantes:

> The figure of $5 an acre was the average price estimated by the assessors from their local knowledge of sales of small holdings, such as 100-acre lots. It was said that these sales ran from $3 to $8 an acre, and that $5 was, therefore a fair valuation. In this the assessors were undoubtedly wrong. Each taxpayer is entitled to have the value of his property separately ascertained. The difference in the prices used might possibly have arisen from differences in time and market conditions rather than in real marketable worth, in which case the propriety of the amount would depend upon equivalence in value, in the absence of which throughout the parish an average figure could not be used. But such a figure is obviously to be distinguished from an average valuation of a large tract of land belonging to one taxpayer and exhibiting wide variations in the value of its several parts.
>
> But the Judge in appeal considered the assessment *de novo* in all its aspects. Rejecting the principle in the inadequate form urged by the company, he properly construed the Statute to provide for valuation on a market basis, as between a willing seller and a willing purchaser, each exercising a reasonable judgment, having regard to all elements and potentialities of value as well as of all risks, and reducing them all to a present worth: *Montreal Island Power Co. v. The Town of Laval des Rapides*, [1935] S.C.R. 304.
>
> ....
>
> He found that $5 was not in excess of the fair value of the land.

Il n'est pas contesté que la question qui se pose est celle de déterminer la valeur marchande ou réelle de la propriété.

Dans *Sun Life Assurance Co. of Canada v. The City of Montreal*[1] la Cour a traité ainsi de la question de l'évaluation réelle d'une propriété. Je cite ici feu l'honorable juge Kerwin, alors juge puîné de la Cour suprême du Canada et juge en chef subséquemment:

> This appeal is concerned with (1) the assessment by the City of Montreal of the appellant's main office building and what is called a secondary building, containing the heating plant; (2) the annual rental value of the two buildings for the purposes of business and water taxes.
>
> The main question is the first and as to it there is no dispute as to the assessable value of the land itself. Article 375 of the charter of the City of Montreal provides for the preparation, every three years, by the assessors, of a valuation roll in each ward of all the "immovables", which expression includes lands and buildings. The roll is to contain "the actual value of the immovables" and the controversy turns upon the method of determining that value or, as it is put in the French version "la valeur réelle desdits immeubles". The rule applicable in determining compensa-

[1] [1950] S.C.R. 220.

tion in expropriation cases is not that to be followed in municipal assessment cases where the land and buildings are to be assessed at their value, or real value, or actual value. The test is an objective one which in many cases may be applied by seeking the exchange value or the value in a competitive market. If there is no such market, then one may ask what would a prudent investor pay for the subject of taxation, bearing in mind the return that might be expected upon the money invested.

Dans la même cause l'honorable juge Taschereau, alors juge puîné de la Cour suprême du Canada et maintenant juge en chef de cette Cour, à la page 240 fait les remarques suivantes:

In order to reach a proper conclusion in a case of municipal assessment, it is the "real value" that has therefore to be considered. As in many other statutes, these words are not defined in the Charter of the City of Montreal, but they have been the subject of many judicial pronouncements.

....

In *Lord Advocate v. Earl of Home,* [1891] 28 Sc. L.R. 289 at 293, Lord Maclaren said:

> It means exchangeable value—the price the subject will bring when exposed to the test of competition.

In *Grierson v. City of Edmonton,* [1917] 58 S.C.R. 13, Sir Charles Fitzpatric, C.J., with whom all the Members of this Court concurred, said:

> Speaking generally, the intrinsic value of a piece of property must necessarily be the price which it will command in the open market.

A la page 219 l'honorable juge Archambault dit:

Le sens des mots «valeur réelle» de l'article 485 de notre *Loi des Cités et Villes* est fixé par la doctrine et la jurisprudence. Les mots «valeur réelle» signifient «valeur actuelle», «valeur marchande».

....

The respondent itself accepts these views, and in its factum also agrees with the "willing buyer" and "willing seller" formula, which has often been recognized by the courts, and cites the case of *La Compagnie d'Approvisionnement d'Eau v. La Ville de Montmagny,* Q.R. [1915] 24 K.B. 416, where Mr. Justice Pelletier said:

> Dans la cause du *Roi* v. *MacPherson* (10 Exch. Ct. Rep. 208), je trouve une définition donnée par le juge Cassels de la Cour d'Échiquier qui me paraît excellente.[1] Voici cette définition: 'C'est

[1] Dans le même jugement, à la page 220, l'honorable juge Cassels a déclaré:

> A somewhat long experience in these matters has taught me that averages have to be made with great good judgment and moderation. In the present case I have not the least doubt that there were parts of the land in question that were worth fifty or sixty dollars an acre, but that it was all worth the one sum or the other per acre seems to be altogether improbable in view of the actual transactions.

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le prix qu'un vendeur qui n'est pas obligé de vendre et qui n'est pas dépossédé malgré lui, mais qui désire vendre réussira à avoir d'un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter.'

Revenons maintenant au témoignage de M. Lemire.

Comme il arrive ordinairement en pareille matière, M. Lemire a produit une liste détaillée des ventes de fermes dans le voisinage, comparables, mais diversement, à la propriété de l'intimé; transactions conclues entre le 6 juin 1955 et le 26 novembre 1956, dont le prix en aucun cas n'excédait 0.126c le pied carré (Voir la charte faisant partie de l'exhibit A-1). J'annexe aussi à mes notes, sous la rubrique «APPENDICE A», une esquisse graphique montrant, en sus des ventes énumérées dans l'exhibit A-1, la vente Groulx (lot 112) aussi bien qu'une autre vente (lot 110) mentionnée dans l'admission des faits. Ladite esquisse fait voir les huit lots—marqués d'une croix—qui, à mon avis, se comparent le mieux avec la ferme Groulx. En effet, ces mutations de propriété eurent lieu à des dates assez rapprochées de la vente Groulx, à savoir, dans les six mois qui ont précédé ou suivi, et aussi en raison de leur localisation et de la facilité d'accès aux chemins publics.

Il est probable que M. Lemire n'était pas au courant de ce que Thorndale Investment Co. avait fait une offre de $350,000, l'équivalent de 15.4c. le pied carré pour la ferme Groulx.[1] Mais même si on accorde le plus de poids possible à cette dernière offre et à la vente du lot 110 à 15c. le pied carré elles étaient au moins $45,000 inférieures au prix de $395,000—représentant presque 18c. le pied carré—obtenu par l'intimé pour sa propriété. Il importe peu que cette différence soit supérieure ou inférieure à $45,000, comme le dit le savant juge Cross dans la cause de *Vestey* (*supra*), à la page 122: «The question, as I see it, is one of principle, not of degree.»

Je suis d'abord d'opinion que l'appelant a au moins établi une cause *prima facie* que la propriété a été vendue à un prix supérieur à sa valeur marchande et que l'intimé n'a pas réussi, comme il lui incombait, à prouver le contraire.

---

[1]M. Feinstein savait bien ce que pouvait valoir, en regard d'une subdivision moderne projetée, une maison comme celle qui se trouvait sur la propriété et il a sans doute tenu compte de cette valeur avant de faire son offre.

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Je dois admettre que j'ai rencontré plusieurs obstacles avant d'en arriver à une décision finale. Ce qui m'a incité davantage à opter pour cette conclusion se situe dans un aspect additionnel de la cause dont l'importance ne peut guère être exagérée, à savoir, déterminer comment et dans quelles circonstances les parties en sont arrivées au prix de $395,000 et si une partie de ce montant reçu par l'intimé constituait en fait un paiement en partie à titre d'acompte *ou au lieu de paiement d'intérêt* (les italiques sont de moi), tel que prévu par ces mots qui terminent l'article 6(*b*). Si la réponse à cette question est affirmative, il s'ensuit que les dispositions de l'article 7 doivent être appliquées. Selon moi, la réponse se trouve plutôt dans le témoignage de l'intimé lui-même, lequel est pratiquement confirmé par les déclarations du représentant de l'acheteur, M. Feinstein.

Au dire de ces témoins, le vendeur a demandé $450,000 mais a réduit ce montant à $400,000 et l'acheteur a offert $350,000; et à ce moment, le vendeur a consenti «—pour employer ses propres mots—» de faire un cadeau de $5,000; ce n'était pas suffisant et jusque-là les questions de termes comme d'intérêt ne furent pas discutées. Suivant l'intimé, afin de conclure la vente, il décida alors de sacrifier l'intérêt. D'après Feinstein, quand ils en sont arrivés au montant de $395,000 l'intimé lui dit: «I will do you a good turn and not charge you interest.» L'intimé, en se servant de l'expression, «Je vous donnerai $5,000 comme cadeau», et M. Feinstein, en disant que l'intimé voulait lui consentir un traitement de faveur en renonçant à l'intérêt, ont créé dans l'esprit du procureur de l'appelant des soupçons que les parties ne transigeaient pas à distance. J'attache peu d'importance à ces expressions de générosité attribuées à l'intimé et je leur accorde la même valeur que ce qu'on appelle en anglais «sales promotion talk».

Toutefois, je ne peux accepter les déclarations de l'intimé qu'il n'a jamais songé à calculer le montant en jeu quand il décida de sacrifier l'intérêt[1], et quand il déclara, à plusieurs

[1] Le montant d'intérêt pour lequel l'intimé pourrait être tenu responsable est indiqué dans le dossier qui a été transmis à cette Cour et dont un extrait est annexé à ces notes sous la rubrique «APPENDICE B». Ce montant pouvait s'élever à $71,992, après avoir tenu compte, de consentement, des avantages adoucissants que l'intimé invoqua en vertu du paragraphe 35 de la loi.

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reprises, que la seule et unique raison qui l'a induit à sacrifier les intérêts c'était que sa ferme était «non-productive» et qu'il ne perdait rien.

J'ajouterai ici, incidemment, que l'intimé, avant de déménager dans une nouvelle résidence, à St-Eustache-sur-le-Lac, a continué d'occuper sa maison à Bois-Franc, dont il estime la valeur de location à $75 par mois environ, alors qu'il obtenait de son locataire, qui occupait une partie de sa maison, à peu près $65 par mois.

A mon avis, l'intimé n'était pas un fermier ordinaire. Comme il appert de ses déclarations de revenus imposables transmises à cette Cour, son revenu taxable pour l'année 1958 excédait $12,500, alors que pour 1959 il était de $15,000. Il recevait une partie de ces montants à titre de salaire d'une compagnie dont il était le président, mais la majeure partie venait de ses investissements. Son témoignage révèle que les transactions immobilières ne lui étaient pas étrangères. Quant à sa déclaration de n'avoir jamais songé à la taxe évitée en renonçant à l'intérêt, un enfant pourrait calculer que l'intérêt à 5 pour cent sur une balance de prix de $310,000 excédait $15,000 par année.

Un contribuable aussi entraîné aux affaires que l'intimé devrait apprécier d'emblée l'avantage pécuniaire de ne pas majorer du double son revenu taxable.

La *Loi sur l'intérêt*, S.R., 1952, vol. III, c. 156, s. 2, édicte que:

> Sauf disposition contraire de la présente loi ou de toute autre loi du Parlement du Canada, une personne peut stipuler, allouer et exiger, dans tout contrat ou convention quelconque, le taux d'intérêt ou d'escompte qui est arrêté d'un commun accord.

L'intimé, je crois, a révélé qu'en sacrifiant l'intérêt son intention avait été de s'assurer un prix de $395,000 en capital—et son témoignage ne pouvait guère créer un état de choses caractérisant mieux une capitalisation des intérêts.

On peut ajouter que des circonstances supplémentaires —nommément le fait que c'est l'intimé lui-même qui a proposé le non-paiement d'intérêt, la faiblesse des raisons pouvant motiver ce geste et les réponses indéfinies données

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par M. Feinstein à la question de savoir s'il aurait payé le prix de $395,000 n'eût été le fait qu'il se trouvait dispensé de payer l'intérêt—militent contre l'intimé. Je crois devoir conclure alors qu'il y a suffisamment de preuve pour justifier les cotisations dont il s'agit.

Par les motifs ci-dessus énoncés, il me faut conclure que l'appel doit, par conséquent, être maintenu avec dépens et le dossier référé au Ministre du Revenu national afin que les cotisations du revenu imposable de l'intimé soient revisées conformément au consentement écrit dûment signé par les parties.

APPENDICE "A"

ESQUISSE GRAPHIQUE MONTRANT LES VENTES ÉNUMÉRÉES DANS L'EXHIBIT A-1, LA VENTE GROULX (LOT 112) ET UNE AUTRE (LOT 110) MENTIONNÉE DANS L'ADMISSION DES FAITS. A MON AVIS, LES SEPT OU HUIT VENTES MARQUÉES D'UNE CROIX SONT CELLES QUI SE COMPARENT LE MIEUX AVEC LA PROPRIÉTÉ GROULX

				Vente 1957—lot 110			.15	
			17		26 nov.	1956	.0948	
			16		17 sept.	1956	.1203	X
			15		17 sept.	1956	.087	
			14		17 sept.	1956	.125	X
			13	sept. ?	3 déc.	1956	.108	
			12		6 août	1956	.0622	
			11		16 juil.	1956	.0801	
			10		30 juil.	1956	.1085	X
			9		25 juin	1956	.0815	
					juil.	1956	.1778	
			8		14 mai	1956	.077	
			7		14 mai	1956	.0855	X
			6		30 jan.	1956	.0823	X
			5		16 jan.	1956	.126	
			4		28 nov.	1955	.072	X
			3		21 nov.	1955	.12	
			2		21 nov.	1955	.12	
			1		6 juin	1955	.0786	

APPENDICE "B" SCHEDULE OF INTEREST UNREPORTED **Schedule No. 1**

Date	Principal and interest	Principal	Interest 5%	Payments due	Interest on overdue payments 6%
July 19/56	$ 395,000.00				
July 19/56	85,000.00				
	$ 310,000.00	$ 238,008.00			
June 1/57			$ 10,335.40		
June 1/58			11,900.40	$ 15,000.00	Ø
June 1/59			11,900.40	25,000.00	Ø
June 1/60			11,607.20	50,000.00	
June 1/61			9,687.60	50,000.00	
June 1/62			7,672.00	50,000.00	
June 1/63			5,555.60	50,000.00	
June 1/64			3,333.40	70,000.00	
	$ 310,000.00	$ 238,008.00	$ 71,992.00	$ 310,000.00	

Date	Interest received to be reported 5%	Interest to be reported 6%	Total interest to be reported
June 1/58	$15,000.00	Ø	$15,000.00
June 1/59	19,136.20	Ø	19,136.20

SCHEDULE OF TAXABLE INCOME

Schedule No. 2

		1959		1958	
Net income declared and assessed		$14,346.09		$12,738.97	
Additional income:					
Interest unreported (Schedule No. 1)		19,136.20		15.000.00	
Revised net income		$33,482.29		$27,738.97	
Deduct:					
Personal exemptions	$ 2,500.00		$ 2,500.00		
Standard deduction	Ø		100.00		
Charitable donations	414.00	2,914.00	Ø		2,600.00
Revised taxable income		$ 30,568.29			$ 25,138.97

BETWEEN:

DONALD APPLICATORS LTD., *et al.* ....APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Ottawa
1966
March 17
March 21

Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 39(4) and 103—General Rules and Orders of the Exchequer Court—Associated corporations—Examination for discovery—Appeals—Evidence—Application for second examination for discovery.

The matter under appeal was whether the ten appellant companies were associated corporations under the Act.

The Minister had already held an examination for discovery to attempt to establish for the purpose of section 39(4) of the Act, the identities of the shareholders by whom the 10 appellants were controlled but had been unsuccessful because the shareholders resided in the Bahamas. It was necessary for the Minister to obtain information regarding the manner in which certain shares of the companies were held. On examination for discovery the manager of the companies was unable to give such information.

The Minister made application to the Exchequer Court for an order granting leave to have a second eaxmination for discovery, this time of the directors of the appellant companies.

The appellants opposed the application on the ground that, the manager had been examined and his evidence was available to the Minister. That Rule 131, in conjunction with Rule 156(*b*)(1), indicated that one discovery is available to a party only where the opposite party is a body corporate or a joint stock company and under the Rules of The Exchequer Court, only one discovery was available to the Minister.

Held That leave should be granted the Minister to have a second examination for discovery of the appellants

2 That on the facts presented, it was apparent that the Minister had not obtained the discovery to which he was entitled.

3 That the Rules of the Court could not be construed as restricting the right of a party to the examination of one witness only where, as here, all the information required could not be obtained from the examination of the first witness.

4 That it was also ordered that the individual directors should be examined under Rule 135 at Nassau or elsewhere at a convenient date

APPLICATION by the Minister for an Order:

(*a*) granting leave to have a second examination for discovery and

(*b*) permitting a number of individuals to be examined for discovery as directors of the ten interconnected appellants.

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Maurice A. Regnier for appellants.

G. W. Ainslie for respondent.

NOEL J.:—This is an application by the respondent, the Minister of National Revenue, for an order pursuant to Rules 131 and 135 of the General Rules and Orders of this Court that:

(*a*) it be granted leave to have a second examination for discovery of the appellants (if such an order is required);

(*b*) that a number of individuals be examined for discovery as respective directors of the ten inter-connected appellant corporations whose trial by consent were ordered to be heard together on common evidence.

The application is opposed by counsel for the appellants on the ground that James G. Greenough, manager of each of the appellant corporations, was on September 29, 1965, examined for discovery by the respondent and that the evidence thus given is available to him; that Rule 131 read in conjunction with Rule 156(*b*)(1) indicates that one discovery is available to a party only when the opposite party is a body corporate or a joint stock company and, finally, that in any event if the appellants manager's answers were not satisfactory or if he could not give answers to the questions asked, counsel for the respondent could have and should have required him to inform himself on such matters.

The key issue in these appeals is whether the ten appellants are associated or not under subsection 4 of section 39 of the *Income Tax Act* and for the purpose of determining the above issue it is necessary for the respondent to obtain information with regard to the manner in which the outstanding Class A shares of the appellant corporations (the holders of which being the only shareholders entitled to elect or appoint directors) are held by a number of individuals residing in the Bahamas.

This information is essential to the respondent in order to be able to deal with the appellants' allegation 3 of their respective notices of appeal which reads as follows (the

individual names having been dropped as they vary in the ten appeals):

3. During the relevant taxation years, 2 Class "A" common shares were issued and outstanding, one having been registered in the name of, and being owned by, ... and the other having been registered in the name of, and being owned by, ...

Mr. Greenough, the appellants' manager, was examined in this regard at pp. 77 *et seq.* and pp. 89 to 96 of the examination for discovery, and although he was informed on matters dealing with the activities of the various Canadian appellant corporations involved in these appeals in Canada, did not know the holders of the Class "A" shares of the appellant corporations, nor could he give any satisfactory information on the manner in which they held these shares and particularly whether they were the legal holders thereof or whether the beneficial or equitable title resided in somebody else. From a complete examination of the discovery transcript, I am satisfied not only that Greenough has no personal knowledge regarding the manner in which the Class "A" shares are held but that it is doubtful that he could, if he was requested to, inform himself on such matters, obtain and give satisfactory information thereon having regard also to the fact that the shareholders all reside outside of the jurisdiction. The rule that a witness must inform himself on matters not within his knowledge is intended as a supplement to and not a substitute for discovery and I do not feel that in the present case the ends of justice would have been fully served if the manager of the appellant corporations had been instructed to inform himself.

On the facts herein it is apparent that the respondent has not obtained the discovery to which he is entitled and leave should therefore be granted for a second examination for discovery unless, as submitted by counsel for the appellants, the provisions of orders 131 and 156(*b*)(1) of the Rules of this Court prohibit such double discovery.

I do not believe that the above rules can be construed as restricting the right of a party to the examination of one witness only although in most cases the appointment of one member or officer of a corporation, fully informed, should be sufficient to allow the party examining him to obtain all the information required as to the facts or as to the admissions he is entitled to.

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Noël J.

It is only when the Court is satisfied that such a result cannot be obtained from the examination of the first witness that recourse should be had to the examination of a second witness. I should add that in no case should such a request be granted when it appears that it is made for the purpose of unnecessarily harassing the other party or of enquiring for ulterior business purposes and, finally, in some cases such an examination should be permitted only upon terms as to the matters to be investigated.

It therefore follows that a second discovery can be authorized only upon an order of the Court if a proper determination of its necessity or of the conditions under which it is to be conducted is to be assured. I am satisfied that the conditions required have been met in the present applications and leave will therefore be granted the respondent to have a second examination for discovery of the appellants; it is also ordered that the individual directors of the appellants, as agreed to between the parties, shall be examined for discovery in regard to each of the appellants under Rule 135 of the Rules of this Court and the said examinations for discovery shall take place either at Nassau, in the Bahamas Islands, or elsewhere at a convenient date. Should the parties have any difficulty in settling either the choice of the individuals to be examined, the place of examination or the terms of such examinations, the matter may be further spoken to. Costs in the cause.

BRITISH COLUMBIA ADMIRALTY DISTRICT

Victoria 1965

Nov. 9, 10

Nov. 17

BETWEEN:

BOMFORD TIMBER LTD. .....PLAINTIFF;

AND

V. JACKSON .....DEFENDANT;

AND

ARNIE LEIGH .....THIRD PARTY.

Shipping—Charter party—Terms of—Towboat operator chartering barge from non-owner—Whether implied warranty of seaworthiness—Loss of cargo—Liability of towboat operator and barge charterer—Salvage—Liability for—Third party issue—Jurisdiction of Exchequer Court—Admiralty Act, R.S.C. 1952, c. 1, s. 18(3)(a)(i).

In July 1960 plaintiff company orally contracted with defendant, a towboat operator, to move a tractor and logging equipment from Thurlow Island to Topaz Harbour, British Columbia. Defendant, who was in the business of offering to carry goods for anyone who chose to employ him subject to an express agreement as to each employment, orally chartered from one Leigh a war surplus landing barge which to defendant's knowledge belonged to one Taylor but had been placed in Leigh's custody. Leigh was informed of the job to be done but said nothing as to the seaworthiness of the barge. Defendant loaded the tractor and logging equipment aboard the barge after partially inspecting its water compartments and proceeded to sea. The barge took on a list and the tractor and logging equipment slid into the sea. Salvage operations were conducted by plaintiff's underwriters with defendant's assistance and the tractor and some equipment were recovered. Plaintiff sued defendant who claimed indemnification from Leigh.

Held, defendant was liable for the damages sustained by plaintiff but had no claim to indemnification or contribution from Leigh.

1. Defendant was a public carrier by water (*Paterson Steamships Ltd. v. Can. Co-op. Wheat Producers Ltd.* [1934] A.C. 538; *Consolidated Tea and Lands Co. v. Oliver's Wharf* [1910] 2 K. B. 395, referred to), and he had not established that his contract with plaintiff contained any limitation on the absolute liability to which a common carrier is otherwise subject.
2. Defendant was not entitled to compensation for his assistance in the salvage operations in the absence of a contract with plaintiff for such work.
3. Under sec. 18(3)(*a*)(i) of the *Admiralty Act,* R.S.C. 1952, c. 1, the Exchequer Court had jurisdiction to entertain a third party issue against Leigh for indemnification.
4. Defendant was not entitled to indemnification or contribution from Leigh notwithstanding the unseaworthiness of the barge. As Leigh was not owner of the barge the charter did not in law contain a warranty of seaworthiness by him, and there was no misrepresentation by him, either fraudulent or innocent, as to the seaworthiness of the barge at the time the charter was made. *Wells v. Mitchell et al.* [1939] O.R. 372; *Smith v. Land and House Property Corpn.,* 28 Ch.D. 7, followed; *Brown v. Raphael* [1958] 1 Ch. 636, applied.

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ACTION for damages.

W. Esson for plaintiff.

Timothy P. Cameron for defendant.

Vernon Hill for third party.

GIBSON J.:—The plaintiff claims in this action against the defendant for damages to its D-8 caterpillar tractor and miscellaneous logging equipment and for loss of some of such equipment while the same were being carried on the 12th July, 1960, upon the barge *Shoal Harbour* being towed by the tug *Iron Mac* from a location called Camp O on the south end of Thurlow Island (25 miles north of Campbell River) to Topaz Harbour in Johnstone Straits, which are waters northeast of Vancouver Island, British Columbia. The damage and loss occurred shortly after the carriage commenced, at a point in Johnstone Straits called Ripple Point which is about 4 miles north of Camp O, when the said tractor and equipment slid into the water from the barge. *Shoal Harbour* and sank in about 60 feet of water.

The defendant also claims against the third party indemnification for the plaintiff's claim for damages and costs or alternatively contribution with respect to the plaintiff's claim and costs in whatever proportion to this Court may seem just, in the event this Court should hold the defendant liable to the plaintiff in the main action. The third party issue was the subject of an adjudication in the preliminary proceedings concerning the same: see *Bomford Timber Ltd. v. Jackson and Leigh (Third Party)*[1], Tysoe, Dpty. Dist. J.

The plaintiff is a company incorporated under the laws of British Columbia. At the material time it was carrying on a logging business and was engaged in the same on the islands in the Johnstone Straits area.

The defendant at the material time was a logger and towboat operator and resided at Campbell River, British Columbia.

The third party at the material time also resided at Campbell River and was a tug boat operator and also did charter out certain barges.

[1] (1963) 44 W.W.R. 706.

The plaintiff early in July, 1960, had occasion to move one of its D-8 caterpillar tractors and miscellaneous logging equipment from the said Camp O to Topaz Harbour for the purpose of carrying on some logging operation at this latter place. To accomplish this move he required the services of a carrier such as the defendant because the method that was employed in moving its equipment was using a tug with a barge in tow upon which barge this equipment was carried.

It is common ground that Mr. E. A. Bomford of the plaintiff company had a preliminary discussion with the defendant, V. Jackson, in a Vancouver hotel a few weeks before the 12th July, 1960, at which time Mr. Bomford let it be known that he wished this move to be made and at which time also Mr. Jackson solicited this business. It was, however, at Campbell River on or about the 8th July, 1960, that a final deal was made between these parties contracting for this move of equipment. The arrangement was verbal. There is a dispute as to whether or not insurance was mentioned on either or both of the said occasions. Mr. Bomford says he asked Mr. Jackson on both occasions whether he had insurance coverage for property damage on his equipment during the course of such prospective carriage and that Mr. Jackson assured him that he did. Mr. Jackson denies that any mention was made of insurance at all on either occasion.

The defendant at this time owned the tug called *Iron Mac* but did not own a barge. He obtained the barge *Shoal Harbour* for the purpose of this carriage from the possession of the third party, Arnie Leigh. The defendant says he chartered this from Mr. Leigh, but among other things Mr. Leigh denies that it was a charter. The barge *Shoal Harbour* was a war surplus landing barge originally called an "L.C.M." and was of plywood construction about 55 feet in length and 26 to 28 feet wide with sides of about 3 to 4 feet and having an open hold. The defendant picked up the barge *Shoal Harbour* from the premises of the third party, Mr. Leigh, on the 11th July, 1960, which premises were located opposite Campbell River and the defendant towed this barge by the tug *Iron Mac* to Camp O late that evening. The next day, the 12th July, 1960, commencing about 7.30 a.m. under the direction of the defendant and in the presence of Mr. Bomford of the

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plaintiff company, the D-8 caterpillar tractor and miscellaneous logging equipment was loaded aboard the barge *Shoal Harbour* which had been beached for the purpose of loading the caterpillar tractor and subsequently pulled out to a stiff-legged float for loading the other equipment.

The defendant said he adjusted the load on the barge *Shoal Harbour* so that the barge was properly trimmed. He caused some of the water compartments to be checked for water and found none in the ones that were checked, but that probably only about half of the water compartments were checked at all. The defendant was not familiar with the barge *Shoal Harbour* except that he had observed it at the premises of the third party prior to that time, but he had made no other inspection prior to employing it on the 12th July, 1960. The only other thing he did regarding inspection of it was again a partial checking of the water compartments on the 11th July, 1960, when he picked it up. But he never was in a position to know the condition of all the water compartments except by observing the trim of the barge as it floated and was under way.

The defendant proceeded in the tug with the barge in tow with one deckhand aboard and two of the employees of the plaintiff, namely, Albert Mayeo and a man by the name of Roberts. Mr. Mayeo was the caterpillar driver and had driven the caterpillar onto the barge.

During the course of the short carriage the defendant and the other personnel, except Mr. Mayeo, remained in the wheelhouse of the tug *Iron Mac,* While Mr. Mayeo sat outside looking astern and observing the barge during the voyage.

About half an hour to one hour later, when the tug and barge had proceeded about four miles, Mr. Mayeo observed that the barge had taken a list to starboard. He informed the defendant who subsequently brought the tug alongside the barge and substituted for the tow line, which had been a steel line about 250 feet in length, a hemp line, and attached the latter to the port forequarter of the barge, and commenced to tow the barge to the nearest beach area on Vancouver Island to the south-west. Mr. Mayeo said they substituted the hemp rope for the steel rope because he was apprehensive, and the defendant concurred, that if the barge sank with the steel cable attached to the tug that it

might cause the tug also to sink, whereas with the hemp rope only attached it was possible to cut such hemp rope and disengage the barge from the tug if the barge did sink.

The tug and barge were then about 400 to 500 feet from the beach area on Vancouver Island and the location is what is referred to and shown on the chart of Johnstone Straits, Exhibit 3, as Ripple Point. The tug towing the barge got to within about 100 feet of Ripple Point, which took about fifteen minutes, before the barge, whose starboard list had been progressive and apparently irreversible since Mr. Mayeo first observed it, listed so badly that the D-8 caterpillar tractor slid off and also all the equipment which was aboard the barge and sank in water which was about 60 feet in depth. In doing so it ripped the starboard side of the barge completely off down to below the water line but the barge did not sink. The caterpillar tractor was tied by a cable to the barge and the crew of the tug were able subsequently to attach a can marker to this cable to identify the spot where the caterpillar sank which was of assistance in the subsequent salvage operation.

The defendant then proceeded back with the tug to Camp O. Mr. Mayeo said that he immediately asked the defendant whether he had insurance covering this loss and said that the defendant told him he had, but the defendant says that what he told Mr. Mayeo was that he believed there was insurance on the barge, but that he did not intend to convey to him the impression that there was insurance on the cargo of the barge.

After arriving at Camp O the defendant spoke to Mr. Bomford of the plaintiff company. Mr. Bomford said that the defendant had told him that he had insurance on the cargo. The defendant said that Mr. Bomford on the contrary told him that he, Bomford, had insurance on his equipment to cover this loss.

In any event, Mr. Bomford of the plaintiff company got in touch with his underwriters who subsquently carried out salvage operations, recovering the D-8 caterpillar tractor and certain of the equipment, which salvage operations were carried out for the underwriters by a Captain John C. Smith, whose report of survey is filed as Exhibit 1. In carrying out this salvage operation the defendant and one deckhand and his tug *Iron Mac* assisted. The survey

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report of Captain Smith reports concerning this that "The services of Tug 'IRON MAC'—Operator Mr. Vernon Jackson and one deckhand offered and used throughout salvage operation free of charge".

The defendant had no cargo insurance and the plaintiff instituted this action against him on the 8th November, 1961. The defendant in turn obtained leave to commence the third party proceedings on the 30th August, 1963, and the third party entered an appearance on the 10th September, 1963.

The defendant takes the position that he chartered the barge *Shoal Harbour* from the third party, Arnie Leigh, and that the arrangements were made some time between the 8th and 10th July, 1960. This barge was owned by one Taylor who had left it in the custody of the third party. The defendant, in the presence of the third party some weeks before the 8th July, 1960, had discussed this barge with Taylor, at which time Taylor had agreed that the defendant, the third party, and any other responsible person could charter it. The defendant says that Taylor told them he had used this barge for carrying heavy loads such as loads of the weight involved in the carriage which is the subject of this action, namely, a tractor of this size which weighed about 20 to 25 tons, and other equipment of some few tons. Nothing else was said concerning the seaworthiness of this barge according to the evidence, except that the third party said that all persons in this trade know that it is ex-Army equipment and that the water compartments of this barge, while once water-tight, are now only as he put it "water resistent". At the time the defendant spoke to the third party, somewhere between the 8th and 10th July, 1960, the defendant asked the third party if the barge was available and he indicated that it was. He told the third party that he had this job to do for the plaintiff and the defendant stated to him that he thought this barge would be preferable to another barge which the third party had for charter, because of the convenience in loading this equipment of the plaintiff, not its seaworthiness, and the third party concurred in this view of the defendant. Other than that no representation and certainly no guarantees were given by the third party to the defendant and no mention was made otherwise of its seaworthiness.

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The plaintiff claims that the contract between it and the defendant was a simple contract of carriage and that the defendant was a public carrier within the meaning of the cases and for breach of that contract he is absolutely liable as an insurer. In the alternative the plaintiff claims that the defendant is liable for these damages in negligence, particulars of which are set out in paragraph 9 of the statement of claim, namely:

(*a*) In providing for the carriage of the plaintiff's goods as aforesaid an unseaworthy barge;

(*b*) In failing so to secure the goods when loaded on the barge as to prevent them being lost overboard;

(*c*) In navigating the said barge in such a manner as to cause it to list and allow the said goods to be cast into the sea.

The defendant says that this contract was subject to a bill of lading by reason of which the *Water Carriage of Goods Act* R.S.C. Chap. 291, Article III, Rule 6, is applicable; that the contract of carriage in any event was subject to the verbal condition alleged to have been expressed by the defendant at the material time and accepted by the plaintiff that the goods carried were "at owner's risk"; that the contract with the plaintiff was not with the defendant but with the company of which the defendant was the president, namely Jackson Enterprises Ltd.; and that there is no basis in law for the alternate claim in negligence on the evidence. The defendant also counterclaims against the plaintiff for services rendered in salvaging the D-8 caterpillar tractor and sunken equipment, for which purpose he employed the tug *Iron Mac*, his deckhand and was employed himself. This is referred to above when mention was made of the survey report, Exhibit 1, made by Captain Smith for the underwriters of the plaintiff.

On the evidence it is clear and I am of opinion that the carriage contract was between the plaintiff and the defendant and not with the company referred to as "Jackson Enterprises Ltd.".

The defendant conceded that he never took any positive means to draw to the attention of Mr. Bomford of the plaintiff company that he was acting as agent for Jackson Enterprises Ltd. The defendant could point to no way that Mr. Bomford might have positively had his attention drawn to this alleged fact.

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In any event, it follows as a matter of law that if the defendant in this case made a contract in his own name verbally without disclosing the name or the existence of his purported principal he is personally liable on the contract to the plaintiff even though he may in fact (which I do not hold) be acting on a principal's behalf.

I am also of the opinion that the defendant, for the purpose of this contract, was a public carrier within the meaning of the cases: *Paterson Steamships, Limited v. Canadian Co-operative Wheat Producers, Limited*[1]; *Consolidated Tea and Lands Company v. Oliver's Wharf*[2]; and see Carver's "Carriage of Goods by Sea" 9th Ed., p. 9.

This class of public carriers by water carry subject to the liabilities of common carriers but they are distinguishable from them because they are not liable to indictment or action for refusing to accept goods for carriage as common carriers.

The defendant in this case said in evidence that at all material times he was in the business of offering to carry goods for any one who chose to employ him; subject to an express agreement as to each voyage or employment of his equipment. Such method of doing business as a carrier characterizes in one way public carriers by water according to the jurisprudence.

As a public carrier by water, in the absence of something to limit his liability, the defendant incurred the liability of a common carrier with respect to the equipment he carried in this matter. Like a common carrier, the defendant, therefore, is absolutely responsible for delivering in like order and condition at the destination this equipment bailed to him at Camp O for carriage to Topaz Harbour, unless he can show either (i) that the loss was due to the act of God or the Queen's enemies or inevitable accident, or (ii) unless that liability is cut down by special contract.

The defendant asserts his liability was cut down by special contract, as is referred to above in these Reasons, saying firstly, the carriage was subject to a bill of lading, as per the type filed as Exhibit 4 on this trial, and secondly, this carriage contract was at "owner's risk".

[1] [1934] A.C. 538.

[2] [1910] 2 K.B. 395.

The conclusion I reach in the main action is that there was a breach of this contract between the plaintiff and the defendant, and the defendant, therefore, is absolutely liable for the damage caused to the plaintiff unless one of the defences he has raised is well founded.

Regarding the first defence concerning the matter of whether this contract of carriage was subject to a bill of lading, Mr. Bomford of the plaintiff company denies that there was any reference made to a bill of lading at any time. The defendant says that he had obtained a pad of blank bills of lading from the third party, who had some spare pads of the same, two or three months prior to the 12th July, 1960, and that he obtained them originally at that time for the purpose of assisting in collecting his fees, because it was better to have the person with whom he was contracting sign something rather than nothing at all, as the defendant put it; but he says that he never went into details as to what purpose a bill of lading served otherwise. He alleges he commenced at that time a system of always using this type of bill of lading in all his carriage contracts from then to the present time. He said he read one copy of these bills of lading from the pad when he had originally obtained the pad of them from the third party, but he did not understand it, and on cross-examination it was obvious he did not know how to fill out this bill of lading. He said that after he loaded the equipment of the plaintiff on the 12th that he went ashore and saw Mr. Bomford and told him he would have to get this paper signed. There was no evidence that, in this alleged conversation with Mr. Bomford, he referred to the paper on the pad he said he had in his hand at the time as a bill of lading. The defendant then delates that Mr. Bomford said they could fill it in at the end of the journey. Certainly from the evidence it is plain that the defendant was not at that juncture able to fill the form in without returning to the barge which was then afloat, because the defendant did not know what equipment was aboard other than that there was a D-8 caterpillar tractor and certain miscellaneous logging equipment. It is not alleged by the defendant that there was any mention made of any bill of lading being employed when the original deal was made on the 8th July, 1960, between the defendant and Mr. Bomford at Campbell River. And, of course, no bill of

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lading was ever filled in or even tendered to the plaintiff by the defendant after this casualty.

On this evidence I am of opinion that this contract of carriage was not subject to this bill of lading, a copy of which was filed on this trial as Exhibit 4. I do not accept the evidence of the defendant that he had established a system of always making any carriage contract which he undertook subject to this bill of lading. He did not bring into Court any copies of such bills of lading which he had employed on other prior or subsequent carriage contracts he completed. He brought in his log book from the tug *Iron Mac* and was able to give evidence of various contracts he had done, but in my opinion the absence of such proof is significant, among other things, in enabling the Court to find that no system of using this bill of lading was employed by the defendant in his business as a public carrier.

Regarding the second defence that the defendant verbally told Mr. Bomford of the plaintiff company that this contract of carriage was at "the owner's risk", he says he told Mr. Bomford this on the 8th July, 1960, at Campbell River when the contract was first entered into. He says he again told them after he had loaded the plaintiff's equipment on the 12th July, 1960. The plaintiff denies that any reference was made to this limitation in the contract at any time. I accept the evidence of Mr. Bomford of the plaintiff company in this regard and hold that no mention was made of such a limitation at any time in any of the conversations between the defendant and Mr. Bomford prior to this casualty.

As to the counterclaim, the defendant is firstly inconsistent. He claims in his personal capacity against the plaintiff for services rendered with the tug, and by himself and his deckhand in salvaging the sunken caterpillar tractor and equipment of the plaintiff four or five days after the sinking, yet says prior thereto in his defence that Jackson Enterprises Ltd. was the contracting party at all material times. But, notwithstanding this inconsistency, it is perfectly clear from all the evidence at the trial and in particular from the evidence adduced by way of the survey report, Exhibit 1, of Captain Smith, that there was no contract by the defendant with the plaintiff to be paid for

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this salvage work, and in fact no contract at all for salvage work. The only contract possible for salvage work was with Captain Smith acting for the underwriters of the plaintiff and it is clear from the excerpt from this survey report, Exhibit 1, quoted earlier in this judgment, that it was agreed between the defendant and Captain Smith for the underwriters that no charge would be made. This is understandable because the defendant probably knew at the time he volunteered to help and did help in salvaging that he was liable for the damages caused in this matter. In any event, the defendant used this survey report, Exhibit 1, in cross-examining Mr. Bomford of the plaintiff company for the purpose of attacking his credibility. Having put it in in evidence for this purpose, it is now evidence against the defendant of the truth of the facts therein contained, of which the above-quoted excerpt from it is part; and even though this excerpt would be inadmissible as hearsay if the plaintiff had sought to introduce it in evidence: see *Dundas v. Eagle Star Insurance Company Ltd. et al.*[1]

In view of the findings on the contract of carriage and the counterclaim with respect thereto, it is not necessary to consider the plaintiff's alternative claim in negligence against the defendant or the defence to it.

Turning now to the conclusion I reach in the third party issue, firstly there is considered the question of the jurisdiction of this Court. The third party in his pleadings raises the objection that the claim made by the defendant against the third party in this particular third party issue is not a claim with respect to which this Court has jurisdiction to adjudicate upon.

I am of the opinion that section 18(3)(*a*)(i) of the *Admiralty Act*, R.S.C., Chap. 1, is unequivocal as applied to the facts of this case that this Court has such jurisdiction. This subsection reads as follows:

> (3) Notwithstanding anything in this Act or in the Act mentioned in subsection (2), the Court has jurisdiction to hear and determine
>
> (*a*) any claim
>
> (i) arising out of an agreement relating to the use or hire of a ship.

In my opinion, the claim made in this third party issue is a claim within the meaning of this said subsection.

[1] (1965) 52 W.W.R. 48, B.C. Court of Appeal.

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On the merits, in this third party issue, the defendant claims against the third party indemnification or, alternatively, contribution if the defendant is found liable to the plaintiff in the main action, alleging that the damage caused the plaintiff was a direct result of the third party supplying the defendant with the barge *Shoal Harbour* which "was not in a seaworthy condition as represented by the third party to the defendant."

First of all I think it clear beyond doubt, and I so find on the facts, that the defendant did charter the barge *Shoal Harbour* from the third party on or about the 8th to 10th July, 1960, which charter was a verbal charter and made in the informal way recited in the facts above. It is clear also that all parties knew at all material times that the owner of the barge *Shoal Harbour* was one Taylor. And it is also not necessary in these reasons, otherwise, to characterize the status of the third party in reference to this barge *Shoal Harbour*.

Secondly, the other main issue in this third party action is whether or not this barge *Shoal Harbour* at the material times was seaworthy or not; and if it was not seaworthy whether the third party is liable to the defendant for such unseaworthiness.

The burden of proving unseaworthiness as a fact rests upon the party who asserts it. But the facts in this case afford *prima facie* evidence of unseaworthiness, namely, the facts that this barge shortly after leaving Camp O took in water and partially capsized causing damage, without any reasonable explanation adduced as to why it leaked so soon. And, in the absence of any other explanation, I find that the defendant has discharged the burden of proving unseaworthiness as a fact, because I make the inference from the circumstance of these facts in this case that the barge *Shoal Harbour* was unseaworthy at all material times.

It follows, therefore, that the third party in this case is liable to the defendant if, as a term of the charter of this barge *Shoal Harbour,* there was in law a warranty of seaworthiness by the third party.

As a matter of law, the third party not being an owner of this barge and being a charterer of it only in the peculiar circumstances of this case as recited above, there is no implied warranty of seaworthiness.

The third party is only liable therefore in this case if, as a term of this charter, he made to the defendant representations or statements which in law were (A) either (i) conditions or (ii) warranties, which were (B) false, being either (i) fraudulent statements or representations or (ii) innocent misrepresentations: *Wells v. Mitchell et al.*[1]; *Smith v. Land and House Property Corporation*[2], followed in *Brown v. Raphael*[3].

Patently in the evidence in this case there is no suggestion that there was any fraud on the part of the third party, and so only the matter of innocent misrepresentation is left to be considered.

And on the facts above stated it is equally clear that there was no innocent misrepresentation made by the third party to the defendant as to the seaworthiness of the barge *Shoal Harbour* in any representation or statement made when this charter was entered into. The words of Bowen L.J. in *Smith v. Land and House Property Corporation, supra,* at p. 15 are apt in categorizing accurately these said statements or representations of the third party to the defendant, from which this conclusion is irresistible:

> In considering whether there was a misrepresentation, I will first deal with the argument that the particulars only contain a statement of opinion about the tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

What was said in any of the said representations or statements by the third party to the defendant in this case may very well have been an opinion, but in my view such did not involve a statement of any material fact or facts. That is the critical matter. No statement of any material fact as to the seaworthiness of *Shoal Harbour* at any material time was or could have been made by the third party to the defendant, in that, and I so find on the evidence, the third party did not know any more material

[1] [1939] O.R. 372.
[2] 28 Ch. D. 7.
[3] [1958] 1 Ch 636.

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facts regarding the seaworthiness of this barge *Shoal Harbour* at any material time than did the defendant.

In the result, therefore, the plaintiff is entitled to judgment against the defendant with costs and there shall be a reference to the Registrar to ascertain its damages.

The counterclaim is dismissed without costs.

The third party issue is dismissed with costs to the third party against the defendant.

BRITISH COLUMBIA ADMIRALTY DISTRICT

Victoria
1965
Nov. 30
Dec. 1
Dec. 7

BETWEEN:

GOLDCO IMPORTS LIMITED .....PLAINTIFF;

AND

THE SHIP *MEITOKU MARU*, MITSUI STEAMSHIP CO. LTD. and THE OWNERS AND CHARTERERS OF THE SHIP THE *MEITOKU MARU*. ...DEFENDANTS.

Shipping—Goods damaged in carriage—Liability of carrier—Proof of damages—Quantum of damages—Salvage offer—Whether required to be accepted—Onus of proof—Mitigating circumstances.

Cartons containing ladies' handbags purchased by plaintiff in Japan and carried by defendant ship to Vancouver were found to be crushed on arrival. Plaintiff had the cartons shipped unopened to Toronto where they were unpacked. It was found that 80% of the handbags could be repackaged at a cost of $894 for labour and $437 for boxes, but 20% were too badly damaged to be salable to plaintiff's ordinary customers, the large retail department stores. Plaintiff was offered a total of $3,751 by a salvage dealer for these bags, whose ordinary value, had they not been damaged, was $16,261. Plaintiff rejected the offer and destroyed the bags in the belief that placing the damaged handbags into trade channels would have an adverse effect on its business reputation, injure relations with its regular customers, and give rise to claims in respect of the damaged bags which as a business matter it would be unable to resist. Plaintiff did not however know anything about the salvage business and made no inquiries to ascertain whether the salvage sale could be made on conditions that would have avoided the above consequences.

Held: 1. It was not the act of a reasonable and prudent businessman to reject the offer of $3,751 for the damaged bags without inquiry as to the possibility of damage to plaintiff's business, and this sum must therefore be deducted from the damages to which plaintiff was otherwise entitled.

2. When a carrier delivers goods in a damaged state the damages recoverable are the difference between the net amount which could be

realized if the goods were sound and the net amount which could in fact be realized in the open market. *Wertheim v. Chicoutimi Pulp Co.* [1911] A.C. 301, per Lord Atkinson at p. 307, applied. Thus in this case plaintiff was entitled to be reimbursed (1) the cost of repackaging the bags which were undamaged, and (2) the difference between the amount plaintiff could have received for the badly damaged bags, *viz* $16,261, and the amount offered for them by the salvage dealer, *viz* $3,751.

3. The onus is on the consignee claiming for damage sustained by goods through the fault of a carrier to establish the extent of his loss, and there is no onus on the carrier to prove mitigation. The matter should however only be decided on the basis of onus in the absence of evidence. *Government of Ceylon v. Chandris* [1965] 3 ALL E.R. 48 per Mocatta J. at pp. 56-7, applied.

ACTION for damages.

W. J. Wallace for plaintiff.

J. I. Bird, Q.C. for defendant.

JACKETT P.:—This is an action for pecuniary loss flowing from physical damage caused to goods belonging to the plaintiff while they were being carried from Kobe in Japan to Vancouver on the ship *Meitoku Maru* under Bills of Lading issued by Mitsui Steamship Co. Ltd.

The goods consisted of ladies' handbags of a kind that the plaintiff had been, for some time, in the course of its business, purchasing in Japan, importing into Canada and selling to well known retail stores such as Eaton's, Simpsons, Birks, Hudson's Bay and Woodward's. The bags were packed in cartons. Each carton contained a number of bags. There were two separate shipments: one from Dodwell & Company, Limited of Osaka Japan, and the other from Sato Shun & Co. Ltd. of Kobe, Japan. Dodwell shipped 164 cartons and Sato Shun shipped 281 cartons. For the purposes of this judgment, all the cartons may be thought of as a single shipment.

Each Bill of Lading provided for the goods being carried to Vancouver. There was, however, on each Bill of Lading an indication that the ultimate destination was Toronto.

When the goods were unloaded at Vancouver, all, or practically all, the cartons had been "crushed". The "Reconditioning Over and Short Report", in each case, described the cartons when received from the ship as "crushed contents intact". The cartons were, nevertheless, shipped, unopened, by rail from Vancouver to Toronto.

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Upon arrival in Toronto, the cartons were unpacked and it was found that approximately 80 per cent of the bags could be sold by the plaintiff to its ordinary customers after replacing the paper stuffing in them and re-boxing them. The remaining 20 per cent of the bags had been crushed in such a way that they could not be restored sufficiently to be sold to the plaintiff's ordinary customers.

The plaintiff received an offer of 55¢ per bag, or $3,751.55, from a salvage dealer for the bags that were damaged too much to be reconditioned for sale to its ordinary customers. It decided, however, that it would not accept such offer. Instead it destroyed them. Indeed, it negotiated an arrangement with its insurer whereby it accepted a reduction in its insurance claim of 57½¢ per bag, or $3,880.68, in lieu of allowing the insurance company to have the bags as salvage.

At the opening of the trial, counsel for the defendants conceded "the issue of liability" and put the plaintiff to the proof of physical damage to the contents of the cartons and of the pecuniary loss flowing therefrom.

It was not seriously disputed by counsel for the defendants, after hearing the evidence, that the plaintiff had established that the value to the plaintiff in Toronto of the bags that were damaged during the voyage from Kobe to Vancouver, through the crushing of the cartons, (other than those that could be restored sufficiently so that they could be sold to the plaintiff's ordinary customers) would, if they had arrived in Toronto undamaged, have been $16,426.01 less 1 per cent thereof or $164.26 (having regard to its record of damage claims) or a net amount of $16,261.75.

It was conceded by counsel for the defendants during argument that the plaintiff's evidence had established that the plaintiff was entitled to be compensated for the cost of putting the undamaged bags into shape for delivery to customers, such cost being $893.77 for extra labour required and $437 for new boxes required to re-box such bags.

From these amounts of

value	$16,261.75
labour	893.77
boxes	437.00
totalling	$17,592.52

the defendants, claim that there must be deducted, to establish the plaintiff's pecuniary loss resulting from the physical damage to its goods,

(*a*) an amount of $575.38, which, according to the defendants, is the amount of a rebate of duty obtained from the Customs authorities in respect of the damaged goods,

(*b*) an amount of $3,751.55, being the amount for which the plaintiff could have sold the damaged goods to the salvage dealer, and

(*c*) an amount of $500.00 being the part of the cost of bringing all the goods from Vancouver to Toronto that is attributable to the damaged goods.

I find that it has not been established that the plaintiff did obtain, or could have obtained, any rebate of Customs duty, and I reject the defendants' contention that there should be a reduction of $575.38 with regard thereto.

With regard to the amount of $3,751.55, for which the plaintiff could have sold the damaged hand bags to a salvage dealer, the plaintiff's explanation of its decision to destroy the bags instead of realizing this amount is, in effect, that it was its business judgment that if it put the damaged handbags into trade channels it would have an adverse effect on its business that would outweigh the proceeds from the salvage sale. The evidence is that each bag had a label in it that showed the plaintiff's trade name in combination with an indication that the place of origin was Japan and that there was a legal requirement that the labels showing the foreign place of origin remain attached to the bags. The evidence is further

(*a*) that the plaintiff, as a matter of business policy, did not sell damaged goods and that, in its opinion, it would damage its business reputation if goods of the kind in question, of which it was a principal, if not the sole, distributor in Canada, were sold in a damaged condition with its trade name in them,

(*b*) that, in its opinion, it would damage its relations with its regular customers if such damaged goods were allowed to reach the public through second rate stores, and

(*c*) that, in its opinion, if they did reach the public, it would become subject to claims in respect of the

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damaged bags, which as a business matter it would be unable to resist.

In the absence of other evidence, I should have been inclined to reach the conclusion that the plaintiff's decision not to sell the damaged goods to the salvage dealer was a reasonable and prudent decision in the circumstances. The plaintiff's evidence as to the importance of these considerations from its point of view was not shaken, if indeed it was seriously challenged, on cross-examination. However, all these factors operated on the plaintiff's judgment because it was of the view that, if the salvage dealer had acquired the damaged bags, they "might have gone" to "sub-standard" stores who would sell them to the general public. Moreover, the plaintiff's evidence shows that it did not know anything about the salvage business, it did not know what disposition would have been made by the salvage dealer of the damaged bags and it made no inquiries to ascertain whether the salvage sale could be made subject to conditions that would have protected the plaintiff from the consequences that it apprehended. In my opinion, it was not the act of a reasonable and prudent business man to reject the possibility of salvaging an amount of $3,751.55 without any inquiry as to the possibility of doing so without serious danger of damage to its business and I so find.

I hold, therefore, that the amount of $3,751.55 must be deducted from the damages otherwise recoverable by the plaintiff.

With regard to the defendants' claim that there should be deducted from the damages otherwise recoverable $500.00 in respect of the cost of transporting the damaged goods from Vancouver to Toronto, I am inclined to the view that this proposed deduction disappears in the light of my disposition of the salvage item. There is no evidence to indicate that there would have been any possibility of developing a salvage sale if the damaged goods had been separated from the undamaged goods in Vancouver and only the undamaged goods had been shipped to Toronto. In any event, in the absence of some evidence to the contrary of which there is none, I am of opinion that the reasonable and prudent thing to do, when the checkers reported that the external cartons were crushed but the contents were intact, was to forward the cartons to the ultimate destina-

tion where the consignee would almost certainly be better able to form a judgment as to how best to deal with the matter rather than to employ somebody in Vancouver to open the cartons and to make a decision on behalf of the plaintiff as to what should be done. In coming to this conclusion I have in mind that it subsequently appeared that only 20 per cent of the total contents were seriously damaged and I infer from that that the condition of the cartons was such as to indicate that a substantial part of the contents was probably in good order.

There will therefore be judgment for the plaintiff for $13,840.97, being $17,592.52 less the unrealized salvage in the sum of $3,751.55.

I should add something, in view of the argument for the plaintiff, with reference to the legal principles applicable to the determination of the pecuniary loss suffered by the plaintiff as the result of delivery by the carrier of goods in a damaged state.

The general principle, as I apprehend it, is as stated by Lord Atkinson in *Wertheim v. Chicoutimi Pulp Company*[1], where he said "... it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed:". In determining what amount is required to achieve this end where there is a breach of a contract of carriage by failure to deliver goods in accordance with the contract, market value of the goods at the appropriate time and place is one of the most significant factors because, as Lord Atkinson said in the same judgment, "it is presumed to be the true value of the goods to the purchaser". In cases where the goods are not delivered because they have been destroyed, market value may be the measure of the loss. Where the breach consists in a failure to deliver at the contract date, the measure of the loss may be the difference between the value at the time when the goods should have been delivered and the value when they were actually delivered. This will not always be so as appears from the judgment of Lord Atkinson in *Wertheim v. Chicoutimi Pulp Company, supra,* at p. 309. Where, however, a carrier delivers goods in a

[1] [1911] A.C. 301 at 307.

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damaged state, I am of the view that the correct rule is as stated in Carver's "Carriage of Goods by Sea" 9th Ed. at p. 1047, where it is put that "the comparison is between the net amount which could be realized... if sound, and the net amount which could in fact be realized in the open market". Compare *Government of Ceylon v. Chandris*[1] per Mocatta J. at pp. 56-7.

This latter rule is the rule that I have endeavoured to apply in this case. Had the total shipment arrived undamaged, it would have had a value to the plaintiff in some amount that I need not determine. In view of the damaged condition of the shipment as a whole, before the plaintiff could dispose of the undamaged bags, which constituted 80 per cent of the total contents, it had to expend $893.77 for extra labour and to use new boxes that cost it $437, which amounts it would not have had to expend if the cartons had been discharged from the ship undamaged. Secondly, the plaintiff could realize from the remaining 20 per cent of the contents in their damaged state only $3,751.55 instead of $16,261.75, which is the net amount that the plaintiff could have realized from such goods if they had not been damaged. Such 20 per cent of the contents were therefore worth $12,510.20 less than they would have been worth if they had not been damaged. The total shipment in its damaged state had therefore a value that was less than the value that it would have had if it had not been damaged by an amount equal to the aggregate of those amounts, viz:

labour	$ 893.77
boxes	437.00
depreciation in goods that were damaged	12,510.20
	$ 13,840.97

I cannot accept the argument of counsel for the plaintiff, as I understand it, that a consignee is entitled, in the case of damaged goods, to the market value that the goods would have if they were undamaged subject to any "mitigation" and that the onus of establishing "mitigation" is on the carrier. None of the authorities cited by counsel for the plaintiff for that proposition, as I read them, relates to physical damage occasioned to goods while in the hands of a carrier. In my view, the onus is on the consignee claiming for damage sustained by goods through the fault of a

[1] [1965] 3 All E.R. 48.

carrier to establish the extent of his pecuniary loss arising from the damage for which the carrier is responsible, but the matter should only be decided on the basis of this onus of proof if there is no evidence upon which a finding can fairly be made. In this connection, I respectfully adopt that portion of the judgment of Mocatta J. in *Government of Ceylon v. Chandris, supra,* where, in discussing how an arbitrator should dispose of a question as to the amount that the charterers in that case could recover from the owner of the ship when it had been established that the damage to the cargo was in part due to breaches of contract by the charterers and in part to breaches of contract by the owner of the ship, he said at p. 57: ". . . the burden of proof rests on the claimants to prove the damages to which they are entitled over and above nominal damages. The umpire should also remember that he is entitled, like any tribunal, to draw inferences from primary facts. Only if, after the most careful consideration of the primary facts proved, he finds it impossible to draw any fair inference as to the quantity of damage caused by the claimants' breach or breaches of contract or by the respondent's breach of contract, should he finally fall back on the law as to the burden of proof as indicated above."

Counsel for the plaintiff relied on his submission as to the state of the law for the sole purpose of throwing on the defendants the onus of establishing that the plaintiff should, as a reasonable and prudent man of business, have sold the damaged goods to the salvage dealer, which onus, he submitted had not been discharged. On my view of the evidence, it was clearly established that the plaintiff did not take the steps that a reasonable and prudent man of business would have taken before deciding to destroy the damaged goods rather than to sell them.

Counsel for the defendants agreed that the judgment should include interest on the amount of the damages awarded at the rate of 4% per annum from the date of delivery and counsel for both parties agreed that this should be taken to be January 22, 1962.

The plaintiff will, therefore, have judgment in the sum of $13,840.97, with interest thereon at 4% per annum from January 22, 1962 to the date of judgment, and for its costs of the action to be taxed.

Windsor 1965
Sept. 3, 4
Ottawa
Dec. 9

BETWEEN:

GRAND MARAIS DEVELOPMENT COMPANY LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Company formed to acquire and develop building lots—Receipt of rental revenue—Whether company's sole purpose to receive rentals—Sale of properties—Whether profit income.

Appellant company was incorporated in November 1953 to acquire certain lots in a suburb of Windsor, Ontario, owned by a house building company, but the lands were not in fact transferred to appellant until September 1, 1955, the price being approximately $97,000. The controlling shareholder of appellant was also controlling shareholder of the vendor. The vendor had built a number of houses in the area and three buildings on the property transferred to appellant. These buildings were leased to commercial tenants and appellant derived $14,612 rent therefrom between September 1, 1955 and July 11, 1956. On that date it sold one of the buildings at a profit of $44,882. On December 31, 1956 it sold the second building at a profit of some $30,000 and on December 10, 1957 the third at a profit of $46,300. Appellant was assessed to income tax on these profits and appealed, contending that the properties had been purchased for the purpose of deriving rents therefrom and that it had been forced to sell because of financial pressure on appellant's controlling shareholder (who was involved in many business ventures) consequent on the institution of a tight money policy in the third quarter of 1955 which resulted in a serious restriction of credit.

Held, the appeal must be dismissed.

The inference to be drawn from all the evidence was that appellant's sole intention at the time it acquired the property was not necessarily to retain the property for the purpose of producing rental income but that it had in mind from the outset the possibility of the sale of the property in view of the likelihood of a retrenchment of its controlling shareholder's business enterprises. *Anderson Logging Company v. The King* [1925] S.C.R. 45; *Sutton Lumber and Trading Co., Ltd. v. M.N.R.* [1953] 2 S.C.R. 77, referred to.

APPEAL from a decision of the Tax Appeal Board.

P. N. Thorsteinsson for appellant.

F. J. Dubrule and *T. G. Zuber* for respondent.

CATTANACH J:.—This is an appeal from a decision of the Tax Appeal Board[1] dated September 13, 1963 which dismissed appeals taken by the appellant herein against

[1] 33 Tax A.B.C. 246.

income tax assessments levied upon it for its 1956, 1957 and 1958 taxation years.

The Minister in assessing the appellant for its three taxation years in question added to the appellant's declared income in the respective years amounts of $44,881.80, $30,070.22 and $46,300 realized on three sales of land on July 11, 1956, December 31, 1956 and December 10, 1957 comprising part of property bought by it on September 1, 1955 as being profit from a business within the meaning of sections 3 and 4 of the *Income Tax Act* and the extended meaning of "business" as defined by section 139(1)(*e*) to include an adventure or concern in the nature of trade.

As against this, the appellant contends that its intention in purchasing the property was to retain and hold the same and to further develop it, as a long-term investment for the purpose of receiving rental income therefrom and that, accordingly, the gain realized by the appellant from the sale of the major portion of the property in three transactions was merely the realization of a capital asset.

The narrow issue is, therefore, whether the appellant when it purchased the property on September 1, 1955, had as its exclusive purpose the retention thereof as a source of rental income or whether that was not its exclusive purpose at the time of purchase of the property but that the appellant also entertained as one of its possible purposes the sale of the property.

If the first alternative were the case, then the profit from the sales would not be taxable, but if the second alternative were the case, then the resultant profit is clearly taxable.

The onus of disproving the Minister's assumption that the latter was the case in assessing the appellant as he did, falls on the appellant. To determine whether the appellant has discharged that onus, it is necessary to examine all the circumstances leading to the appellant's purchase of the property and those surrounding the appellant's disposition of the major portion thereof. The question of fact as to what the purpose of the appellant was in acquiring this property is one that must be decided after considering all the evidence.

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The appellant is a joint stock company incorporated as a private company, pursuant to the laws of the Province of Ontario by Letters Patent dated November 30, 1953 for the following purposes and objects:

> To acquire, by purchase, lease, exchange, concession or otherwise, and to own, operate, maintain, rent, lease, mortgage or otherwise charge or encumber lands and premises situate in the Township of Sandwich West, in the said County of Essex, and being composed of lots 700 to 716 inclusive according to Registered Plan 1343 and lots 307 to 309 inclusive according to Registered Plan 1056 in the said Township of Sandwich West and such rights-of-way and easements as may be appurtenant thereto or enjoyed therewith and such other lands and premises as may be contiguous or adjacent thereto or in the vicinity thereof or wherever situate which may be used in conjunction therewith, and to build upon, develop and improve the said lands and premises or any part or parts thereof;

The authorized capital of the appellant consisted of 900 non-cumulative redeemable preference shares of the par value of $100 each and 10,000 common shares without nominal or par value which common shares might be issued for a consideration not to exceed, in the aggregate, an amount or value in the sum of $10,000.

It would appear that at no time pertinent to the present appeal, had any of the preference shares been issued. Prior to the relevant times, all of the 1000 common shares were issued for a consideration of $1,000 and they remained issued and outstanding during all relevant times. Of the common shares, 85 per cent or 850 were issued to Mr. Robert Slutzky and the remaining 15 per cent or 150 common shares were issued to David Richardson, now deceased, who had acted as the solicitor and secretary of the appellant, and Alec T. Kashkawal. Whether Mr. Slutzky's shares were issued as fully paid and what amount or value he paid thereon is conjectural but such circumstances are not material to a consideration of this appeal.

Mr. Slutzky was the president of the appellant company at all relevant times.

Mr. Slutzky was also the president and the majority shareholder of Economy Home Builders of Windsor Limited (hereinafter referred to as "Economy Windsor") and Economy Home Builders of London Limited (subsequently referred to as "Economy London"). As is apparent from the corporate names, these two companies were engaged in the business of purchasing real estate, subdividing the real

property so purchased into building lots, erecting houses thereon and selling the same, in the cities of Windsor and London and their immediate environs.

It was Mr. Slutzky's invariable practice, upon the advice of his solicitor and accountant, when a parcel of real estate was purchased, to incorporate a company and vest the property acquired in the company so incorporated to be held for and ultimately used by the companies engaged in actual building.

Mr. Slutzky, though resident in Detroit, Michigan, conducted his business enterprises in the Windsor area. He began his business career at a tender age by working with his father in a linen supply business. On his father's death he continued the conduct of that business. Prior to 1944 the linen was laundered by a local laundry. In 1940 Mr. Slutzky bought the laundry. In the ensuing years he acquired several other laundries and cleaning plants in the City of Windsor.

In 1949 he embarked upon a residential home building business at which time Economy Windsor was incorporated to conduct that business and in 1953 Economy London was incorporated to conduct a similar business in the London area.

The lands which give rise to the subject appeal were acquired pursuant to agreements entered into by Economy Windsor in 1951 and were situated on Grand Marais Road, a concession road, in the Township of Sandwich West, a suburb of Windsor. In 1950 Economy Windsor built and sold a number of houses on land in this immediate area which had been, prior thereto, devoted to exclusively agricultural uses. Because of the residential development of the area Mr. Slutzky foresaw the possibility of commercial development on Grand Marais Road to supply services to residents which he foresaw as a likely main traffic artery.

Titles to the lands in question were vested in Economy Windsor by four different deeds as follows:

In 1951, Canada Trust and Deslippe to Economy Windsor lots, 704, 716 and 730.

In 1953, Canada Trust to Economy Windsor lots, 705 to 711 and 725 to 729.

In 1953 Yasbeck to Economy Windsor lots, 307 to 309.

In 1955, Canada Trust to Economy Windsor lots, 701 to 703, 712 to 715, 721 to 724 and 731, 732 and part of 733.

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Lots 701 to 716 were facing Grand Marais Road on the South side and lots 721 to 733 were to the rear of the lots facing on the street. Lots 307 to 309 were on the North side of the street and face thereon.

While the actual transfers were not effected to Economy Windsor until the years indicated, nevertheless, Mr. Slutzky testified that there was a firm commitment with the vendors who were agreeable to the lots being picked up whenever Economy Windsor required them.

Economy Windsor built three buildings on the property. The first was built in 1952 and portions of it were leased to a confectionery, a barber shop and a bank, respectively. In 1955 a second building was built. A part of it was used as the office of Economy Windsor (that part produced no rental return). Other parts were leased as a hardware store and a cabinet shop, respectively. There were three residential apartments on the second storey. In 1953, a third building was erected by Economy Windsor. It was leased to a supermarket. In 1955 the supermarket was enlarged and an alteration was made to the premises occupied by the hardware store.

The leases for the premises were negotiated by and entered into by Economy Windsor for fixed terms, usually between five and ten years, with provisions for increased rentals at specified intervals during the term of the lease or for negotiations for increased rentals.

While the appellant was incorporated for the objects and purposes above indicated on November 30, 1953, the lands described in the said purposes and objects were not transferred to the appellant until September 1, 1955. On that date the appellant purchased from Economy Windsor the lands described in its objects, with minor variations, together with buildings erected thereon by Economy Windsor at a total price of $97,282.95, being the cost of the land and buildings, less depreciation of the buildings, as carried on the books of Economy Windsor. Payment was effected by the appellant to Economy Windsor by a cheque for $1,000, the assumption of a first mortgage of $20,000 bearing interest at 5½ per cent and by giving back a mortgage to Economy Windsor with semi-annual payments of

$1,250 for the first five years and $2,500 in the succeeding years with interest at 2 per cent. The amount of the mortgage so given back was $76,797.54 after adjustments.

The leases were assigned by Economy Windsor to the appellant which collected the rentals from the tenants from September 1, 1955 forward. The rental income received by the appellant for the period between September 1, 1955 (when the property was acquired by it) and July 11, 1956 (when the supermarket was sold) was $14,612.10 which would be more than sufficient to meet the commitment on the two outstanding mortgages which I compute to be roughly $3650 leaving a net income of approximately $11,000 less the usual maintenance and like expenses.

In his testimony, Mr. Slutzky explained that the reason the lands acquired by Economy Windsor were not transferred to the appellant immediately upon its incorporation in November 1953, despite his instructions to that effect, was either oversight or neglect on the part of his solicitor, the late Mr. Richardson, who was also the secretary and a shareholder of Economy Windsor. I cannot subscribe to such explanation. It is evident that Economy Windsor did not acquire title to certain of the lots which were to be transferred to the appellant until 1955 and accordingly no such imputations can be justifiably attributed to Mr. Richardson.

The appellant, upon its incorporation, performed corporate acts but did not embark upon the objects for which it had been incorporated until September 1, 1955. In the interval it lay in a state of suspended animation.

In 1955 Mr. Slutzky and an associated shareholder in Economy London agreed to rearrange their holdings of shares in Economy Windsor and Economy London so the latter became a shareholder in Economy Windsor to the extent of 20% and Mr. Slutzky's shareholding in Economy London was increased proportionately. Since such shareholder was not to participate in the property on Grand Marais Road, this circumstance precipitated the transfer of that land to the appellant on September 1, 1955.

Mr. Slutzky further testified that there was a two-fold purpose to be accomplished in transferring the commercial property in question to a corporate entity created to receive it, in this instance the appellant herein. These avowed

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purposes were (1) to separate what he termed "commercial long time investment property" from the trading assets of Economy Windsor and (2) to separate the commercial property from the trading liabilities of Economy Windsor and from the land commitments and liabilities involved in the purchase of land by Economy Windsor.

The principal of Mr. Slutzky's many enterprises was undoubtedly that of home building conducted by Economy Windsor and to a lesser extent by Economy London. The financing of the operations of these respective companies was by means of a line of credit or overdraft from the companies' banker to the total amount of $350,000, $250,000 being allocated to Economy Windsor and $100,000 to Economy London.

Mr. Slutzky stated that the building companies enjoyed their peak production in 1955 and at that time acquired by agreements for purchase lands ten times in excess of their normal requirements. As intimated before, it was the invariable practice of Mr. Slutzky, when land had been purchased for the eventual use by the home building companies, that such land was vested in a separate corporate entity set up to purchase and hold such lands. I assumed from the evidence of Mr. Slutzky that the funds for the initial payment on property so purchased were loaned by Economy Windsor or Economy London to the holding company and that subsequent payments, when they fell due, were also advanced by Economy. Mr. Slutzky also stated that in 1955 Economy Windsor was over extended and liable for payments falling due in 1956 which he estimated as amounting to between $750,000 and $1,000,000. At this point I must confess that I was unable to obtain a clear and precise statement of the exact commitment of Economy Windsor and its associated holding companies and what companies were responsible for payments on the purchase of lands, or whether such purchases could be abandoned with a consequent loss of deposits or payments already made since Mr. Slutzky persisted in talking in generalities. He included in his estimate of liabilities an obligation to install a sewage treatment plant in accordance with the regulations of Central Mortgage and Housing Corporation prior to the commencement of a house building project in which Economy Windsor was to engage

thereby increasing the cost thereof by $125,000. However, I am certain that Economy Windsor and its associated companies were faced with substantial liabilities in 1955 which by reason of their precarious financial position and the under capitalization of Economy Windsor they would have great difficulty in meeting.

As mentioned before, the building operations of Economy Windsor and Economy London were conducted by means of bank financing which the bank never permitted to exceed $350,000 and which the two companies utilized to the maximum. It was established that the constant practice throughout 1955, which was a peak year in the companies' affairs, officers of Economy Windsor were received in the bank after normal banking hours to make deposits from the proceeds of sales received during the day to cover cheques which had been written so as to ensure that the bank overdraft did not exceed the prescribed maximum. Furthermore, the obligations of Economy Windsor to its bank were guaranteed by each and every company in the Economy group, including the appellant, as well as by Mr. Slutzky personally.

Mr. Babcock, the manager of the branch of the bank through which Mr. Slutzky conducted his business as well as that of the Economy group of companies testified that from 1950 to 1955 the account was considered as satisfactory, but also testified that the account was under pressure for some time prior to the spring of 1955. He added that because of a tight money policy beginning in the third quarter of 1955 which resulted in a definite restriction of credit, the Economy group account was reviewed. Mr. Slutzky was told by him that the operations of the companies were not generating sufficient money to meet the payments and he was accordingly advised to sell some properties in order to place Economy Windsor in a better financial position. In June 1956 Mr. Slutzky and Mr. Babcock attended at the head office of the bank, which was concerned about the standing of the account, at which meeting officers of the bank insisted that Mr. Slutzky begin an immediate policy of retrenchment.

This Mr. Slutzky did. He conducted what might be termed a salvage operation abandoning some properties, disposing of other properties and businesses and attempting to raise money by placing mortgages on still others in order

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to cut down on liabilities and raise further funds, the whole to be devoted to shoring up the financial position of and maintaining Economy Windsor as a going concern.

Included in this realization of assets was the property held by the appellant. The buildings on the lands owned by the appellant occupied one-third of the total area and the remaining two-thirds was vacant land. If I understood the evidence correctly, the land upon which the buildings stood was subject to the first mortgage in favour of Sterling Construction Co. Ltd. in the amount of $20,000 and the balance was subject to the mortgage to Economy Windsor in the amount of $76,797.54. However, prior to the meeting at the head office of the bank, Mr. Slutzky had already arranged for a short term mortgage on the vacant property held by the appellant in the amount of $25,000 at a very high rate of interest, the proceeds of which were turned over to Economy Windsor by the appellant.

The tenant of the supermarket had previously exhibited an interest in purchasing the premises that it occupied but this was not considered by the appellant.

However, on July 11, 1956 the appellant sold that part of its property to the proprietor of the supermarket, through a nominee, whereby the appellant realized a profit of $44,-881.80. At the time of this sale the purchaser was given the opportunity of first refusal on a further portion of the appellant's property which it wished to purchase but was unable to do so at that time for lack of funds.

On December 31, 1956 the appellant sold a further part of its property to Spence's Markets Ltd. and realized a profit of $30,070.22.

On December 10, 1957 the firm who was the purchaser in the transaction of July 11, 1956 exercised the right of first opportunity to purchase further property that it might require, given to it by that transaction. From this sale the appellant realized a profit of $46,300.

The Minister added the profits from these three transactions to the appellant's incomes for the years in question, which additions constitute the basis of the present appeal.

The balance of the property, being three vacant lots on the North side of Grand Marais Road, remained in the possession of the appellant and these lots were subsequently expropriated for a municipal library.

The proceeds of these three sales, if received in cash, were loaned to Economy Windsor and, if received in securities, were made available to Economy Windsor to improve its financial position with its banker by way of reduction of its indebtedness or collateral.

During the trial I raised with counsel the question whether the three sales above mentioned might be subject to different considerations. They both took the position that when the appellant's decision to sell was taken it was tantamount to the entire project being liquidated and the second and third sales followed consequentially upon the first. Therefore, the three sales were part and parcel of one overall decision by the appellant and each individual sale was a piecemeal realization of the appellant's decision to sell the whole or as much of the whole as was possible. Each of the three sales is accordingly subject to the same considerations and each forms, in effect, steps in one overall plan.

A corporation, being an incorporeal body, can only act through the agency of natural persons. In the present instance, throughout the existence of the appellant company, its interests and its intentions were identical with those of Mr. Slutzky, its principal shareholder and its president. There is no question that his decisions became the decisions of the appellant and were implemented by it. Similarly the intention and decisions of Economy Windsor were also identical with those of Mr. Slutzky as were those of all other companies in the Economy Group.

On behalf of the appellant it was submitted that its intention when purchasing the commercial buildings in question and the adjacent land was to retain and hold those properties for rental income and to further develop the lands for that same purpose and that such an intention is confirmed by the purposes and objects as set forth in the Letters Patent incorporating the appellant under date of November 30, 1953. Although the actual purchase of the lands by the appellant did not occur until September 1, 1955, Economy Windsor erected revenue producing buildings thereon so that what the appellant did acquire was revenue producing and the appellant did, in fact, receive revenue therefrom. As further indications of such an intention, reference was made to the long term leases entered into by Economy Windsor with provision for increased

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rentals and that when it became necessary to raise funds to relieve Economy Windsor from its financial straits resort was first made to raising funds by way of mortgage.

For such reasons it was submitted that there was no evidence of intention to sell the property at the time it was acquired by the appellant and that the decision to sell was occasioned by the dire and unforeseen financial stringencies which affected Slutzky in his capacity as principal shareholder of Economy Windsor thereby depriving him of the "pension" he sought to secure for himself through the medium of the appellant.

It is axiomatic that a taxpayer's intention is most accurately deduced from what it actually did. Here the appellant acquired the property on September 1, 1955 and shortly thereafter sold the same. The logical inference to be drawn from such specific and incontrovertible facts is that the possibility of sale was present from the outset unless some convincing reason is advanced to explain the sale. In so stating I have not overlooked the many circumstances cited as *indicia* of the appellant's intentions to retain the property, to derive revenue therefrom but, as is so often the case, these circumstances are susceptible of interpretation either way and are accordingly not conclusive.

As Duff J. pointed out in *Anderson Logging Company* v. *The King*[1], if a transaction is within the business of the company as contemplated by the objects, then *prima facie* any profit derived is profit from the business of the company, the company being presumed to have a business and to carry it on. However, in the present appeal the exact converse is the case. The purposes and objects of the appellant are those of an investment company. The question to be determined is not what the appellant was authorized to do by its Letters Patent, but rather what, in fact, it did do (*Sutton Lumber and Trading Co., Ltd.* v. *M.N.R.*)[2].

As intimated before I cannot accept the explanation put forward by Mr. Slutzky that the delay from November 30, 1953 to September 1, 1955 in the appellant's purchase of the property as being attributable to his solicitor's neglect. I am inclined rather to attribute it to the circumstance that title to the property was not acquired until 1955 and that

[1] [1925] S.C.R. 45. [2] [1953] 2 S.C.R. 77.

at that time another shareholder was to participate in Economy Windsor, but not in the commercial property, for which reason the property was then transferred to the appellant. Therefore, the material date at which the appellant's intention must be determined is September 1, 1955, being the date of the actual acquisition of the property rather than the date of incorporation on November 30, 1953.

Neither do I find convincing Mr. Slutzky's explanation of vesting the property in the appellant to protect it from the liabilities of Economy Windsor because immediately upon the property being transferred to the appellant, the appellant joined in a guarantee to the bank for Economy Windsor's overdraft as had all other companies in the group.

In order to obtain a realistic appreciation of the circumstances it is impossible to look solely to the activities of the appellant company, but rather the activities of all companies in the group must be considered together with those of Mr. Slutzky.

Because of the precarious financial position of the Economy group at the time of the acquisition of the property in question, which precarious position was the direct cause of the sale, and because of the sale of the property within ten and one-half months after its acquisition, I conclude that the possibility of sale was present from the outset. From this conclusion it follows that the reason advanced for the sale must be considered. The reason so advanced was the unforeseen and stringent financial straits in which Economy Windsor found itself and the consequent pressure from its bankers for that company to assume a more liquid position resulting in a general retrenchment of Mr. Slutzky's enterprises as a whole and a realization of as many assets as possible to preserve Economy Windsor which was Mr. Slutzky's principal enterprise.

However, I cannot accept the submission that this eventuality was either sudden or unforeseen. Economy Windsor in conducting its business operations, did so to the very maximum of its banking credit. Its difficulty with its overdraft was of a continuing nature. The bank manager testified that the account had been under constant pressure

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throughout 1955 and accordingly it does not follow that the pressure from the bank was suddenly exerted at the time of the meeting at the Head office in June 1956. Mr. Slutzky was aware of his precarious financial position and it accordingly follows that the likelihood of the guarantors of the bank's indebtedness being called upon was neither remote nor can it be said that the pressure brought to bear by the bank was unexpected.

The cumulative effect of all surrounding circumstances leads me to the inference that the appellant's sole intention was not necessarily the retention of the property for the purpose of producing rental income, but that the possibility of the sale of the appellant's property must have been present from the outset in view of the likelihood of it becoming necessary to effect a retrenchment of the Economy group of companies of which the appellant formed a part.

After having given careful consideration to all the evidence, I am not satisfied that there is a balance of probability that the appellant acquired the property for the purpose of deriving rental income therefrom to the exclusion of any purpose of disposition at a profit. Accordingly it cannot be said that the Minister was not warranted in assessing the appellant as he did.

The appeal is, therefore, dismissed with costs.

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Winnipeg Nov. 22, 23

Ottawa Dec. 9

BETWEEN:

HARRY WALSH .....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ..RESPONDENT.

AND BETWEEN:

ARCHIE ROBERT MICAY .....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ..RESPONDENT.

Income tax—Rentals from apartment buildings and shopping centre—Whether income from property or business—Whether services provided tenants affected character of revenue—Capital cost allowances—Income Tax Regs. 1100(3), 1104(1)(a).

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On November 1, 1960, appellants (who were partners in a firm of solicitors) and two other persons purchased for $2,712,650 two large apartment buildings and a shopping centre in a Winnipeg suburb. The properties were managed for the owners by a management company. Tenants of one or both of the two apartment buildings were supplied with heat, electric stoves and refrigerators, carpets and drapes, parking space with block heaters, carpeted hallways, window washing, repair of electric and plumbing facilities, decorating as required, a self-operating elevator, coin-operated washers and dryers, and a telephone in the entrance lobby. Tenants of the shopping centre were supplied with heat and air conditioning and could for a consideration affix a sign to the free standing electrical neon sign.

Appellants claimed capital cost allowances on the properties for the whole of 1960, but the Minister would allow capital cost allowances for two months only, i.e. from the date of purchase of the properties, on the assumption that the income from the properties was income from a business and that capital cost allowances were limited to two months by virtue of secs. 1100(3) and 1104(1)(*a*) of the *Income Tax Regulations*.

Held, allowing the taxpayers' appeals, the income was income from property rather than from a business. The extent and nature of the services provided tenants did not affect the rentals received with a trading character. The rentals received represented payments for occupation of the premises, the additional services provided tenants being relatively insignificant. *Wertman v. M.N.R.* [1965] 1 Ex. C.R. 629, referred to.

APPEALS from decisions of the Tax Appeal Board.

J. F. O'Sullivan for appellants.

T. E. Jackson and *R. A. Wedge* for respondent.

CATTANACH J.:—These are appeals from decisions of the Tax Appeal Board[1], dated June 25, 1964, upholding assessments for income tax of the appellants for their respective 1960 taxation years. By order, upon consent, dated October 21, 1965 the appeals were tried together with common evidence.

The appellants carry on their profession in the City of Winnipeg as the senior members of a firm of barristers and solicitors. The appellants, as tenants in common and not in partnership, each acquired an undivided one-sixth interest, together with two other persons who each acquired a one-third interest, in three properties at a total purchase price of $2,712,650.

The three properties so purchased were (1) Park Towers Apartment, situated at 2300 Portage Avenue in the City of St. James, Manitoba, a part of greater Winnipeg, consisting

[1] (1964) 36 Tax A.B.C. 5, 16.

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of land and a building containing 121 suites and the chattels therein such as washers, dryers, refrigerators, stoves, carpeting, drapes and the furniture of one suite, (2) Silver Heights Apartment, situated at 2255 Portage Avenue, also in the City of St. James, consisting of land and a building thereon containing 136 suites and chattels therein being washers, dryers, refrigerators, stoves and like chattels, and (3) Silver Heights Shopping Centre, situate at 2281-2299 Portage Avenue, also in the City of St. James, consisting of land and a commercial building thereon and containing 18 stores and offices and chattels therein or thereabout being air conditioners, a neon electric advertising sign and other like chattels.

The vendor of all the aforesaid properties and chattels was Silver Heights Development Co., Ltd.

The agreement of purchase was entered into on September 22, 1960 with closing date of November 1, 1960. On the closing date, in accordance with an agreement among the parties, title to the properties was taken in the name of Burnell Investments Ltd., a corporation controlled by the appellants, for the purpose of avoiding the personal covenants under first mortgages to be assumed by the purchasers. On that day Burnell Investments Ltd., executed and registered transfers to each of the actual purchasers with respect to the real properties and executed bills of sale with respect to the chattels. Separate certificates of title were issued to each of the appellants in accordance with their respective interests in the land.

By an agreement dated October 12, 1960 between Silver Heights Development Co. Ltd., the vendor, and Burnell Investments Ltd., the vendor undertook to manage the properties for a period of five years commencing on November 1, 1960. This agreement was not assigned by Burnell Investments Ltd. to the appellants and the other two co-owners of the properties. However, Silver Heights Development Co., Ltd. did manage the properties, in all aspects, on behalf of the appellants and the other two co-owners thereof in accordance with the precise terms of its agreement with Burnell Investments Ltd. It secured the tenants, executed all the leases, collected all the rents, hired all necessary personnel, paid all maintenance expenses, made the payments under the mortgages from the rental proceeds received and remitted the balance directly to each

undivided owner proportionately to the interest of each of them. There were no occasions after November 1, 1960 when the monthly rental income collected by Silver Heights Development Co., Ltd. from the properties was insufficient to meet all expenses and mortgage payments. If there had been deficiencies the appellants and the other two owners would have been called upon to pay their proportionate share thereof.

In accordance with the management agreement all matters of policy governing the operation of the premises were subject to the approval of the owners and the management agent was not to incur any unusual expense in respect of repairs, renovations or improvements to the premises without the approval of the owners first being obtained.

The management agent undertook to and did furnish at the end of each month statements and vouchers showing the income and expenditures incurred. A firm of chartered accountants was employed to audit and verify the monthly statements of the rental agent on behalf of the appellants and the other two owners. The remuneration of Silver Heights Development Co., Ltd. for its management services was computed at 2½ per cent of all rental monies received by it. This remuneration worked out to a sum less than that paid for salaries of the janitors, who were employees of a firm providing janitorial services, and which janitors were supplied with living accommodation in the premises.

With respect to Park Towers Apartments the tenants therein were supplied with heating, electric stoves and refrigerators, carpeting in the living rooms and hallways in all suites and drapes upon the windows. The common hallways were carpeted and were maintained by the janitorial service employed. There was inside parking space provided for the tenants' automobiles as well as outside parking space with electrical plug-ins for block heaters with additional charges for such facilities. In winter the outside parking area was kept clear of snow at the expense of the landlords. The landlords also paid for window washing services, normally every six months, as contracted for by the management agent. The electrical appliances, plumbing and like facilities were repaired and maintained by the landlords. Decorating was done as required. The building contained a self-operated elevator and coin-operated washers and dryers were located strategically on each floor for

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the convenience of the tenants. A telephone was located in the entrance lobby for the convenience of the tenants. The Park Towers apartment was described as a high rise apartment commanding a high rental. I would assume that drapes were supplied by the landlords to ensure a uniform and thereby attractive external appearance to the building.

Similar services were supplied to the tenants of Silver Heights apartment, except that the living rooms and hallways of the suites were not carpeted, there was no elevator nor telephone in the entrance lobbies, nor was there an indoor parking area and the coin-operated washers and dryers were in one central location rather than on every floor. The rentals commanded for suites were more moderate than those in the Park Towers apartment.

The tenants of the shopping centre were supplied with heat and air conditioning. They were entitled to affix a sign to the free standing electrical neon sign for which an additional charge was exacted.

The appellants still own their respective one-sixth interests in the three aforesaid properties and have subsequently purchased the interest of one of the other two original co-owners.

In completing their respective income tax returns for their 1960 taxation years the appellants claimed an allowance in respect of the capital cost on the two apartment buildings and shopping centre for the entire twelve months of the taxation year.

By notice of re-assessments mailed June 19, 1960 the Minister allowed only 61 days out of 366 days of the capital costs allowance so claimed against the rental income.

The appellants filed a Notice of Objection. After considering the facts and reasons set out in the Notice of Objection the Minister confirmed the assessment as having been made in accordance with the provisions of the *Income Tax Act* and in particular on the ground that

> the allowance in respect of the capital cost of the depreciable property *of the business* known as Park Towers, Silver Heights Apartments and Silver Heights Shopping Centre has been determined in accordance with the provisions of subsection (3) of section 1100 of the Income Tax Regulations as the 1960 taxation year of the said business was less than 12 months in duration as defined by paragraph (*a*) of subsection (1) of section 1104 of the said Regulations.

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The provisions of sections 1100 (1)(*a*), 1100 (3) and 1104 (1) upon which the Minister based his contentions read as follows:

1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

(*a*) such amounts as he may claim in respect of property of each of the following classes in Schedule B not exceeding in respect of property

(iii) of class 3, 5%

of the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

. . .

(3) Where a taxation year is less than 12 months in duration, the amount allowed as a deduction under paragraphs (*a*), (*d*) and (*h*) of subsection (1) shall not exceed that proportion of the maximum amount allowable that the number of days in the taxation year is of 365.

. . .

1104. (1) Where the taxpayer is an individual and his income for the taxation year includes income from a business the fiscal period of which does not coincide with the calendar year, in respect of the depreciable properties acquired for the purpose of gaining or producing income from the business, a reference in this Part to

(*a*) "the taxation year" shall be deemed to be a reference to the fiscal period of the business, and

(*b*) "the end of the taxation year" shall be deemed to be a reference to the end of the fiscal period of the business.

. . .

Under section 1100 (3) it is provided that, if a taxation year is less than 12 months in duration, the amount allowed as a deduction under section 1100 (1) (*a*) should not exceed that proportion of the maximum amount allowable that the number of days in the taxation year is of 366 which in the present case would be 61 days.

However, the present case is one where individuals acquired income producing properties during the course of the year. Since section 139 (2)(*b*) of the *Income Tax Act* provides that the taxation year of an individual is the calendar year, section 1100 (3) of the Regulations would not apply. Accordingly, an individual acquiring income producing property during the year is entitled to claim capital cost allowance for the entire year. But under section 1104 of the Regulations where income from a business is included in an individual's income and the fiscal period of the business does not coincide with the calendar year then the words, "taxation year" in the Regulations are deemed

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to be a reference to the fiscal period of the business. Therefore if an individual begins to carry on a business the fiscal year of which is not a calendar year then capital cost allowance on the depreciable assets acquired to carry on that business would be pro-rated according to section 1100 (3) of the Regulations.

Thus the question for determination resolves itself into the very narrow one as to whether the income received by the appellants was income from a business, as contended by the Minister, in which event the appellants would only be entitled to 61/366ths of the capital cost allowance or whether it was income from property, as contended by the appellants in which event they would be entitled to deduct a capital cost allowance for the entire year.

In *Henry Wertman v. M.N.R.*[1], Thurlow J. had occasion to consider the question of whether receipts from the letting of real property are to be considered to be receipts from a business or receipts from property. He carefully reviewed and analyzed the leading United Kingdom and Canadian cases on the subject. He was particularly conscious of the fact that in Great Britain, income from real property is computed for taxation purposes on a special basis prescribed under Schedule A and that because of this, cases in which the revenue authorities have sought to bring the rentals of real property into the computation of profits under Schedule D as profits of a trade are not strictly parallel and thus not applicable in considering a case arising under the provisions of the *Canadian Income Tax Act*. He did conclude, however, that they offer light on the subject of what is income from property as distinguished from income from trading.

He concluded that when the question arises it is one that must be resolved on the facts of the particular case. I am in complete agreement with this conclusion and the reasoning by which it was arrived at.

In my view, *prima facie* the perception of rent as land owner is not the conduct of a business, but cases can arise where the extent of the various services provided by the landlord under the terms of a leasing contract and the time and labour devoted by him are such that the rental paid by the tenant can be regarded as in a substantial measure

[1] [1965] 1 Ex. C. R. 629.

payment for such services as well as for the use of the property and the interrelation of the use of the premises with the use of such services may be so extensive that the whole sum could readily be regarded not as mere rental of property, but as true receipts of a business of providing apartment suites and services to tenants. It is a question of fact as to what point mere ownership of real property and the letting thereof has passed into commercial enterprise and administration.

In the present case I do not consider it necessary to decide whether the appellants engaged Silver Heights Development Co., Ltd. as their management agent with respect to the properties in question in the capacity as agent or independent contractor. It is obvious that if the management agent had not been engaged then the services undertaken by it would have to have been performed by the appellants personally or in such proportions as might be agreed upon among themselves and the other two co-owners.

In my opinion the question remaining to be determined is whether the extent and nature of the services provided to tenants as above outlined can affect the rentals received with a trading character as distinct from mere income receipts from property.

On the evidence I think that the rentals received by the appellants should be regarded as having accrued to them as owners of the properties rather than as traders and that the rentals accrued from use by the tenants of the property in that the rentals represent payments for their occupation thereof rather than from a combination of such use and the other services from which the tenants benefitted. I regard the additional services which were provided to tenants as being relatively insignificant and insufficient to convert the appellants from land owners into the conductors of a business. The services such as the provision of heat, electric stoves and refrigerators, janitorial services to the common hallways, snow removal, carpeting in some rooms of the suites and drapes for windows are those which tenants have come to expect and are those which landlords normally provide in living accommodation of this kind. These are refinements offered to the tenants in connection with the occupation of suites and, in most instances, are also

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property for the use of which, along with the suites themselves, rent is paid. The heating of the building and snow removal are ancillary to the property itself and are exercised in the landlords capacity as owner of the property rather than as a service to tenants although the tenants incidentally enjoy the benefits thereof. While the nature of services provided has a bearing on the question, the services above described are not such as would characterize the rental received therefor as income from a business rather than income from property, as services such as the provisions of breakfast, maid, linen, laundry and such like services might do.

The additional charges imposed upon tenants for the use of either indoor or outdoor parking space is also income which accrues from the occupation of property.

Accordingly, I am of the opinion that the income received by the appellants from the operation of Park Towers Apartment, Silver Heights Apartment and Silver Heights Shopping Centre was not income from a business, but was income from property.

In my view, the appelants were, therefore, entitled to a capital cost allowance with respect to the three buildings owned by them from November 1, in the 1960 calendar year, for the entire twelve months of that year.

The appeals are, therefore, allowed with costs and the assessments are referred back to the Minister for reconsideration and re-assessment in accordance with these reasons.

Winnipeg 1965 Nov. 24, 25 Ottawa Dec. 8

BETWEEN:

IDEAL INVESTMENTS LTD. .....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ..RESPONDENT.

Income tax—Profit on sale of land—Company formed to deal in land—Series of purchases and sales—Whether trading transactions—Intention—Whether properties purchased as investment or for sale.

Appellant company was incorporated in Manitoba in 1956 with the stated objects, *inter alia*, of leasing and dealing in real property. Between 1956 and 1962 appellant purchased 11 properties in Winnipeg in close proximity to commercial districts which were rapidly being encroached upon by commerce, and in addition a 219 acre farm a short distance from Winnipeg. In 1956 and 1957 the appellant sold two city properties, which were virgin land, at a profit, and paid income tax thereon. In 1959 it sold at a profit three residential properties which

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were under lease to rooming-house keepers and paid income tax thereon. In 1959 it also sold at a profit 85 acres of its farm which was under lease and paid tax thereon. In 1962 it sold at a profit three properties. One of these had originally been acquired in a run-down condition and been repaired and leased to a grocer. The second property, which adjoined the first, had been acquired by appellant with the intention of providing sufficient area for an apartment or commercial site, and it and the third property were both under lease. Appellant was assessed to tax on its profit from the sale of these properties and appealed, contending that the properties had been purchased as investments and not for sale.

Held, dismissing the appeal, the whole of the evidence indicated that the properties were acquired with the over-all intention of turning them to account for profit.

APPEAL from a decision of the Tax Appeal Board.

C. V. McArthur, Q.C. for appellant.

R. A. Wedge and *S. Hynes* for respondent.

CATTANACH J.:—This is an appeal from a decision of the Tax Appeal Board[1], dated December 29, 1964 upholding an assessment by the Minister in respect of the appellant's income for its 1962 taxation year.

The appellant is a joint stock company incorporated pursuant to the laws of the Province of Manitoba by Letters Patent dated March 22, 1956 at the behest of David Levin, Q.C. and Ben Green, a retired electrical contractor for the following purposes and objects:

To carry on the business of a holding and investment company and in connection therewith to lease, exchange, hold, own, mortgage, dispose of, improve and deal in and with lands and real and personal property and any rights and interest therein.

The authorized capital of the appellant was $50,000 divided into 495 preferred shares of par value of $100 each and 50 common shares of the par value of $10 each. None of the preferred shares have been issued.

Immediately prior to the incorporation of the appellant, Messrs. Levin and Green possessed, as joint owners, four properties in the City of Winnipeg municipally known as 196-198 Smith Street, 175 Harvard Avenue, 515 Sargent Avenue and lots 4 to 11 on Beaverbrook Street.

These four properties were transferred to the appellant on March 22, 1956 in consideration of $55,135.86 being the cost thereof to Messrs. Levin and Green less the deprecia-

[1] (1964) 37 Tax A.B.C. 225.

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tion thereon. Messrs. Levin and Green were each issued 25 common shares of the par value of $10 each, out of which issue of common shares each transferred one qualifying share to a daughter. The balance of the purchase price of the four properties, and the price of other assets also purchased by the appellant at the same time totalling $3,397.51, was loaned to the appellant by Levin and Green on the security of demand notes, without interest, in the amounts of their respective interests therein.

Mr. Green became the president of the appellant and Mr. Levin its secretary.

In the year 1956 the appellant acquired two further properties in the city of Winnipeg, municipally described as 1275 Alexander Avenue and 56 Donald Street.

In 1958 the appellant purchased four further properties being 78 Hargrave Street, 635 Broadway Avenue, 207 Edmonton Street and a farm at Charleswood consisting of approximately 219 acres. The farm at Charleswood is located between eight and ten miles from the centre of the city of Winnipeg.

In 1960 the appellant purchased 190 Smith Street which abuts 196-198 Smith Street.

In 1962 the appellant purchased a further property municipally described as 488 and 492 Hargrave Street.

Between 1956 and 1962 the appellant purchased, in all, twelve separate properties.

In 1956 and 1957 lots 4 to 11 on Beaverbrook Street were sold by the appellant and a profit realized thereon, upon which income tax was paid. Mr. Green testified that those lots, which were virgin land, were purchased with the intention of building houses thereon for sale. However, mortgage money in the amounts expected was not forthcoming and the lots were sold in two transactions to a building contractor.

In 1959 the appellant sold the two properties known as 515 Sargent Avenue and 1275 Alexander Avenue, the first of which had been transferred to the appellant upon its incorporation and the second had been purchased by the appellant in 1956 subsequent to its incorporation. Profits were realized from both such sales upon which the appellant paid income tax. Both of these properties were residen-

tial houses which the appellant leased to tenants who in turn let rooms. The appellant experienced difficulty in leasing these premises to satisfactory tenants for which reason the properties were sold. It had been anticipated that 515 Sargent Avenue might be a suitable apartment site but the appellant took no steps to erect such a building. Approximately three years elapsed between the purchase of these two properties by the appellant and their ultimate sale by it.

Also in 1959 the appellant sold the property at 78 Hargrave Street which it had purchased in 1958. Difficulties similar to those experienced with respect to 515 Sargent Avenue and 1275 Alexander Avenue were also experienced with this property in addition to which the property was damaged by fire. Income tax was paid upon the profit realized from this sale. In this same year the appellant sold 85 acres of the 219 acre farm it had purchased at Charleswood. A profit was realized from this sale upon which income tax was paid. Mr. Levin and Mr. Green testified that the farm had been purchased by the appellant to achieve a diversification of investment. When first purchased the entire 219 acres was rented to a tenant on a crop sharing basis. After the sale of 85 acres in 1959, the remaining 134 acres continued to be operated on a crop sharing basis with a tenant.

In 1962, (which is the only taxation year under review in the present appeal,) the appellant sold the property at 196-198 Smith Street, which had been transferred to it by Messrs. Levin and Green on its incorporation on March 22, 1956 together with 190 Smith Street which the appellant had purchased in 1960. The property at 56 Donald Street which the appellant had purchased in 1956, shortly after its incorporation, was also sold by it in 1962. The dispute in the present appeal concerns the taxability of the profits realized upon these two particular sales.

The property at 207 Edmonton, which the appellant purchased in 1958, was sold in 1963, that is subsequent to the taxation year now under review.

From the foregoing it can be seen that of the twelve properties purchased by the appellant, seven were sold by it, as was a portion of an eighth property, being the farm at Charleswood. Of the twelve properties so owned by the

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appellant it still retains two, they being 635 Broadway Avenue and 488-492 Hargrave Street, both acquired in 1958 and the remaining 134 acres of the 219 acre Charleswood farm also purchased in 1958. Of the eight sales so made by the appellant, income tax was paid on the profits resulting from five of such sales. Of the three remaining sales, that of 207 Edmonton Street occurred after the taxation year under appeal and it is the profits from the sales of 190, 196-198 Smith Street and 56 Donald Street which are in issue now.

It is fair to say that, with the exception of lots 4 to 11 on Beaverbrook Street and the Charleswood farm, none of the properties owned by the appellant were in a choice residential area. The property at 196-198 Smith Street was leased to a tenant who carried on a corner grocery store. When this property was acquired by Messrs. Levin and Green it was in a generally run-down condition. They carried out repairs thereto. In 1960 the premises at 190 Smith Street were acquired by the appellant for the avowed purpose of improving the holdings on Smith Street by increasing the frontage so that it would be more desirable for an apartment or commercial site. While the appellant, at one point, contemplated the erection of a car wash, no steps were taken to implement that project nor any other similar project. However, additional rental income was received from 190 Smith Street. Subsequent to the sale of this combined property in 1962 the property has been allowed to deteriorate by the purchaser to the extent that the buildings have been condemned by the municipal authority for residential use.

The property at 56 Donald Street was also in an area subject to development for apartment sites. The appellant attempted to purchase the property adjoining 56 Donald Street, again for the avowed purpose of improving this particular holding, this time as a potential apartment site, but the appellant considered the prospective vendor's asking price to be exorbitant. Instead the appellant accepted an offer to purchase 56 Donald Street from an owner of property in the immediate area who was engaged in assembling of a parcel of real property. The premises at 56 Donald Street had been leased by the appellant to a tenant who had sublet space therein.

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Incidentally the appellant had no office space of its own. It had no telephone and consequently no telephone directory listing. None of the appellant's properties were advertised for sale, nor were any of them listed for sale with a real estate agent. The appellant refused several unsolicited offers to purchase properties owned by it for the obvious reason that it considered the offered prices too low. However, the appellant did pay a portion of the real estate agent's commission on the sale of 190, 196-198 Smith Street, but did so to ensure consummation of that sale at an attractive profit. I do not attach any significance to the fact that neither of the subject properties were advertised or listed for sale. The appellant did not have to do so since offers were made to it without solicitation.

Neither do I attach any significance to the precise terms of the objects and purposes for which the appellant was incorporated as set out in the Letters Patent. The question to be determined is not what the appellant might have been authorized to do, but what in fact it did.

By the Notice of Appeal from the Tax Appeal Board (*supra*) the appellant sets out its case as follows:

1. That the properties known as 196-198 Smith Street, and 56 Donald Street, were purchased as an investment but the income from the said properties when sold in 1962, did not warrant their retention for investment purposes on the basis of the price realized from the sale thereof and the proceeds of the sale or sales were used for the purpose of purchasing other property for investment.

2. The sale of the said properties did not constitute an adventure or concern in the nature of trade on the part of the Appellant.

3. The profits realized from the sale of the said property were capital gain and should not have been included as taxable income.

The Minister's reply insofar as it is relevant, reads as follows:

5. In assessing the Appellant he assumed:

(*a*) that the Appellant acquired the 196-198 Smith Street, 190 Smith Street, and 56 Donald Street with a view to trading in, dealing with, or otherwise turning to account a profit;

(*b*) that the Appellant realized during 1962 a profit of $71,214 25 from the purchase and subsequent resale of the 196-198 Smith Street, 190 Smith Street and 56 Donald Street;

(*c*) that the profit realized from the sales year constituted part of his income for the 1962 taxation year since they were profits from a business or adventures in the nature of trade.

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6. In making the assessment referred to in paragraph 6 hereof, he allowed as a deduction the sum of $44,757.41, pursuant to para (*d*) of ss. (1) of sec. 85B of the Income Tax Act, in computing the Appellant's income.

...

9. The Respondent states that the profit realized from the sale of 196-198 Smith Street, 190 Smith Street and 56 Donald Street is income from a business within the meaning of para (*e*) of ss. (1) of sec. 139 of the Income Tax Act and was properly included in computing the Appellant's income for its 1962 taxation year in accordance with the provisions of sections 3 and 4 of the said Act.

The narrow issue is, therefore, whether the appellant purchased the properties at 196-198 Smith Street, and subsequently 190 Smith Street, and 56 Donald Street, with a view to trading in, dealing with, or otherwise turning them to account at a profit. If it was not the appellant's sole and exclusive purpose at the time of acquiring 196-198 Smith Street, 190 Smith Street and 56 Donald Street to derive rental income therefrom, but that it also entertained the possibility of their disposition at a profit, then the resulting profits are taxable. If, however, as the appellant alleges, these purchases were made as an investment for the sole and exclusive purpose of receiving rental income and that the properties were sold only because the price realized from the sale thereof did not warrant the retention of the properties as an investment, then the profits from the disposition thereof would not be taxable.

The onus of showing that the assumptions made by the Minister that the former was the case, were unfounded, falls on the appellant.

The question of fact as to what the appellant's purpose was in acquiring these properties must be decided after considering all the evidence. The evidence of Mr. Green and Mr. Levin at the trial, that the properties were acquired for the purpose of deriving rental income therefrom, is only part of the evidence. The interest and intentions of Mr. Levin and Mr. Green are identical with those of the appellant from the beginning of its existence. While their evidence may have been given in all sincerity, nevertheless, it still may not reflect the true purpose at the time of acquisition. Statements now made as to intention at the time of acquisition must be considered along with the objective facts.

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In my opinion the whole of the evidence points to the conclusion that these particular properties were acquired with the overall intention of turning them to account for profit. None of the twelve properties with exception of the two properties before mentioned purchased by the appellant were in desirable residential areas. While the buildings were in a reasonable state of repair or were put in such state by the appellant to realize rental income, nevertheless, all such properties, with the exception of the Charleswood farm and the lots on Beaverbrook Street, were in areas that were in close proximity to commercial districts and were rapidly being encroached upon by commerce, if that encroachment had not already occurred.

A review of the income statements attached to income tax returns for the years previous to 1962, discloses that most of the properties sold at a profit upon which income tax was paid, did not yield returns which would characterize them as sound investments. In some instances, when depreciation was deducted, losses were incurred. I cannot differentiate between those transactions upon which income tax was paid on the resulting profits, apparently without question, from the sales of the Smith and Donald Street properties. Furthermore, it seems obvious that the acquisition of 190 Smith Street and the attempt by the appellant to acquire additional property adjoining 56 Donald Street to increase the frontage of those respective properties and thereby improve them, could only have been with the ultimate objective of rendering the properties more attractive and saleable as commercial or apartment sites despite the fact that additional rental income was received from 190 Smith Street during the interval it was owned by the appellant.

After giving careful consideration to all the evidence, I am not satisfied that there was a balance of probability that the appellant acquired the Smith Street and Donald Street properties for the purpose of deriving rental income from them to the exclusion of any purpose of disposition at a profit.

Accordingly it cannot be said that the assumptions of the Minister in assessing the appellant as he did were not warranted.

The appeal is, therefore, dismissed with costs.

Ottawa 1965
Dec. 9
Dec. 14

BETWEEN:

JOHN PINKER .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Post Office—Prohibition of mail—Interim prohibitory order—Post Office Act, R.S.C. c. 212, s. 7—Right to be heard—Sufficiency of information supplied—Interlocutory injunction—Right to issue—Whether proceeding properly directed against Crown.

By petition of right filed on November 24th, 1965 suppliant sought to restrain the Postmaster General from issuing an interim prohibitory order under section 7 of the *Post Office Act* prohibiting the delivery of mail to the suppliant without informing him of the charges against him and giving him the right to defend himself. On December 6th the Deputy Postmaster General informed the suppliant by letter of the charges against him, *viz* misrepresenting by advertisement the nature of photographs sent through the mail and of sending obscene photographs through the mail, both being offences under the Criminal Code; and suppliant was given 48 hours to answer the charges. Suppliant answered the accusation by mail and applied for an interlocutory injunction pending judgment on his petition.

Held, the application for an interlocutory injunction should be dismissed for the following reasons:

1. It had not been established that the suppliant had not been afforded a sufficient opportunity to be heard with respect to the charge of misrepresentation and the questions whether or not the conditions existed under which an interim prohibitory order might be issued and whether the order should issue were for the Postmaster General rather than for the court to decide. *Randolph et al. v. The Queen* [1966] Ex. C.R. 157 referred to.
2. An order by the court that an interim prohibitory order should not issue until final disposition of the petition of right would involve a declaration that the Crown is in the interim in some way bound by law to restrain the Postmaster General from exercising the authority given to him by statute, and there is no legal foundation for such a declaration.
3. The proceeding was misconceived. While the right of a person not to have an interim prohibitory order issued against him without statutory authority might conceivably be enforced by a proceeding directed against the official proposing to do the act, effect could not be given to such a right by a proceeding by petition of right against the Crown.

APPLICATION for interlocutory injunction.

J. P. Ste. Marie, Q.C. for suppliant.

P. M. Ollivier, Q.C. for respondent.

THURLOW J.:—This was an application for:

an order granting an interlocutory injunction recommending to Respondent that the Postmaster General of Canada refrain from issuing, against suppliant, an interim prohibitory order as defined in the Canada Post

Office Act, until final judgment has been rendered on suppliant's Petition of Right.

At the conclusion of the hearing I indicated that the application would be refused and that I would file a memorandum of my reasons.

The proceeding was begun on November 24th, 1965 by a Petition of Right which alleges *inter alia* that the suppliant has been advised by an official of the Post Office Department that unless he signs a document promising not to use the mails for certain purposes an interim prohibitory order will be issued against him by the Postmaster General of Canada and that he has been denied information as to the grounds for such an order. The Petition concludes with a prayer that the Court:

> (*a*) RECOMMEND to Respondent that the Postmaster General of Canada refrain from issuing against suppliant an interim prohibitory order, as defined in the Post Office Act of Canada, until and unless suppliant has been made legally and officially aware of the accusations borne against him, and has had the right, the opportunity and the time to defend himself;

The notice of application for interlocutory relief was filed on the same day.

Subsequently, by a letter dated December 3rd, 1965 and delivered on December 6th, 1965, the Deputy Postmaster General informed the suppliant that he had seen a copy of an advertisement, (a photo copy of which was enclosed) which the suppliant sends through the mails, offering for sale films, photographs and books and he went on to say:

> On the basis of that advertisement and of the samples of the films which you remitted to our officials in Montreal as being the films which, on your own admission, you actually sell to the public, which films have been screened by officers of this Department, I have reasonable grounds to believe and I do believe that your advertisement substantially misrepresents the true character of these films and that consequently your activities in relation to the sale of these films to the public, through the mails, constitute offences contrary to the provisions of Sections 323 and 324 of the Criminal Code.
>
> I have also seen photographs, photocopies enclosed, which you forwarded through the mails to one Lindsay C. Brooke, 115 North 15th, La Grange, Kentucky, U.S.A., in an envelope, photocopy also enclosed, postmarked "Montreal, 6 P.M.-8XI 65, Quebec" and bearing the return address "5992, 2nd Avenue, Rosemount, Montreal, P.Q.", which photographs were so forwarded as the result of an order sent to you by mail at your above mentioned business address by the sender, Lindsay C. Brooke. I have reasonable grounds to believe and I do believe that these photographs are obscene in character and that your use of the mails for the purpose of transmitting or delivering these photographs constitutes an offence contrary to Section 153 of the Criminal Code.

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In a final paragraph the letter notified the suppliant that the Deputy Postmaster General intended to issue pursuant to s. 7 of the *Post Office Act* an interim prohibitory order against the suppliant unless within forty-eight hours from the time of delivery of the letter he forwarded his representations in writing showing cause or evidence why the order should not issue.

On December 8th, the suppliant in reply forwarded a five-page letter purporting to be verified under oath stating a number of objections to and arguments against the issue of such an order and in particular denying the commission of any fraud in the carrying on of his business and further denying that he sent to Lindsay C. Brooke the photographs referred to by the Deputy Postmaster General. That the photographs were obscene is not disputed.

The samples of films referred to in the Deputy Postmaster General's letter as having been remitted by the suppliant to an official of the Department in Montreal were not produced on the hearing of the application and there is no evidence of what they showed.

Section 7(1) of the *Post Office Act*[1] provides as follows:

(1) Whenever the Postmaster General believes on reasonable grounds that any person

(*a*) is, by means of the mails,

(i) committing or attempting to commit an offence, or

(ii) aiding, counselling or procuring any person to commit an offence, or

(*b*) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,

the Postmaster General may make an interim order (in this section called an "interim prohibitory order") prohibiting the delivery of all mail directed to that person (in this section called the "person affected") or deposited by that person in a post office.

In *Bernard Randolph et al. v. The Queen*[2] the President of this Court decided that an interim prohibitory order cannot be made under this provision without first affording the person affected an opportunity to be heard but, in discussing the nature of the opportunity to which the person to be affected would be entitled, he said at p. 19 of his judgment:

On the other hand, it is to be borne in mind that the right to be heard to which the person affected would automatically be entitled, if it is not impliedly excluded, is a much less formal and far reaching type of investigation than that for which section 7 provides. It would be

[1] R.S.C. 1952, c. 212.

[2] [1966] Ex.C.R. 157.

sufficiently accorded to him if he were notified by the Minister what was alleged against him and what action was proposed and were given a reasonable time, which might be quite short in the circumstances, to answer what was said against him by any adequate means, which might be merely a statement in writing sent to the Postmaster General.

On the basis of the material before me, I see no reason to think that the suppliant has not had the opportunity to which he was entitled with respect to the allegation of misrepresentation contained in the Deputy Postmaster General's letter. Having stated the charge and the evidence relied on as establishing it and having given the suppliant an opportunity to state and establish his answer, it does not appear to me that there has been any denial of an opportunity to be heard of the kind indicated by the President in the passage which I have quoted. The opportunity to be heard having been afforded to the suppliant the decision as to whether or not the conditions under which an interim order may be issued exist and whether the order should issue is not one for the Court but under the statute is to be made by the Postmaster General. It was submitted that the Postmaster General would not be entitled to regard as reasonable grounds under the statute matters which could not properly constitute such grounds but as already indicated the films are not before the Court and even if, contrary to my opinion, such a point could be considered on an application such as this, the materials for reaching a conclusion on it are not before me. On this ground alone, therefore, the application must fail on the merits.

I should add, however, that with respect to the other charge in the Deputy Postmaster General's letter, the suppliant was not advised as to any evidence which may be available to the Minister to indicate that the suppliant sent the photographs in question to Lindsay C. Brooke and counsel for the Crown conceded that on the basis of the judgment in the *Randolph* case the Postmaster General would not be in a position to make an interim order based on this incident without informing the suppliant as to what such evidence was and giving him an opportunity to state his position with respect thereto.

In the course of argument counsel for the suppliant conceded that the Court is not in a position to make an order restraining the Crown but he submitted that the Court could, nevertheless, deal with the motion by deciding

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and declaring "what is right to be done"[1] between the Crown and the suppliant. However, to decide that as between the suppliant and the Crown no interim prohibitory order should issue until the final disposition of the Petition of Right appears to me to involve as an incident a declaration that the Crown is in the interim in some way bound by law to restrain the Postmaster General from exercising the authority given to him by the statute. I know of no legal foundation for such a declaration. Accordingly even accepting the suppliant's analysis of the nature of the Court's function in a proceeding by Petition of Right it seems plain to me that his application cannot be granted.

Finally, it appears to me that the proceeding is misconceived. It may be that prohibition would lie if the Postmaster General proposed to issue an interim prohibitory order in circumstances in which the statute does not authorize it, but, whether prohibition would lie or not, it seems to me that any proceeding taken to enforce the right of a person not to have an interim prohibitory order issued against him without statutory authority must necessarily be a proceeding against the official proposing to do the act which is alleged to be beyond his authority. I do not see how the right of a person likely to be affected by such an act can be raised and given effect to by a proceeding by Petition of Right against the Crown.

The application is dismissed with costs.

[1] *Vide Dominion Building Corporation v. R.*, [1933] A.C. 533. *Miller v. The King* [1950] S.C.R. 168 at 175 per Kellock J.

Montreal 1964
Oct 21-23, 26-30, Nov. 2-6, 16-20, Dec. 14-18
1965
Jan. 18-21
Ottawa Sept. 8, 9
Nov. 2

BETWEEN:

EDWIN J. PERSONS ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

AND

The said HER MAJESTY THE QUEEN, Constituting herself.. } CROSS-PLAINTIFF;

AND

The said EDWIN J. PERSONS ..... CROSS-DEFENDANT.

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Crown—Contract for construction of air base runway in Quebec—Whether default under—Adequacy of notice to take work away from contractor—Whether decision to cancel made by authorized official—Construction of confiscatory clause.

In June 1960 suppliant was awarded a contract by the Department of Transport for the construction of an air base runway at Three Rivers, Quebec, to be completed by October 31st 1961. Suppliant worked until the end of December 1960 and then ceased for the winter months. In April 1961 suppliant was told by Departmental officials that to avoid certain difficulties which had arisen the previous year he would be given a schedule of work to be done in the ensuring year. On June 1st 1961 suppliant, who had not yet started work on the contract, was notified by the Department's resident engineer pursuant to clause 18 of the contract to put an end to his default in diligently executing the works to be performed under the contract on or before June 12th 1961. On June 12th 1961 the Department's resident engineer handed suppliant's engineer a schedule of work "to be initiated immediately in the sequence listed". On June 13th suppliant was notified in writing by the Department's Director of Construction Branch that the work was being taken out of his hands for failure to put an end to the default pursuant to the notice of June 1st. Suppliant, who contended that the notice was illegal, continued to work on the contract until July 6th. The work was then completed by another contractor.

Held, suppliant was entitled to damages for breach of contract.

1. Suppliant was not in default under clause 18 of the contract consequent on the notice of June 1st until he had received the schedule of work promised by the Department's representatives.
2. The respondent having restricted the exercise of the power conferred by clause 18 to take the work out of the contractor's hands to the first case provided thereunder it was not sufficient to subsequently support the exercise of this power on any other default, delay or reason in complying with one of the requirements of the contract.
3. Further, it had not been established that the decision to take the work out of suppliant's hands had been made by the Minister of Transport or his Deputy as required by the terms of the contract. The decision to take the work out of suppliant's hands had been made by some other official.
4. The notice of June 1st was insufficient under clause 18 of the contract in failing to set out the specific defaults or delays charged to suppliant. *Boone v. The King* [1934] S.C.R. 457 at p. 469.
5. The effect of the delivery of the schedule of work to suppliant on June 12th was to suspend the operation of the notice of June 1st and to set a new departure date for the continuation of the work so as to require a new notice if respondent wished to apply clause 18 of the contract thereafter. A confiscatory clause must be construed against the party seeking to enforce it. Cf. *Neelon v. Toronto and E.J. Lennox* (1893-6) 25 S.C.R. 579.
6. *Semble,* in any event under the notice of June 1st giving suppliant until June 12th to end his default the six days' continued default called for by clause 18 did not commence to run until June 12th.

Crown—Constitutional Law—Construction contract with Crown—Assignment of sums due under contract to bank—Non-compliance with Part VIII A of Financial Administration Act, S. of C. 1960-61 c. 48—Compliance with Quebec law—Invalidity of assignment.

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Suppliant, a party to a construction contract with the Crown in right of Canada, assigned to a bank the sums due him under the contract. The assignment did not satisfy the requirements of Part VIII A of the *Financial Administration Act*, S. of C. 1960-1961 c. 48 but did meet the requirements of the law of Quebec respecting assignments.

Held, the assignment was ineffectual under s. 88D of the *Financial Administration Act*. The *Financial Administration Act* displaced any provincial law that might otherwise have been applicable, at least to the extent that it was inconsistent with the provincial law.

Crown—Damages—Construction contract in Quebec providing schedule of prices—Whether governed by Quebec Civil Code, Arts. 1690 and 1691 re extras—Damages recoverable—Restrictions on—Engineering and accounting expenses in preparing for trial—Right to recover.

A construction contract remunerated on the basis of a series of unit prices set forth in the contract is not a *"contrat à forfait"* and therefore not subject to Articles 1690 and 1691 of the Quebec Civil Code, which provide that extras cannot be claimed unless specified in writing and that on cancellation of the contract the damages recoverable are limited to actual expenses plus damages; and this is so even though the contract provides that extras may be authorized in writing. *Quebec v. Dumont* [1936] 1 D.L.R. 446 considered.

This does not mean however that the contractor is entitled to claim the cost of any additional work not provided for in the contract or the specifications as the rights of the parties must be determined having regard to the terms of the contract.

Held also, in the circumstances of this case suppliant was entitled to recover the engineering and accounting expenses which he necessarily incurred in preparing for trial.

PETITION OF RIGHT.

Alexander McT. Stalker, Q.C., and *Robert J. Stocks* for suppliant.

Louis Bloomfield, Q.C., Paul Ollivier, Q.C. and *Daniel Miller* for respondent.

NOËL J.:—The Suppliant, a contractor, by his petition of right seeks to recover from the Respondent the sum of $492,397.59 of which $180,397.59 is for work allegedly completed prior to December 31, 1960, and $312,000 for damages allegedly sustained as a result of the Respondent cancelling a contract for the construction of the Three Rivers, P.Q., air base runway on June 14, 1961, and ordering the Suppliant not to complete the work provided for under same, on the allegation that he was not diligently nor satisfactorily proceeding with the work, ordering him off the job site and negotiating a contract with H. J. O'Connell Limited, the second lowest bidder, for its termination. The Suppliant had obtained this work as the lowest bidder in June of the previous year and had worked thereon up until

the month of December 1960, when the job was shut down because of the winter season. The Suppliant, one of seventeen tenderers, produced a bid of $461,983.50 on a unit price basis, which was $109,683.50 lower than the second lowest bidder, H. J. O'Connell Limited and $48,016.50 (or even $226,016.50 if Ex. R-5 is relied on) lower than the amount estimated by the engineers of the Department of Transport, and there lies the cause of many of the difficulties encountered in the execution of this job.

The Respondent, on the other hand, counter-claims from the Suppliant, the Cross-Defendant, a sum of $131,495.45 as damages allegedly sustained as a result of the completion of the work by H. J. O'Connell Limited, made up as follows:

Net amount paid to Cross-Defendant (Suppliant) is $167,600 less hold back of $16,700	$150,840.00
Total amount paid or payable to H. J. O'Connell for completion of the project	$440,209 31
Total	$591,049 31
If Cross-Defendant had proceeded with the project to completion, total cost according to Cross-Defendant's unit price	$459,553 86
	$131,495 45

The cost of completing the work exceeded the Cross-Defendant's bid price because the latter's bid unit price for the supplying of the granular material to be placed in the fill of the paved area of the runway was not high enough to deal with the cost of transporting this material from sites several miles from the runway and also because on several items of the work performed by H. J. O'Connell the payment was made on a rental of machinery basis instead of on a unit price basis and, in some instances, on unit prices higher than the prices which applied to the Cross-Defendant.

The allocation of the work on a machine time rental basis appears to have been justified in some cases, where it was impossible or difficult to divorce the work done by the Cross-Defendant from that to be performed by H. J. O'Connell and, therefore, calculate exact quantities, and although, in other cases, this could have been done, it would have involved considerable minute and costly calculations.

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Subsequent to the taking of the present action and the production of the cross-demand, the Suppliant produced an incidental demand, claiming additional damages, allegedly incurred since the institution of the original action, in an amount of $152,800 and resulting from additional financial costs of the Suppliant in the amount of $2,800, representing 6 per cent interest on $70,000 for a period of eight months, which he had to borrow to use as security for a contract for which he was allegedly unable to secure a bond because of the present action and $150,000 loss of profit he would have allegedly sustained in not being able to bid, since the institution of the original action, on a number of Eastern Townships autoroute contracts because of the actions of the Respondent's representatives.

The parties by their respective counsel at the trial agreed that the evidence submitted would be common to the principal demand, the incidental demand and the cross-demand in so far as it would be applicable to each of them.

I should also, at this stage, deal with a matter that came out in evidence during the course of the trial and which raised some doubt as to the Suppliant's right to claim in the present action the receivables under the contract when Mr. Duke, the Suppliant's auditor, stated that on March 19, 1962 the Suppliant had executed a document purporting to assign to the Royal Bank of Canada certain specified "debts" under the Government construction contract under which the Suppliant claims relief in these proceedings and "all the debts growing due under" that contract and that, on March 20, 1962, the Royal Bank of Canada had written to a chief treasury officer of the Government of Canada a letter stating that there was being enclosed, *inter alia*, the bank's "form of Assignment of Contract" covering the contract in question. The only response from the chief treasury officer, according to the evidence, was a letter acknowledging receipt and stating that, according to the chief treasury officer's information, there was no money due under the contract.

This "assignment", and the correspondence to which I have referred, took place prior to the commencement of these proceedings.

The evidence to which I have referred raised in the mind of the Court the question whether the effect of the

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"assignment" had been to transfer to the Royal Bank of Canada a part or all of the Suppliant's cause of action so that the Suppliant was left, at the time of the commencement of these proceedings, with no legal basis for the relief claimed by his petition of right with regard to his receivables under the contract.

If the Respondent in these proceedings were any person other than the Crown, it would be clear that the Royal Bank of Canada, and not the Suppliant, is, by virtue of the laws that operate in the Province of Quebec, entitled to the relief sought in these proceedings.

At this point, it may be helpful background to refer to the situation as it existed before the decision of Thorson P. in *Bank of Nova Scotia v. The Queen*[1]. Prior to that decision, it appears that the Government of Canada took the position that there could not be an assignment of a claim against the Crown. This had been the position taken by that Government since Confederation and, as a result, a practice had grown up whereby the Government paid monies owing by it to persons holding powers of attorney from its creditors providing such powers of attorney were in prescribed form and complied with Treasury Board directions relating to such documents. The Government followed a practice of honouring such powers but consistently denied all responsibility for ensuring that the money got into the hands of the attorney rather than his principal, the Crown's creditor.

As a matter of fact, the Government so consistently paid in accordance with such powers of attorney that the chartered banks, as a general practice, accepted such powers of attorney as though they were legally binding assignments of the debts covered by them.

In addition, banks frequently took assignments of debts in their own forms and these assignments were, some times, attached to the powers of attorney that were placed by the banks in the hands of the Government's paying officers.

The *Bank of Nova Scotia case* decided in 1961 that the position taken by the Government of Canada over such a long period of time was erroneous and that claims against the Crown were assignable. Following that decision, Part

[1] (1961) 27 D.L.R. (2d) 120.

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VIIIA was added to the *Financial Administration Act* by chapter 48 of the Statutes of Canada of 1960-1961.

Part VIIIA does two things. On the one hand it spells out a procedure whereby a "Crown debt" may be made the subject matter of an "absolute assignment...not purporting to be by way of charge only", (section 88C). On the other hand, it provides that, except as provided by the *Financial Administration Act,* or some other Act,

> (*a*) a Crown debt is not assignable, and
>
> (*b*) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of such debt. (section 88B).

(By definition, section 88A(*d*), "Crown debt" includes any chose in action ("droit incorporel") in respect of which there is a right of recovery enforceable by action against the Crown).

The statutory procedure for assignment in so far as it is relevant for present purposes, requires that notice of an assignment be given "in prescribed form" to "a paying officer" and contemplates that there be an acknowledgement of the notice "in prescribed form" (section 88D). The Statute provides that the assignment is effectual in law to pass the creditors' rights "from the date service of such notice is effected" [section 88C(1)] and provides that service of the notice "shall be deemed not to have been effected" until the acknowledgement, in prescribed form, is sent to the assignee by registered post [section 88D(2)].

In this case, it would appear that the Royal Bank of Canada has dealt with the power of attorney and the assignment in the same manner as it was probably accustomed to deal with such documents before the 1961 amendment to the *Financial Administration Act.* It did *not* send notice of the assignment "in prescribed form" but it did send the power of attorney and assignment under cover of an ordinary letter of transmission. Presumably, for that reason, the treasury officer simply acknowledged the documents received and did not send an acknowledgement in prescribed form.

In the circumstances, it is clear that the assignment to the Royal Bank of Canada has not, as yet, become "effectual in law" by virtue of section 88C of the *Financial Administration Act* and, as far as I am aware, there is no

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other provision in that Act or in any other Act of the Parliament of Canada that would give it legal force. It therefore falls within the wording of section 88B of the *Financial Administration Act,* which provision reads as follows:

> 88B. Except as provided in this Act or any other Act of the Parliament of Canada,
>
> (*a*) a Crown debt is not assignable, and
>
> (*b*) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of such debt.

Without venturing into the very difficult and complex subject of the application of provincial laws to the determination of the rights and obligations of Her Majesty in Right of Canada, I feel confident that a law such as Part VIIIA of the *Financial Administration Act,* when enacted by Parliament, displaces any provincial law that might otherwise be applicable in the circumstances, at least to the extent that it is inconsistent with such provincial law. Section 88B therefore operates in accordance with its terms and clearly has the effect that, until the assignment here in question becomes effectual in law by virtue of section 88C, the claims of Persons against the Crown are not assignable and the assignment is not effective so as to confer any rights or remedies on the Royal Bank of Canada.

The call for tenders for the construction of the Three Rivers runway was made some time prior to May 1960 and the Suppliant's tender was received by the Department of Transport on May 3, 1960, together with a security deposit in the amount of $35,599.17.

The Suppliant's low bid, particularly with regard to the price of crushed gravel base (70 cents per ton), the granular base material (40 cents per ton), the 8″ metal pipe porous backfill, the manholes and for consolidating sub-soil base were immediately noted, as appears from a memorandum of the Chief Engineer, C. W. Smith, to the Director of Construction Branch (Ex. R-4) of May 5 and doubt was expressed as to whether the Suppliant understood the strict specifications as to the required percentage of fractured faces in the crushed material and as to sieve analysis on the granular sub-base.

I might inject here that adherence to the specifications regarding the density of materials which go into the

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construction of a landing strip, and particularly the paved area, is important and this was stressed by Mr. Connolly, Director of the Construction Branch of the Department of Transport when, at p. 593 of the transcript, he stated:

> A. Well, the only way I can answer is that we have spent thousands of dollars in research work since immediately after the war on the investigation of different pavements that had failed. And, we prepared very elaborate study, which incidentally, got the blue ribbon in Washington at the meeting of the highways states officials—and we had one of the best known engineers in Canada in soil mechanics to direct this study. We investigated every pavement failure in any of the airports in Canada and it all went back—practically all of the pavement failures were due to the failure of the sub-grade and the base course. At that time, while we made this extensive study, it was forecasted for commercial aviation, the aircrafts were going to get much larger and we determined to get what we could in the way of information. That is, what the forecast for the future was, so we devised our own formula for pavement design from that and we learned from our experience in our research work that the most important, or one of the most important factors was the density of that sub-grade material. And, in designing this whole thing, our objective was to reach a frost resistant material and we know from experience in the different —actually, we cut down into the pavement and the sub-grade of those that failed and took samples and we knew what loading this pavement had been subjected to over the years. We had records of all the landings and take-offs over a number of years and the aircraft types. It was proved that the sub-grade and the base course was the most important part in the pavement design.

The asphalt section of the runway, as specified, comprises 3½ inches of asphalt, underneath which there is a 9 inch layer of crushed gravel laid over a 22 inch layer of granular material on a 12 inch sub-graded consolidation. The specifications also required that the sub-grade was to be compacted to 95 per cent modified Proctor ASTM, the granular material 98 per cent and the crushed gravel to 100 per cent.

The sieving or size of the granular is dealt with in the specifications under *Granular Base Course* as follows:

> 2. The base course shall be of hard, durable granular run-of-the-bank materials or quarried or crushed stones from which all stones above three (3) inches in diameter have been removed. Material passing the two hundred (200) sieve must not exceed eight (8) per cent and not more than thirty (30) per cent passing the number forty (40) sieve.

On May 9, 1960, the Director of Construction Branch, H. J. Connolly, wrote (Ex. R-5) to the Assistant Deputy

Minister for Air, reporting on the seventeen tenders received for the Three Rivers strip and dealing particularly with the Suppliant's low bid.

He stated therein that the Department's estimate for this work was $688,000 "somewhat higher than would have been estimated if we had been sure of the source of gravel that could be obtained for the work" and provision was therefore made for a source approximately 15 miles from the site. He added that the Suppliant had never worked for the Department before and that, in reviewing his unit prices for a number of items, it appeared that he was unfamiliar with the Department's rigid specifications and he suggested that the Suppliant be asked to come to Ottawa for the purpose of reviewing the tender with the engineers of the Department, which was agreed to and done.

The Suppliant met with Mr. Connolly who told him that he was extremely low in his bid and could lose a lot of money and suggested that he take his tender back and review all his prices and then return. He later returned with his engineer, a Mr. Potvin, and stated that he and his engineer had re-studied this job and that they definitely wanted it and the work was awarded to the Suppliant sometime in June 1960.

It may be useful at this stage to describe the reaction of the Department's resident engineer, Mr. Jos. F. Corish, to the awarding of the contract to the Suppliant, as he was the man who controlled the job from the very beginning and was involved in a number of decisions regarding the manner in which the work was to be conducted, the acceptance of material, the making of tests and, finally, he played some part in the decision that was later taken to replace the Suppliant by another contractor.

Questioned in this respect at p. 3095 of the transcript, he gave the following answers:

Q. What was your reaction, Mr. Corish, upon learning that the contract had been awarded to Mr. Persons?

A. My reaction was, I was most discouraged.

Q. Now, I think we would like to know why, Mr. Corish.

A. Well, I had been at that site in nineteen fifty-eight (1958) and had explored or had supervised the series of tests that were taken over two (2) lines extending ten thousand (10,000) feet and approximately southeast, northwest direction and northeast, southwest direction, twenty thousand (20,000) feet in all. Now, while these lines did not correspond with the base line or centre line or property

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line down the project on which I was engaged, nevertheless, I had arrived at the conclusion that there was no suitable material on or near the site other than for purpose of common fill, fill material, and I had been informed over the telephone by Mr. Davies—I haven't got that date—previous to my meeting Mr. Potvin, that the tenders had been opened in Ottawa and that the low bidder was Persons Construction. Mr. Davies had asked me if I had ever heard of him or had any knowledge of him. I said no. I asked him where the head office was and he said, "Sweetsburg". And, he said to me, "Where is that" and I said, "I don't know".

At p. 3100 of the transcript, Corish describes a conversation he had with another contractor interested in this job, a Mr. Franceschini and states that they both agreed that the granular item was "the guts of the job" and at p. 3101 of the transcript, he adds:

> So, after I had been sent to Three Rivers and had been informed by phone by Mr. Davies, that the low bidder was E. J. Persons Construction Company, that their price for granular was forty (.40) cents a ton, and to my remark that the Department would be very foolish to entertain a bid for this material at that price, he agreed and assured me that he was pretty sure the contract would not be awarded to the low tender, because of the low price for this particular item.

And at p. 3103 of the transcript, he stated:

> In the same conversation, I suggested to Mr. Davies that if he insisted or if the Persons Construction representative was insisting on the tender being considered, why did they not disclose their proposed site that I had a crew on the job and if I only knew where this material might be, we would examine it.
>
> I admitted to Mr. Davies, it is possible that they may have something. This is a big country, it is covered with bush and after all, I am not a wizard, but why do they not disclose?

He then referred to his diary where an entry therein indicates that he had marked down "I told RCE we would have trouble because of the low price".

It was under such circumstances that the Suppliant on June 22, 1960, started working on the construction of the Three Rivers airport and later, on August 5 of the same year, signed with the Respondent a contract produced as Ex. S-1, together with detailed specifications for same, produced as Ex. S-17. The time for completion of the airport is set down in the contract as October 31, 1961. He also supplied, as requested, a performance bond in the sum of $230,991.75 (Ex. S-2) and a labour material payment bond in the same amount (Ex. S-3).

For the proper understanding of the difficulties which later developed in the prosecution of this contract, it may be useful to deal briefly in a general way with the nature

and extent of the work to be performed by the contractor in building this strip. The development consisted of a runway 6,000′ X 600′, which comprised the paved area 150′ in width with 225′ right and left thereof, thus forming a total width of graded area of 600′, a parking area of 300′ X 300′ and a connecting taxiway and access road.

The general area, however, to be worked on covered borrow pits allowed to a line 325′ left and right of the runway paralleling both sides including the ditches on the graded area and also 100′ at the south end of the runway towards an existing ditch to be cleared and deepened, an area (for the easement ditch) of 40′ wide and at a point on the north side, an area which flared out and was wider than the 600′ from the centre line.

Exhibit S-17, plan Q-81-3-A, shows a line in the centre which indicates a limit graded area comprising basically the runway, the shoulder and the side strip outside of which appears a line consisting of long lines broken by two short lines which show the limit of clearing, stumping and grubbing covering a greater area than the limit of the grading. At each end there is a section enclosed by a broken line consisting of fairly long sections which are indicated as to be cleared only at the ratio of one and fifty (which refers to the glide slopes of an aircraft coming in and is meant to provide clearance for safety purposes for the landing of aircrafts by cutting the trees back in a slope) from the end of graded area which means that no grubbing or stumping are to be done in that section.

The part which had to be stumped and grubbed first was where the excavation and grading was to be done and this is where the Suppliant started on June 22, 1960.

The main work to be performed by the contractor in order to construct the airport was to clear, stump and grub the area, excavate or cut the graded area and smooth and roll it, drain by means of ditches to be excavated or to be cleaned and deepened, install 8″ and 10″ metal perforated pipe drains and 12″ non perforated pipe drains and concrete catch basins and finally, as already mentioned, lay down on the paved area of the runway 3½ inches of asphalt, over a 9-inch layer of crushed gravel over a 22-inch layer of granular material on a 12 inch sub-graded consolidation.

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The drawings attached to the contract show in detail the lines and grades, as staked out by the Department's engineers, to which the work is to be built by the contractor and the specifications require that if the amount of material to be excavated from the areas to be graded is not sufficient to bring the low places to the required grade, additional material shall be obtained in borrow pits in locations approved by the Department's engineer in the field and borrowed materials shall be paid on the same basis as grading excavation.

Under the specifications of the contract, common excavation applied to earth, muck, muskeg, clay, hard-pan, shale, silts, sand, cemented sand, quicksand, gravels and any other material which can be removed with heavy power grading or earth moving equipment and payment for excavation was to be made at the unit price tendered per cubic yard and include all costs entailed in carrying out these operations as well as the full and complete disposal of materials as specified or directed by the engineer.

In order to measure the quantities involved in the excavation of sections, bench marks are used which are correlated to sea levels. The contract plans show various levels and contours at different points. The dotted line is the existing ground and the solid line is the proposed runway. The high point on the solid line is the centre of the pavement and the low point at the end of the solid line is the edge of the pavement taken as a rule every 100 feet. A cross-section of the level of the ground before any work is done is made and then following the completion of the excavation or the fill, cross-sections are taken of the stage of the job at that point and by relating it to measurements, the quantities can be calculated. To obtain the area in cut which applies to all material taken out, the base line method is used as appears from Ex. S-34A. The total area of the whole of a particular station from the base line, right through to the original ground is first calculated in square feet. The final grade is indicated by a solid line on the plan and the area from the base line to the final is then calculated and by subtracting the latter from the total area, the cut area is determined. This is the manner in which the quantities were calculated during the construction of the strip.

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When borrow pit material was required as fill, a similar method was adopted to calculate the cut quantities as appears from Ex. S-35 where two sections were taken from borrow pit No. 5, situated right off the runway bordering the right ditch and running from station 110 plus 00. The walls of the borrow pit are ordinarily sloped before measurements are taken in order to facilitate same.

Common excavation, therefore, includes the removal of material from high points on the site and the placing of material in low points which have to be brought up to grade. The amount of fill is calculated from the amount of excavation which is done and shown on the sections and the amount of excavation done in the borrow pits.

The quantity of black muck and how it should be dealt with became a serious point of contention between the parties at the trial and as black muck was met with at least twice in substantial quantities on this job, on the east end and the west end, it would be useful to set out how Mr. Davies, the regional engineer, at p. 967 of the transcript, described the manner in which this material was calculated:

Q. So that in the case of black muck, assuming that the material is wasted...

A. Yes.

Q. There would be another stage of calculations?

A. That's correct.

Q. In other words, in effect, to establish a new starting line.

A. You have a new original and a new final to cover the organic material taken out in filled areas. The reason for doing that is that we do not want to build hard surface over organic material.

We have to pay the contractor for taking out organic material before we start depositing fill from the borrow, the good fill.

Mr. Silverwood, the Department's engineer, at p. 2951 of the transcript also described how black muck quantities were calculated:

Q. Now, would your sections be taken before that material was brought in?

A. Of course, sir because that is the way all our calculations are based on. We've got to, after the contractor has cleaned the unsuitable material to the satisfaction of the resident engineer, we sectioned that before they put any fill on there because if they would, we could not calculate nothing. That is the method of payment established by the Department of Transport.

And speaking of the black muck found at the west end, (which according to Mr. Davies, p. 970 of the transcript,

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extended 1,750 feet) and the time it would take to measure the quantities, Silverwood stated at p. 2952:

> A. Before, two (2) hours after they had finished cleaning this unsuitable material from one hundred and ten (110) to ninety-eight (98) ... it would take me two (2) or three (3) hours at the most.

Mr. Davies also stated at p. 970 of the transcript, and this also became a point of contention between the parties, that there was to be no excavation of black muck other than under the paved area as it was required only under the hard surface.

The Suppliant started working on June 22, 1960, and although there occurred a number of minor altercations between the Suppliant's representatives and Mr. Corish, the Department's resident engineer during this period, which indicate that from the very beginning up until the time the contractor was removed, there was a lack of that co-operation necessary for the proper prosecution of the job, the work appears to have progressed satisfactorily enough, at least in so far as it being completed on time was concerned, as even up to December 1960, when it was suspended for the winter months, Mr. Corish reported on progress report No. 12, dated December 15, 1960, that the anticipated completion date was still September 30, 1961, i.e., one month earlier than the completion date set down in the contract, although there is a notation that "on December 16, the contractor was found backfilling excavation around new manholes with loose sand in direct violation of contract requirements and the writer's specific directive of November 28 to his Mr. Dabrowski. Contractor unco-operative workmanship most unsatisfactory".

This alleged violation of the contract requirements, however, would seem to have been of a minor nature as during the lengthy evidence submitted at the trial, very little reference was made to it, the Suppliant explaining that the backfilling of the manholes in the fall was merely for the purpose of protecting them during the winter months. It also appears that, by that time, the relationship between the Department's engineer and the contractor, or his representatives, had deteriorated considerably due to

some extent to the resident engineer's constant alertness in preventing a low bidder from cutting corners and to some extent to a number of incidents for which the suppliant or his men were not entirely responsible.

The first incident of this type took place at the early stages of the work while Corish discussed with a subcontractor engaged by the Suppliant to do the clearing, the stumping and grubbing, the price he was receiving for the work and disclosed to him the price the Suppliant obtained for the same work, which was $15 per acre more than he was paying the sub-contractor. This caused the latter to be dissatisfied with the price he was receiving for his work (although he should not have been, as a $15 mark up for supervision on a combined unit price of $160 was far from being out of line) thereby causing strained relations between the Suppliant and his sub-contractor.

It turned out also, and this did not help matters, that this sub-contractor had been introduced on the job without any reference to Corish and without his approval, as contemplated by the contract.

The Suppliant then irritated Corish further by installing a slab foundation under his garage, of which Corish was most critical, and on a location for which he had not obtained approval and although strictly speaking, the contractor was required to obtain prior approval from the resident engineer, the location chosen by the contractor caused no inconvenience and it would appear to me that the Suppliant's decision to lay down a slab foundation was not unreasonable.

Another incident occurred early in the work when Corish intervened and insisted that the access road level was 6 inches too low and that Mr. Swanson, the Suppliant's foreman be fired for incompetence, although it later developed at the trial that the Department had issued conflicting plans regarding the level of this road. This matter was referred to the Suppliant and the foreman was discharged.

The Suppliant sometime in July 1960 was delayed for a period of approximately three weeks when the city of Three Rivers could not obtain the easement for the drainage

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ditch running north and west from the westerly end of the runway. This is confirmed by Corish's progress report No. 3 of July 31, 1960, wherein it is stated that "Proposed easement for clearing existing ditch (shown in red) has not been secured by city of Three Rivers. This prevents start of essential drainage work, contractor complaining." This surely must have caused some delay to the contractor and although the obtaining of this easement right was the responsibility of the Department it is most surprising to see the reaction of Corish to the Suppliant's engineer's request that something be done to hasten this matter, when at p. 3114 *et seq.* of the transcript, he suggested to Potvin that he see the city authorities or the owners of the property himself in order to settle this matter.

Corish states that he suggested that pending the necessary easement rights the site could have been drained by pumping the water into the existing water course and that if this had been done he would have allowed an extra, but I cannot see how this could have been legally done without the consent of the riparian owners.

A further incident took place sometime in the fall of 1960 when the Suppliant set up a scale shack for the purpose of weighing the material placed on the site which Corish found to be too small and unsatisfactorily heated for the health of the Department's employees who would use it. However, after discussing the matter, the Suppliant complied with Corish's requirements and this matter was closed.

Until the paved area base had been prepared to receive the granular, which was some time in the fall of 1960, the difficulties between the contractor, his representatives and Corish were confined to skirmishes such as we have just seen. However, when time came to choose the granular, of which approximately 155,000 tons were required to fulfil the contract, the situation deteriorated into a real battle with the contractor attempting to get the resident engineer to accept material situated as close as possible to the site and in several instances from borrow pits alongside the runway, and the resident engineer refusing such material on the basis that it would not meet with the requirements of the contract.

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The resident engineer further took the firm position that the contractor should not only disclose the source of his material, its depth and quantity but also that he should make it possible for the Department's men to test it by opening the face of the pits to render the material available for testing.

The Suppliant appears to have first realized that the rigid requirements regarding the granular material would be an expensive item and entail a loss on September 20, 1960, when he spent a few days on the site, accompanied by a Mr. Leonard and met with Corish.

According to Corish, the Suppliant told him that he had made a personal inspection of the job and that he had been fooled, adding that if he proceeded with the work he would lose $80,000. He asked Corish what he should do. Corish's recommendation was that he should go to his friends in Ottawa and ask them to allow him to abandon the work. The Suppliant, according to Corish, thanked him and said "I am going to Ottawa".

The Suppliant admits that he had a conversation with Corish at the time, not entirely, however, along the lines indicated by Corish and says that he did not go to Ottawa. His version of the incident is that shortly before the meeting he had been approached by a Mr. Perron, who was from the Minister of Transport's law office in Three Rivers, asking whether he would be using more trucks and inquiring as to where the material would come from. Mr. Perron's inquiry in this regard, according to the Suppliant, was instigated by the fact that there were in the Three Rivers area at the time, between 50 and 60 trucks out of work and the suggestion was that if he abandoned the job the balance of the work could be done by day labour. It was under these circumstances, according to the Suppliant, that he went to Corish's office, and to use his own words, "to find out how much did he know about the pressure being put on me by not wanting to accept the material from the site and we had to get it off the site, we had to use trucks".

He claims that having inquired from Corish as to whether he had heard about his getting off the job and it being finished by day labour, Corish would have told him "I think if you want to get off the job it could be arranged,

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you will be paid for everything up to the end of the year and you will be able to get your tender cheque back and it would be finished up by the Department".

With respect to the loss of $80,000, he claims it would have been a loss of $20,000 only, on the basis of all the granular coming from the Paquette pit.

Nothing, however, came out of this meeting as the Suppliant did not go to Ottawa and continued to press on with the job, his men in the meantime searching right and left for suitable material.

Matters then deteriorated further around October 20, 1960 when, according to the Suppliant, he was called to the site by his engineer Potvin to straighten things out as the latter claimed that Corish was driving him crazy (cf. p. 1870 of the transcript). This visit of the Suppliant to the site did not, however, seem to help matters as, according to his evidence at pp. 1870-1871 of the transcript, he states:

> Then, it kept on and at the end of October, between the twentieth (20th) and the end of October, he was practically bogging the job down, refusing to do this, to inspect borrow pits, refusing to talk to my men and to my engineer and walking out on them on several occasions.
>
> He is the hardest man I ever ran against on every contract I have been on for twenty-five (25) years.

Now, although Corish was not the most co-operative nor the easiest man to get along with, he certainly was not what the Suppliant attempts to paint him.

He did, in one instance, refuse to test material three miles south of the runway, and in other instances he did refuse to test material close to the runway and his reasons for doing so appear to have been reasonable as it was either because it appeared clearly not to be suitable, or, if suitable, not to be in sufficient quantities, and in other cases because the Suppliant or his men did not open up the pits sufficiently to allow proper testing.

On the other hand he did on several occasions test material at the expense of the Department. Indeed, on one occasion, with his men he proceeded to a place in the vicinity of Les Forges where some man had stated that he thought he had coarse material. In this instance, he used the Department's crew on the Department's time, excavated and drilled holes and then tested without finding however suitable material. Borrow pit No. 3, alongside the air

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strip, was also sieved by Corish's men after the contractor had provided a crane with a clam shell bucket, but here again the material could not be accepted. He further sampled material when Potvin the Suppliant's engineer, brought him a glass gallon jar on October 26, 1960, and he said: "Mr. Corish, this is a sample of granular we propose to supply, will you test it?", to which Corish is said to have answered: "Paul, that looks good, if you have got the quantity of that material, don't wait for our test. Get going and let's get the surface ready and the sub-grade ready and start hauling", insisting however that Potvin disclose the source of this material. Potvin however added that he could not tell the source, to which Corish answered: "I cannot test that on the official form of the Department of Transport. I cannot send to head office a record of that test because I will get the same question I am asking you 'what is the source'. What is it, because I, you, as you know, can go into that field and by selecting stone and certain sand we can get wonderful samples, 5 or 10 pounds."

On October 27, 1960, Potvin returned and pleaded with Corish to test the glass jar material, stating that Mr. Persons, the Suppliant, wanted to know. Corish then gave in and after testing the material himself, stated it was suitable, adding however he still wanted to know the source. He was informed of this source by Mr. Persons himself, on November 4, 1960, over the telephone, when he told him it was a mixture of $\frac{2}{3}$ from the site at 142 plus 00 left and $\frac{1}{3}$ from some other source and asked Corish to test the 142 plus 00 and the latter refused to do it on the basis that this area was on the site of the other projected runway and also because the sample involved had been secured by an individual by the name of Flanigan who had been falsely introduced to him as the Suppliant's project engineer but who, in fact worked for a material testing firm by the name of Warnock-Hersey.

On November 4, 1960, the Suppliant appears to have abandoned using material coming entirely from the site as he wrote to Mr. Davies, chief engineer, Department of Transport, Dorval, P.Q., (Ex. R.-22) the following letter:

Dear Sir:

Further to our telephone conversation of this day, pertaining to item No. 19 of the above-mentioned contract (granular materials) it is our intention to use a mix made up of approximately 65% coming

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from the site and 35% from a gravel pit off the site. This mix will in our opinion meet your laid down specifications.

Concerning the handling of these materials we will of course install the necessary scales and in so far as the mixing is concerned we would do this with graders using the blading process.

At any time that your project engineer wishes to discuss our plans and make the necessary tests of the materials we intend to use we will be very happy to show him our material sources.

The last paragraph of this letter, although innocuous looking, appears to have angered Corish considerably as upon receiving a copy of same, and in reporting to the Department, he referred to the Suppliant and his representatives as being dangerous men apparently because he thought that the paragraph insinuated that he was refusing to test material. The Department, however, appears to have taken the letter as a reasonable request and to have responded by a meeting on November 8 and a letter from R.L. Davies on November 9, 1960, which reads as follows:

Dear Sir:

We wish to acknowledge your letter of November 4, 1960, regarding granular materials for the above airport. In your letter, you state that it is your intention to use a mix containing 65% of materials from the site and 35% of materials from a gravel pit off the site.

Please be advised that if it is found feasible to proportion these materials and produce a suitable mixture, these proportions will be determined by our Resident Engineer after he has made the required sieve analysis on all materials. It will no doubt be necessary to vary the proportions from time to time depending on the gradation of the materials in the pits in order to adhere to specifications.

As mentioned to you during our meeting of November 8, we have an adequate materials laboratory on the site and our Resident Engineer is anxious to cooperate and is equipped to carry out all required testing.

This proposal to blend, however, was turned down on November 21, 1960, when Corish wrote to the Suppliant the following letter, (Ex. S-5):

Dear Sir:

With reference to your proposal dated Nov. 4th. ult. to blend material from Paquette farm with material from Three Rivers Airport site for purpose of supplying granular material to this project.

The writer has re-investigated and retested material from your proposed source at the airport site and your proposed source on the Paquette farm and regrets having to herewith confirm my verbal directives—to your Mr. Potvin on Sept. 9th and repeated to yourself and your Mr. Leonard on Sept. 28th—that specification bank run granular material exists in satisfactory quantity on the Paquette farm and that your proposed method of blending any portion of this Paquette material with material from the airport site would not satisfy your contract requirements.

On November 30, 1960, a change of heart appears to have taken place again when, following a meeting held at the airport on November 24, Mr. Davies wrote to the Suppliant the following letter, (Ex. S—6):

Dear Sir:

This is to confirm the conclusions of the meeting held at Three Rivers Airport on November 24th attended by:

Mr. E. J. Persons
Mr. B. Dabrowski (E. J. Persons Project Engineer)
Mr. Leonard (of E. J. Persons)
Mr. R. L. Davies (Regional Construction Engineer)
Mr. J. F. Corish (Resident Engineer)
Mr. W. G. Nurse (Regional Materials Engineer)

As previously advised by Mr. Corish the proposed granular sub-base material from Paquette's farm was accepted for use as granular fill.

The amount of sand obtained from the airport property which may be blended with forementioned granular material will be determined as follows:

Your firm will place a six inch loose lift of granular material obtained from Paquette's farm, on the runway. During placing Departmental Forces will obtain representative gradations of the forementioned material, as well as of the proposed blending sand.

On the basis of these tests our Resident Engineer will advise you of the approximate weight per cent of sand which may be blended However, final acceptance of the granular sub-base will be based on gradation tests of the blended material, sampled in place.

The blending sand will be deposited by scrapers and laid in a thin lift over the granular material, the thickness of which will be determined by the estimated allowable weight per cent of sand to be used. Rippers or other suitable equipment will be used to completely mix the two materials.

Should it be found that the thickness of the two materials is too great to obtain the specified density it will be necessary to decrease the initial lift thickness from that mentioned above.

Your firm will provide on the airport property the necessary certified scales for the weight measurement of both the blending sand and the granular material from Paquette's farm.

Since your firm has questioned our estimate of the quantity of common excavation performed to date, you were requested to have your Engineer present at the time final cross sections are taken on all borrow pits and graded areas. You were also requested to advise this office in writing as to your acceptance of these final cross sections.

It was agreed that existing borrow pits will not be disturbed, while obtaining blending sand from the airport property.

It was also established that the placing of the 22" granular sub-base course would be allowed to continue this season until weather conditions were such as to prevent obtaining the specified density.

Your firm will provide the Resident Engineer with information as to the source, and with crushed samples of the proposed material for use in the construction of the 9" crushed gravel base course.

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The Suppliant then prepared for the laying of the granular from the Paquette pit in accordance with the authorization laid down in the above letter when he was again prevented doing so by Corish revoking this authorization. Mr. Dabrowski, the Suppliant's engineer, who at that time had replaced Potvin, describes what took place on this occasion as follows (cf. p. 1574 of the transcript):

Q. Will you tell his Lordship just what happened on that occasion?

A. Once, he permitted and other times he did not permit. So, in the last moment, there was permission given and after a while he phones me, "Dabrowski, no gravel tomorrow". I had arranged everything so I could not revoke everything. So, I phoned Mr. Persons. Then, Mr. Corish told me: "On instructions from Mr. Davies, okay, put the gravel tomorrow". So, I put it.

Q. At what time of day did Mr. Corish tell you that you could not put the gravel on the next day?

A. Well, it was afternoon.

Q. Early afternoon, late afternoon?

A. Sometime after noon.

Q. And what time did he finally call you to tell you that you could go ahead?

A. I was getting all ready to go to bed.

. . .

A. Well, if you want so many questions, I tell you how it was already about the gravel. So, it was decided for some time we are putting the gravel. Then, it was hold up by Mr. Corish. Then, he mentioned permission. Then, it was bad weather. Then, it was the question of the cabin, then it was the problem of the cabin how that began.

Then, it was late. Then one day, finally, he decided, "okay". Then in the afternoon, he told me "no". And that night, at nine (9:00) o'clock, he said, "Okay".

So, we started around the next day.

. . .

Q. But this interruption of your delivery of gravel on the site, did that happen more than once?

A. It happened for a few days. It was on and off all the time, disputing. I don't know, I have nothing against Mr. Corish, he is an engineer, he knows his job very good, of course, but his behaviour was not so good.

Even when I went about that matter, he told me to leave his office, "get out, Dabrowski". So, I told Mr. Corish: "Everything in writing, no talk", because he was changing his mind here and there. I was really confused after he does that.

Q. Was he dissatisfied with the quality of the material?

A. I beg your pardon?

Q. Was he dissatisfied with the quality of the material?

A. Very dissatisfied, and the material was very good. But, he was very dissatisfied. He was never satisfied anyway.

It would seem here that Corish would have been concerned with the compaction of the sub-base but that he finally gave in and accepted the deposit of 6 inches of granular by the Suppliant upon the latter undertaking to compact the granular by means of a 50-ton roller the following year.

The Suppliant then delivered, between December 2 and December 15, 1960, approximately 26,000 tons of granular from the Paquette pit to the site, thus supplying about 6 inches out of 22 inches of the granular material required, which was approximately 155,000 tons during which time representative gradations of the material were taken by a departmental engineer by the name of Steve Bruneau and his assistants and a sieve analysis made, the Department finally deciding that the possibility of blending would depend upon the results of this sieve analysis.

Mr. Smith, the Department's engineer in Ottawa, admitted that there was nothing to prevent the contractor from taking a few thousands from one source and some from another as long as the Department was sure it was getting the proper supply. The result of this sieve analysis which, incidentally, was not communicated to the Suppliant until the trial, is contained in Ex. S-23 and indicates that the average percentage passing No. 40 sieve is 20.3 which means that 80 per cent of the material stayed on the sieve thereby allowing (based on 70.9 per cent airport sand passing the No. 40 sieve) 20 per cent to be added from the site as 30 per cent passing was acceptable and the material would still have been within the specifications as admitted by Mr. Smith, of the Department.

The blending of the Paquette material was, however, according to Mr. Davies, turned down on the basis that the Paquette material was borderline material and that there was not enough leeway to permit blending although the only tests produced regarding this material in the pit indicated a variation from 7.5 per cent to 19.9 per cent which was well within the specifications (cf. p. 729 of the transcript) Davies adding, however, that there were not enough tests made in this case to really form an opinion.

It would appear to me, however, that the real reason behind this refusal to blend was the firm stand taken by

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Corish in this regard, and this appears from his statement at p. 3476 of the transcript:

> Now, that is my personal decision, I told Mr. Smith, and I will not sanction it personally and I will not take the responsibility for what might happen if it is sanctioned by you or somebody over you.

Now the decision with respect to blending is under the contract, the responsibility of the engineer and I would not be prepared to say that he was wrong in this regard, nor would the mixing of the material, as required, have been economical if Davies's evidence is relied on, although this refusal to blend might appear to be somewhat arbitrary when consideration is given to the fact that when Persons was allowed to place material on the site, out of the 124 tests made, 7 only failed and that when O'Connell later was allowed to place material out of 179 tests, 68 failed (Ex. S-40). It did appear that in the latter case, 50 per cent of the tests were made of material from a pit which Corish cut off after 4,000 tons of unsuitable material had already been delivered on the strip.

It does, however, seem to me that having given consideration to the possibility of blending and having sampled the material from the Paquette pit, the decision not to allow the Suppliant to blend should have been communicated to him.

Mr. Davies is questioned in this regard at p. 735 of the transcript and from his answers does not appear to be too sure whether it was or not:

Q. Are you aware whether Mr. Persons was ever advised for whatever reason it was decided the blending of material from the site, would not be permitted.

A. If he ever was advised?

Q. Yes.

A. In other words, if he was ever advised that it would not be permitted?

Q. Yes.

A. I would have to check the records. I believe that he was advised.

Q. In what way?

A. By letter.

Q. Could you find such a letter?

A. I could, certainly, try, if you will give me a few minutes.

Q. During lunch hour, you may do that, Mr. Davies, and we will come back to that.

A. Yes.

No letter, however, was produced and I therefore take it that the Suppliant, following the tests made on the Paquette material, was not informed in writing that he would not be allowed to blend. Davies however, later on at the trial, having obviously refreshed his memory, returned to say that at a meeting held at his office in Dorval, P.Q., on April 15, 1961, the Suppliant had been informed of the decision verbally (cf. p. 2249 of the transcript):

> Q. And do you remember whether the contractor was told that he could or that he could not blend?
>
> A. Yes, that was discussed. The contractor was told, at that time, on the basis of the tests made up to that point, that "he would not be permitted to blend".

Davies then admitted, in answer to a number of questions asked by the Court, that the question of blending was still open providing proper material was found.

The Suppliant on the other hand denies that he was ever told that he could not blend and that he was waiting for the Department's decision as to whether he would be allowed to blend or not and in what proportions (cf. p. 2082 and following of the transcript), together with instructions in writing or a schedule of work of what he was supposed to do in other respects when he went back to work in the spring of 1961.

Before proceeding to the spring of 1961 and to the month of June when the Suppliant was removed from the work, it may be useful to indicate here that in addition to the differences to which I have already referred, which occurred in the course of the work on this construction contract and which has given rise to a number of altercations, the situation had been aggravated further when, sometime at the end of November or beginning of December 1960, Corish, upon instruction from Davies, (which at the trial he said he followed reluctantly and against his better judgment) proceeded to a number of suppliers of the Suppliant, and particularly to a firm by the name of Loranger and Molesworth, of Three Rivers, P.Q., who had supplied the pipe for the air strip at a cost of approximately $32,000, for the purpose of suggesting that this firm file a claim with the Department, (incidentally telling the supplier that although "the work as it existed then was up to schedule" the future work to be done by the Suppliant would cause him to lose $100,000,) although the supplier

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had made no complaint to the Department in this regard and had, as a matter of fact, agreed with the Suppliant to wait until he was paid by the Department (which payment at the time was forthcoming but had not yet been made) and notwithstanding the fact that the suppliers were more than covered by the materials' bond supplied by the contractor at the signing of the contract of which, however, the suppliers were not informed.

The Suppliant's men had also questioned the estimates made by the Department's men of the amount of common excavation done particularly with regard to a large quantity of black muck which was found in the west end and which had not been indicated on the pre-tender plans by the Department, as well as the quantity of excavation in the borrow pits and on the access road and had requested payment for sub-grade consolidation of the granular laid by the Suppliant at the time. As a matter of fact, the major part of the evidence in this lengthy trial dealt with an attempt made by the Suppliant to establish by an examination of the Respondent's engineers that the cross-sections taken during the course of the work were defective and did not indicate the real quantities involved. These differences regarding quantities were carried into the year 1961 and around the 14th of April 1961 at a meeting in Mr. Davies's office in Dorval, P.Q., were the subject of lengthy discussions between the Suppliant's and the Department's engineers. This appears clearly from the evidence and also from a letter written to Persons on April 19, 1961 (Ex. R-11) which refers to this meeting. A memorandum to the Assistant Deputy Minister for Air from the Director of the Construction Branch (Ex. R-8) further deals with the meeting of April 14, 1961, and why it was called, as follows:

> 2. Many complaints were heard against the Resident Engineer, Mr. Corish, as to being non-cooperative, etc. but I think it was clear to the Minister, and certainly to the undersigned, that the chief complaint was that the contract would be completed at a considerable loss. To substantiate a claim for additional payment the Resident Engineer was accused of being responsible for the loss sustained to date and also that he would not pay for the work the Company had already completed.
>
> 3. It was agreed that D.C.B. would arrange a meeting with the Contractor, Contractor's Superintendent, Regional Construction Engineer and the Resident Engineer in the Spring before work commenced to discuss all contentious points that had arisen or would be liable to arise during the new construction season to clear any possible misunderstanding in interpreting the contract and specifications.

4. A meeting was called on Friday, April 14th, in the Regional Engineer's office, Montreal, and in addition to the writer, the Regional Construction Engineer, the Resident Engineer, Mr. Persons had his solicitor, his Secretary-Treasurer, and his Superintendent present.

5. We were not able to obtain from the Contractor a schedule of operation for the coming year that he would follow to complete the work by the completion date of the contract which is the end of October, 1961. At first his reluctance to provide this information was said to be due to his inability to plan until he was assured of payment of his claim for additional quantities of excavation, etc. Needless to say we could not agree to this with so much in dispute.

6. The Contractor was not able to produce any documents, cross-sections or other data to substantiate his claim to us that we might compare his cross-sections with those of our own field staff. However he did say that the information required was available at his office. D C B. suggested that the Department would send an Engineer experienced in quantity survey to meet with their Engineer and endeavour to determine by comparing the cross-sections why there was such a terrific difference in the quantities determined by the D.O.T. Engineers and the Contractor's personnel.

7. Arrangements have been made for Mr. Dujay of our Headquarter's Engineering Staff to proceed to Three Rivers and make this independent study of the available cross-section and data and bring forward a recommendation.

8. On receipt of his recommendation it is the intention to advise the Contractor of the amount of money due to him for work done to date and instruct him to proceed and complete his contract. If he refuses the settlement it will be necessary to have our Legal Branch prepare an order to the Contractor instructing him to commence work within a specified time, failing which the Bond Company will be asked to take over.

As a result of this procedure, it would appear that the Suppliant's request for further quantities and additional payments met with some success as on May 18, 1961, H. J. Connolly wrote to Persons a letter explaining the manner in which progress payments on unit price contracts are calculated by the engineers of the Air Service Branch and informing the Suppliant that:

A report has now been received from our Engineer from Headquarters, who recently conducted an examination of the plans and cross-sections pertaining to this contract, and as a result of this report we are having a progress estimate prepared which we are ready to put forward for payment when actual physical work has commenced on the project. In this connection we understand that the site has been suitable for working for the past week and it would be to your interest to make an early start for the completion of the contract by October 31st, 1961, as there will be no extension of this date and any incompleted work at that time will be very costly.

This letter contained another paragraph where some response was given to the contractor's request for further payment and further quantities which reads as follows:

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In preparing a new progress estimate we will show a payment of $300.00 for removal of fences. This, as you know, was a controversial item during our discussion. Common excavation we are prepared to increase by 20,000 cu. yds.; ditching 18,000 cu. yds.; cleaning of ditches 3475 cu. yds. and for excavation of the entrance road we will be allowing 14,000 additional cu. yds. subject to remeasure as, due to winter conditions, accurate calculations were not possible. Smoothing and rolling we consider was adequately covered in our letter of April 19th.

Smith, however, one of the Department's engineers, stated that the additional quantities granted were based at the time on estimates only and that the final estimates (Ex. R-1) established, with respect to the 14,000 cubic yards of excavation allowed for the entrance road in addition to the 18,000 already granted, that the exact figure was 19,117.74 cubic yards which, therefore, was not too far from Corish's estimate.

During the winter months, a number of the Department's men, under the instructions of Corish, worked throughout the months of January, February, March, April and May 1961 in going over once again the sections already taken during the work performed by the Suppliant (and this must have been a very expensive procedure) because "it was his (Corish) solid judgment that this contractor would not complete the contract on the basis of what he had seen" (cf. p. 3222 of the transcript) and at p. 3226 thereof he further develops his assumption as follows:

A. ... "This man will not complete this job irrespective of his assets, his prices cannot produce a structure anywhere in conformity with this requirement of this contract". That is based entirely on my own knowledge and responsibility.

Now, although there is no question in my mind that the Suppliant, because of his low tender, could not make any profit on this job and would probably have sustained a loss, and on this subject I will say more later, the above statement would seem to indicate that its author was unmindful of the fact that the lowest bidder on any work is always entitled to lose money on a particular job and may I add as little as he possibly can, providing he produces and completes the work on time and in accordance with the requirements of the contract and its specifications. As a matter of fact, many jobs are taken by contractors at a loss, (although this is not the present case) merely to retain their key men or even sometimes to keep available

machinery busy; and it therefore appears to me that the mere fact a contractor might lose money on a job is not a good enough reason to remove him.

The Respondent, of course, does not rely on the fact that the Suppliant could not at his price, produce the required structure but, in his plea, takes the position (in section 46 thereof) "that the Petitioner failed to proceed with the construction diligently and in accordance with the terms of the said contract"; (in section 47) "that he failed or neglected to pay certain of the subcontractors to whom he was indebted;" (in section 54) "that no action was taken with respect to the foregoing consolidation of sub-grade and installation of ducts referred to in the preceding paragraph 53 by the Petitioner in December 1960, in May 1961 or during the first two weeks of June 1961; and in fact no such action was ever taken by the Petitioner;" (section 74) "that the Regional Construction Engineer made several attempts on May 19th, May 23rd and May 29th, 1961 to contact Petitioner at his office at Sweetsburg to obtain a schedule and to inquire when Petitioner intended to recommence operations" but to no avail; (section 84) "that the Project Engineer of the Petitioner, one Mr. Shinner, appeared on the construction site on June 8th, 1961, but without any knowledge of the works programme or specific instructions from the Petitioner on the manner of advancing the work and on the schedule of the said work, so as to complete the construction by the contracted completion date of October 31st, 1961;" (section 86) "that the equipment which Petitioner sent to the site on June 9th, 1961, consisted only of two bulldozers, only one of which was operational and neither of which was proper nor could it be used for these parts of the project most vital and urgent;" (section 90) "that Petitioner failed to diligently carry out the work required, the performance of which he contracted;" (section 93) "that up to the date of the said notice, the contractor had shown no desire to carry out the contract and it was evidenced from the organization and equipment planned for the job that the work could not possibly be completed by October 31st, 1961 in accordance with the terms of the contract;" and finally (section 99) "that the Petitioner evidenced no intention of recommencing work after the winter lay-off when time was opportune

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for doing so by May 15th, 1961, and not even after he was put in default to do so by the notice of June 1st, 1961".

I might say that of all the complaints raised in the plea, the only one, in view of what took place prior thereto, which might have justified the Respondent in taking advantage of section 18 of the contract at the time would be that the Suppliant "did not diligently execute the work to be performed under the contract and that he evidenced no intention of recommencing work after the winter lay-off when time was opportune for so doing by May 15, 1961 and not even after he was put in default".

As for diligently performing under the contract until the 30th of December 1960, (if I can deal with this at all, in view of the manner in which the Respondent exercised its rights under Clause 18 of the contract of which more later) I cannot in view of Ex. S-21, which is Corish's progress report No. 12, dated December 1, hold that the Suppliant was remiss in this respect in view of the Department engineer's statement that the completion date was September 30, 1961, i.e. one month before the completion date set down in the contract. It therefore follows that the only real issue here, and a crucial one, is whether when the Suppliant was informed by letter dated June 13th or 14th (Exs. S-12 and S-13) signed by H. J. Connolly, Director of the Construction Branch of the Department of Transport, that the work was taken out of his hands and turned over to another contractor, H. J. O'Connell Limited, he, the Suppliant was legally in default under clause 18 of the contract. The Respondent here takes the position that as attempts by the Department to reach the Suppliant during the months of April and May in order to find out when he would start working on the project, were unsuccessful and although the site was ready to be worked on at least as early as May 15, 1961, there was no sign of the Suppliant or of his men in Three Rivers as late as the 1st of June 1961, the Respondent had no alternative but to take advantage of clause 18 of the contract, which reads as follows:

18. In case the Contractor shall make default or delay in commencing or in diligently executing, any of the works or portions thereof to be performed, or that may be ordered under this contract, to the satisfaction of the Engineer, the Engineer may give a general notice to the Contractor requiring him to put an end to such default or delay, and should such default or delay continue for six days after such notice shall have been

given by the Engineer to the Contractor, or should the Contractor make default in the completion of the works, or any portion thereof, within the time limited with respect thereto in or under this contract, or should the Contractor become insolvent, or abandon the work, or make an assignment of this contract without the consent required or otherwise fail to observe and perform any of the provisions of this contract then, and in any such case, the Minister for and on behalf of Her Majesty, and without any further authorization, may take all the work out of the Contractor's hands and may employ such means as he, on Her Majesty's behalf, may see fit to complete the works, and in such case the Contractor shall have no claim for any further payment in respect of work performed, but shall be chargeable with, and shall remain liable for, all loss and damage which may be suffered by Her Majesty by reason of such default or delay, or the non-completion by the Contractor of the works, and no objection or claim shall be raised or made by the Contractor by reason or on account of the ultimate cost of the work, so taken over, for any reason proving greater than, in the opinion of the Contractor, it should have been; and all materials, articles and things whatsoever, and all horses, machinery, tools, plant and equipment and all rights, proprietary or otherwise, licences, powers and privileges, whether relating to or affecting real estate or personal property, acquired, possessed or provided by the Contractor for the purposes of the works, or by the Engineer under the provisions of this contract, shall remain and be the property of Her Majesty for all purposes incidental to the completion of the works, and may be used, exercised and enjoyed by Her Majesty as fully, to all intents and purposes, connected with the works as they might theretofore have been used, exercised and enjoyed by the Contractor, and the Minister may also, at his option, on behalf of Her Majesty, sell or otherwise dispose of, at forced sale prices, or at public auction or private sale or otherwise, the whole or any portion or number of such materials, articles, things, horses, machinery, tools, plant and equipment at such price or prices as he may see fit, and retain the proceeds of any such sale or disposition and all other amounts then or thereafter due by Her Majesty to the Contractor on account of, or in part satisfaction of, any loss or damage which Her Majesty may sustain or have sustained by reason aforesaid.

The following notice (Ex. S-9), dated June 1, 1961, was forwarded to the Suppliant:

Pursuant to clause 18 of the contract in writing between HER MAJESTY THE QUEEN IN RIGHT OF CANADA, represented by the Minister of Transport, and E. J PERSONS, doing business under the firm name and style of E. J. PERSONS CONSTRUCTION of Sweetsburg, in the Province of Quebec, dated August 5, 1960, bearing No. 64840 in the records of the Department of Transport, being in respect of the construction of a Runway 6,000′ × 150′, a Parking area 300′ × 300′, a connecting Taxiway and Access Road at Three Rivers Airport, Three Rivers, Province of Quebec, I hereby give you notice that I require you to put an end to your default and delay in diligently executing the works to be performed under the said contract.

And I have to advise you that in the event of failure on your part to comply with this notice on or before June 12, 1961, the works will be taken out of your hands and will be completed by the Department as may seem fit, and, in this connection, your attention is called to Clause 18 under which you will have no claim for any further payment, but you will

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be chargeable with and shall remain liable for all loss and damage suffered by Her Majesty and to clauses 48 and 50 under which the security deposit made by you will be forfeited.

This notice was acknowledged by the Suppliant's solicitor on June 7, 1961 by a letter of that date (Ex. S-10) which reads as follows:

Dear Sir:

On behalf of our client, Mr. E. J. Persons, we wish to acknowledge your notice of June 1st 1961 concerning the commencement of work in respect of the above noted Contract, by June 12th, 1961.

As you are undoubtedly aware, due to weather conditions and soil conditions, it was impossible up until a few days ago, for our client to commence work and be certain that it would be done to the proper standards. We wish to advise you that our client intends to commence work on or before the 12th of June 1961.

It is our understanding that it was agreed at our last meeting, between yourself and members of your Department, with our client and ourselves, that when Mr. Persons recommenced work in respect of the above Contract, you would send a new engineer on the job and so would our client. When our client commences work he will have a new engineer on the job and we presume that your Department will also present a new engineer. If this is not so, we would appreciate hearing from you in this regard on or before the 12th of June 1961.

This letter was followed by a wire from E. J. Persons, dated June 8th (Ex. S-11) which reads as follows:

RE THREE RIVERS AIRPORT PLEASE BE ADVISED THAT OUR ENGINEER MR. MIKE SHINNERS IS NOW AT AIRPORT SITE WILL BE READY TO RESUME WORK MONDAY JUNE TWELFTH

Mike Shinners, a professional engineer, then appeared on the site with two bulldozers, one which was stopped by Corish some time after it had started, on June 12, stumping, grubbing and pushing the stumps around and shaking them out, because it had a straight blade, the other continued working until the 6th of July, 1961. He also contacted Shell Oil Company for the supply of fuel oil and made the necessary arrangements to bring on to the site a back hoe to work on the trenches for the conduits on the runway and he stated that three half yard back hoes and one two yard back hoe as well as a wobbly wheel compactor were available at the site of another job in Three Rivers, where the Suppliant was working.

Shinners' instructions from the Suppliant when he proceeded to the site in June 1961 (of which I will say more later) were as follows, cf. p. 1014 of the transcript):

Q. And what instructions were you given by Mr. Persons in June 1961 when you went back on the job?

A. I was told to get a schedule of work as to how we would proceed from the Department of Transport and you know bring your equipment in, getting the work . . .

Q. In accordance with that schedule?

A. Yes.

Q. Were you to do anything particularly, in the meantime as far as the work was concerned, until you got this schedule and got the equipment back?

A. If we had the equipment in, we would be shaking out the stumps which had been placed the year before, on the site of the runway.

On June 12, 1961, Corish delivered to Shinners on the site, a memorandum (Ex. S-8) comprising a schedule of work which reads as follows:

1. Because of the confused and unsatisfactory manner in which the work on this project has hitherto been conducted by your principal and because of various unjust allegations (seriously reflecting on the writer's capacity and character) which have been addressed by Mr. E. J. Persons and his Mr. Leonard to my authorities, I am adopting this unusual and in my long experience, unique procedure of giving all of my directives to yourself and your principals in writing.

2. Accordingly I am requesting that you:—

(*a*) ask your principal to confirm to me personally or in writing, that you or such other suitable person as he may decide are in fact the "lawful representative of the Contractor" as set out in Item 13 of Contract Indenture.

(*b*) ask your principal to disclose to me his complete schedule of work, sources and samples of all materials he has contracted to supply to this project.

(*c*) ask your principal to expedite this information so as to give me adequate time to arrange for necessary staff, materials tests, etc. As of this date I am unaware of your principal intentions re his proposed schedule of work, the equipment he proposed to supply or the source & quality of all of the materials for which he is responsible.

3. (*d*) Assuming that you are now or are to be the representative of the Contractor, I am submitting for your information and action my requirements for the priority and sequence of work remaining to be done on this project:—

(*a*) Install all ducts across runway & taxi strip as specified.

(*b*) Excavate existing backfill material round all manholes, catch-basins and over pipes across runway & taxiway and replace backfill material to subgrade level in the manner & with the equipment specified.

(*c*) Compact 12" deep as specified runway subgrade extending 77' left from center line of runway between stations 155 00 & 124 00 and such other subgrade areas as may be indicated when tests are completed.

(*d*) Compact as specified loose layer of gradular material existing over entire runway, taxiway & apron subgrades.

(*e*) Supply, apply & consolidate as specified additional granular material required to bring compacted surface of this material to planned and given grade.

(*f*) Supply and apply crushed gravel base course as specified.

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(*g*) Apply priming material as specified (priming material to be supplied by the Dept.).

(*h*) Supply & apply as specified, 3½" asphaltic concrete (Asphalt cement to be supplied by the Dept.).

5. It is to be distinctly understood that these operations are to be initiated immediately, carried to completion before October 31st, 1961 and in the sequence as listed. Other works remaining to be done must also be completed in the stipulated time—on or before Oct. 31st, '61—provided always that the initiation or prosecution of any item not set out in the above directed schedule does not interfere in any manner whatsoever with the urgently required priority of the items listed.

The following day, H. J. Connolly, Director, Construction Branch, Department of Transport, forwarded copy of a letter dated June 13, 1961, addressed to E. J. Persons to the Fidelity-Phenix Insurance Co., whom he erroneously thought had issued the performance bond and the original of the same letter, but dated June 14th (Ex. 12) (the date appearing to have been changed) to E. J. Persons. This letter reads as follows:

E. J. Persons Construction,
67 Main Street,
Sweetsburg, Quebec.

Dear Sirs: Re: Contract No 64840 dated August 5, 1960, between the Department of Transport and E. J. Persons Construction for construction of a runway, parking area, connecting taxiway and access road at Three Rivers Airport.

Reference is made to my notice of June 1, 1961, addressed to E. J. Persons Construction giving notice pursuant to clause 18 of the above mentioned contract to put an end to the default and delay in diligently executing the works to be performed under the said contract.

In view of the fact that the work covered by Contract No. 64840 has not been proceeded with pursuant to my notice, aforesaid, of June 1, 1961, I have to advise E. J. Persons Construction that the *Department* is taking the work out of the said contractor's hands and has entered into a contract with another contractor, namely, H. J. O'Connell Limited, to complete the work covered by the said contract.

Yours truly,
Sgd. H. J. Connolly
(H. J. Connolly),
Director, Construction Branch.

c c. The Fidelity-Phenix Insurance Co.

H. J. Connolly explained how this was done at p. 551 and following of the transcript:

A. Yes, at that time, when I wrote the letter, it would be on June thirteenth (13th) with the intention of going down there to verify in my own judgment, whether I should cancel the contract. I took the letter. I had it typed by my stenographer in the office.

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Q. In Montreal?

A. No, Ottawa, sir. Then we had to arrange transportation to get down there. And, I found out the closest place we would get was to get our own aircraft and fly down to Cap de la Madeleine and we would have to drive from there.

I took this letter with me intending to serve it, if I found that our regional engineer was correct in what he was saying.

Then at p. 552:

There was no work being done. When I was convinced that they had not been doing any work, and did not appear to be wanting to do any work, then I sent the letter back by hand. But, the date was already on it. It was the day before. I sent this letter back to Montreal .... no, I am sorry, I left the letter in Montreal with the Regional Office and told them, if the conditions of the work were unsatisfactory when I got down there, I wanted them to take this by hand, with a witness and serve it by hand on the contractor at Sweetsburg.

Now, I said, "I will phone you and tell you whether this is to be sent". Now, I left it with them. When I got down to Three Rivers and the place was such a mess, there was no one there to talk to, I decided we would send the letter.

So, I called the Montreal Regional Office by telephone and asked them to send the letter down but to put the correct date on the letter.

So, I assumed they made the change on the date on the letter in the Montreal Office.

At p. 553 Connolly is asked the following:

Q. . . . in this letter Exhibit S12, it states near the end, "the Department is taking the work out of the said contractor's hands and has entered into a contract with another contractor, namely H. J. O'Connell Limited, to complete the work covered by the said contract".

He was then asked from the evidence which he gave earlier if this was correct and he answered:

A. In my opinion, I had a verbal contract with the representative of the O'Connell Company. Actually, what transpired down at the job, when we were looking it over, I said, "Now, the essence of this contract is speed and time".

And, I said, "Can you (the H. J. O'Connell representative) start immediately". He looked at his watch and it was twenty after twelve (12:20) and he said, "I cannot start to-day, but I can start tomorrow morning". He said, "We are working on a job up here a few miles up on the highway job and I will bring some equipment down from there".

I said, "Will you do that". And, I said, "I've got to get this job moving". He said, "Yes, I will bring some in the morning". So, I said, "Go ahead".

I had committed the Department to that contract.

Q. At that point, some of the prices had not been discussed or decided?

A. It had been agreed that we would give him some extra consideration for a number of what we considered low prices.

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Q. This letter, you say, was written the previous day?
A. That is correct.
Q. In your office? In Ottawa?
A. Yes.
Q. At that point, there was no contract with O'Connell, you had not even met Mr. Verge?
A. That's right. All I had at that time was they say, "they would be prepared to take it over at adjusted prices".

I have gone into the evidence here in some detail because the background which led to the Department taking advantage of clause 18 of the contract is necessary to properly deal with the question as to whether the Minister has validly taken "all the" work out of the contractor's hands pursuant to clause 18 of the contract.

In considering this question, it is important to have in mind the various alternative conditions precedent to the exercise of the power conferred by clause 18 to take the work out of the contractor's hands. These are:

(1) "In case (*a*) the contractor shall make default or delay in commencing or in diligently executing any of the works or portions thereof to be performed...to the satisfaction of the engineer; (*b*) the engineer gives a general notice to put an end to such delay or default, and (*c*) such delay or default continues for six days after such notice."

(2) "Should the contractor make default in the completion of the works or any portion thereof, within the time limited with respect thereto in or under this contract."

(3) "Should the contractor become insolvent,"

(4) "or abandon the work,"

(5) "or make an assignment of this contract without the consent required,"

(6) "or otherwise fail to observe or perform any of the provisions of the contract".

A comparison of these various classes of cases in which, if they arise, the Minister may take the work away from the contractor, makes it clear that while the Minister has authority under clause 18 to base the exercise of the power upon a "default in the completion of the works...within the time limited...in the contract" (No. 2 *supra*) or any failure to observe or perform any of the provisions of the contract (No. 6 *supra*) when as in the notice of June 1, 1961 (Ex. S-9) and the letter of June 14, 1961, (Ex. S-12)

as well as in the firm position its counsel took at the trial, the Respondent specifically bases Herself on No. 1 (*supra*) i.e., "default or delay in ...diligently executing any of the works or portions thereof to be performed...under this contract", She cannot rely on any other basis.

It therefore follows that the Respondent having thus restricted the exercise of the power conferred by clause 18 to take the work out of the contractor's hands to the first case provided thereunder, (No. 1 *supra*) it is not sufficient to subsequently support the exercise of this power on any other default, delay or reason in complying with one of the requirements of the contract.

The Respondent in basing Herself on No. 1 (*supra*) must show all of the following in order to validly take the work out of the contractor's hands pursuant to clause 18:

(*a*) that the contractor "to the satisfaction of the engineer" made a default or delay in "commencing" or "executing" some specific "work" or portion of work;

(*b*) that the engineer gave a general notice to the contractor to put an end "to such default or delay";

(*c*) a failure to put an end "to such default or delay" for six days after such notice.

The notice of June 1, 1961, does not comply with (*a*) or (*b*) (*supra*) of which I will say more later and it is even doubtful that it complies with paragraph (*c*) (*supra*) as appears hereunder.

Two main attacks were made by the Suppliant with respect to the notice given by the Respondent herein, as well as the letter given by Connolly taking the work out of the hands of the contractor in that (1) the Suppliant under the Respondent's notice (Ex. S-9) was entitled to correct any default or delay beyond June 12, 1961, and up to June 17, 1961, and (2) the Minister or Deputy Minister only were entitled to take the work out of the contractor's hands.

Clause 18 provides that if default or delay continues for six days after notice has been given, then the Minister can take all of the work out of the contractor's hands. In the present case, however, the Department's engineer having chosen to specify a date or a deadline for the commencement of the work and having granted a specific delay for

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compliance with the notice dated June 1, 1961, (Ex. S-9) namely that work was to be commenced on or before June 12, 1961, and not having simply required the contractor to get on with the work, in which case the six days' delay would have commenced when the notice was given, i.e., June 5, 1961, the delay here would have started running only on June 12, 1961, and the six days continuance of such default could not, therefore, have been completed until the end of June 17, 1961. Thus until June 17, 1961, as urged by counsel for the Suppliant, the Minister had no power under the contract to take the work out of the contractor's hands, and, therefore, the steps taken by the Department of Transport on or around June 14, 1961, were premature, not in accordance with the terms of the contract, and the work was illegally and improperly taken out of the Suppliant's hands.

Counsel for the Respondent on the other hand submits that as the notice was received by the Suppliant on June 5, 1961, the six days during which the latter remained in default ended on June 12 at which time the work could be removed from the contractor which however as already mentioned happened to be also the very day Corish delivered his schedule of work.

The language used in the notice cannot I believe, lead to this interpretation and I would incline towards the view that the six days of continued delay necessary under clause 18 of the contract would have commenced to run on the 12th of June and terminated on the 17th as submitted by the Suppliant. However, even if Respondent's interpretation of the said notice is the correct one and the Suppliant would have been in default on June 12, 1961, he still would not have been in default in view of Ex. S-8, Corish's instructions in writing to the contractor of June 12, 1961, wherein he determined the work to be done and the sequence to be followed and stated in paragraph 5 thereof that: "It is to be distinctly understood that these operations are to be initiated immediately, carried to completion before October 31st, 1961, and in the sequence as listed." These instructions of the resident engineer in conflict with Connolly's notice of June 1, 1961, would, in my view, supersede the latter, act in effect as a waiver thereof, set a new departure

for the continuation of the work and require a new notice again if the Respondent wanted to avail Herself of Clause 18.

The words of clause 18, under which the Department purported to act, is a confiscatory clause and as such should be strictly construed against the party seeking to enforce its provisions (cf. *Neelon v. City of Toronto and E. J. Lennox*[1] where it was held that a forfeiture provision [similar to the one dealt with here] is to be strictly construed and that where the building owner and architect dismissed the contractor, he must comply strictly with the requirements of the contract). I would nevertheless, in a case such as this, have hesitated to decide an action such as the present one on the sole basis that the Respondent had not taken a mere formal step required under the contract. There is, however, here such inconsistency, irregularity and non-compliance on the part of the Respondent in exercising its rights under clause 18 of the contract that I find myself unable to say that we are merely dealing here with a question of simple procedure or formality. I might further add that although the Court must not attempt to mitigate the hardship upon the contractor of such a clause, however oppressive it may be, it also follows, I believe, that care must also be taken not to add to its severity by making it available to unauthorized persons or by allowing it to be exercised in a manner which (through the very actions of the person or persons in whose favour such a clause is inserted) would not allow the contractor the opportunity contemplated by the contract to correct whatever default he is accused of.

On the basis of the evidence adduced, I would have been prepared to hold that the Respondent's engineers were entitled to assume from the inactivity of the Suppliant on the site of the work in the spring of 1961 that he was not diligently prosecuting the work and that there was great doubt that he would have terminated the job on time if at all, were it not for (1) the sending of the notice (Ex. S-9) by the Respondent which (and this was admitted by the Respondent's counsel during argument) indicates clearly that if upon receipt of same and within the period set down therein he diligently proceeded with the work notwithstanding what he had done prior thereto, the Department

[1] (1893-1896) 25 S.C.R. 579.

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would not be able to take advantage of clause 18 as, once the notice was given, the Respondent's right to act on it depended not on its view of the Suppliant's conduct prior thereto but on whether, after receipt of the notice, he did or did not for six days make default in regularly proceeding with the works, and for (2) the schedule of work (S-8) produced by Corish on June 12, 1961, and the effect it had on waiving any rights the Respondent had under the notice of June 1, 1961, (if any) which I have just dealt with, and for (3) the position taken by the Suppliant that as a result of a number of discussions held with the Respondent's engineers and particularly a meeting held on April 14, 1961, attended by the Respondent's engineers and the Suppliant and his counsel, he had been promised a decision as to whether he could bury the stumps, or even merely push them (as O'Connell later was allowed to do) instead of burning them, whether he would be allowed to blend the granular, and in what proportion and finally that he would be given a schedule of work in order to avoid all the trouble he had experienced the preceding year with the Respondent's resident engineer, even suggesting that he would send in a new engineer if the Department would do likewise.

It therefore appears that the question as to whether the Suppliant was justified or not upon receipt of the notice of merely doing whatever work required no definite instructions, such as pushing stumps around, pending receipt of a written schedule of work, depends on whether this schedule of work had been promised to him or not. As the evidence on this subject is somewhat conflicting it will be necessary to review it in some detail in order to assess it properly.

Persons, at p. 1750 of the transcript, speaking of the meeting held in Davies' office on April 14, 1961, when trying to discuss the job in general to get some idea of what quantities the Department would allow him and to see what could be worked out for the coming year, asserted that:

> One thing was discussed, it was how we were going to proceed with the job and if we could not avoid trouble which we had been having in the past two (2) months from the fifteenth (15th) of October to the fifteenth (15th) of December, nineteen sixty (1960) and get on better relationship between my engineer and the site engineer, which we had somehow, some argument at that meeting.

As I remember, when Mr. Stalker started questioning Mr. Corish, he got up and tried to leave the room. He said, "He was not taking that kind of talk from that gentleman", and he walked to the door and Mr. Connolly said, "You come back and sit down. You've got to listen to this man and you've got to answer his questions".

So, Mr. Corish came back and sat down and then the meeting went on and we agreed that everything would be done in writing, all orders, instructions would be given in writing to us and we did agree that the schedule of work would not come from myself, it would come from Mr. Corish because I did not want any more of this stuff going around. When we decided to do something, he was out in the field to stop us. When he decided, it was much easier. So, I thought I would reverse the procedure and let him give the orders and we would try to get along with him the best way as possible.

I mentioned that I would bring a new engineer on the job and I was hoping and I asked them if they would not send a new engineer on the job and they said, they would think about it—they would discuss it.

I told him I thought it would be much better if we both sent a new engineer on the job and let them have a new start, that I thought the thing would work out okay.

When the job started, Mr. Corish came on the job. I was supposed to be notified when to go back to work. I could not go back to work on my own, I had to receive a letter from The Department of Transport and they were to notify me when their engineer would be there, ready to proceed with the work.

The attitude taken by the Department with regard to the schedule of work issued by Corish on June 12, 1961, was not too clear. It started out with a clear denial that it had ever been discussed at the meeting of March 14, 1961, and ended by an admission that the matter had been discussed. Corish's evidence on this matter is not too clear either, when at p. 3237 of the transcript he is asked the question:

Q. Did you do that at the request of Mr. Shinners?

A. No, I did it on my own initiative and for the record, because at the time I had been able to contact the RCE, he was up here and he said he had been instructed and I was awaiting instructions other than what he told.

And later cross-examined by Mr. Stalker, counsel for the Suppliant, at p. 3586 and p. 3587 of the transcript, these instructions would seem to have resulted from the meeting of April 14, 1961:

Q. Mr. Corish, on the twelfth (12th) of June nineteen sixty-one (1961) . . .

A. Yes.

Q. You handed to Mr. Shinners at Three Rivers ... I believe you also mailed to Mr. Persons a memorandum dated the same day, headed "Directive re: Prosecution of work on contract number 46840". This is produced as Ex. S-8.

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You referred to this in your evidence and this arose, as I recall and as I think your evidence stated, as an outcome of the meeting which was held in Mr. Davies office on the fourteenth (14th) of April of that year.

You referred to this in your examination in chief, as a series of questions to be directed to the contractor's representatives as to the prosecution of the work. But looking at both, from the title and from the wording, it is instructions rather than questions, is it not?

A. It is primarily a question and secondarily there are instructions based on a supposition that this contractor will go ahead with the work. You can interpret it—that was my intent and meaning.

Connolly at p. 561 of the transcript does not remember if the proposed schedule of work was discussed at the April meeting.

Davies on the other hand starts by denying that there was ever any question of supplying the Suppliant with a schedule of work and then ends up by admitting that the matter was discussed and this appears clearly from extracts of his evidence at pp. 2251-2252 of the transcript, where he answered as follows:

Q. At this meeting, was there any question of furnishing a work schedule to the contractor?

A. No, not to my knowledge.

Q. Was the question of the time, when the contractor should return on the job, discussed?

A. No, I do not recall that being discussed.

Q. Do you recall whether the contractor would have been told that he was not to return on the job until he heard from the Department?

A. Definitely not. I do not recall that at all.

Q. Was there any question of written instructions furnished to the contractor discussed?

A. No.

However, later Mr. Davies, on this rather important point, returned to the stand and while being examined by counsel for the petitioner, at pp. 3948 and 3949 of the transcript, stated the following:

Q. In your evidence, Mr. Davies, in discussing the meeting which was held in your office on the 14th of April, 1961, you stated more flatly than that, there was no discussion of furnishing of any written instructions or order of work to the contractor.

A. During that meeting?

Q. Yes at that meeting ...

A. I made the statement that there were no discussions of furnishing written instructions?

Q. Yes.

A. I do not recall making that statement, Mr. Stalker.

Q. Without going back into the evidence, if I were to ask you the question now, "was it discussed at that meeting" ...
A. I believe it was discussed at the time.
Q. Fine. I had a different note down I know now what it is.

It would seem that the situation created by the decision on June 13, 1961, to remove the contractor from the job a day after Corish had delivered his schedule of work resulted from a lack of coordination within the Department between Corish and Connolly and also because the latter either did not know or had forgotten that such a schedule of work had been promised. Now, for whatever reasons this was done, it does appear to me that I must, on the basis of the evidence before me, accept the Suppliant's contention that he was awaiting a promised schedule of work which arrived on June 12, 1961. In this respect, I go no further than say, and I do this without deciding whether the contractor was remiss in his duties to proceed diligently with the work or not, that under the circumstances, it is not possible to hold the contractor in default in not diligently proceeding with the work so as to allow the Respondent to take advantage of the confiscatory clause 18 of the contract (and which incidentally is an extraordinary measure to be exercised strictly within its terms) when the contractor having received a notice to correct a default from the head office of the owner is entitled to await written instructions promised either by the owner's representatives, Mr. Davies in the Montreal office or Mr. Corish on the job, and which was necessary to correct such default. How indeed is it possible to find the Suppliant in default on June 12, 1961, as urged by counsel for the Respondent, on the very day he received the written instructions he had been promised and was awaiting to proceed with the work.

There is, however, a further reason for holding that the Respondent could not, under the circumstances, avail Herself of clause 18 of the contract, in that the evidence is not sufficiently cogent that the decision to take the work out of the contractor's hands on June 13 or June 14 was taken by the Minister of Transport or the Deputy Minister, as required by the terms of the contract, particularly when all the evidence points to the decision having been taken by the Department through Mr. Connolly, its Director of Construction Branch.

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Clause 18 of the contract states at line 12 that "The Minister for and on behalf of her Majesty...may take all the work out of the Contractor's hands..." and under clause 1 of the contract "Minister" is defined as "the person holding the position, or acting in the capacity, of the Minister of Transport, for the time being and shall include the person holding the position, or acting in the capacity, of the Deputy Minister of Transport, for the time being" and at the relevant time the Minister here was the Hon. Mr. Balcer and Mr. John Baldwin was the Deputy Minister of Transport, and not Mr. H. J. Connolly who was by definition "the engineer" under the contract. That Connolly or some other departmental official would have taken this decision instead of the Minister or Deputy Minister appears from the letter forwarded by Connolly (Ex. S-13) wherein it is specifically stated that "the Department" is taking the work out of the contractor's hands as well as from his evidence at the trial.

Furthermore, although Mr. Balcer was called as a witness, he was never asked (although the validity and legality of the notice had been raised in the pleadings of the Suppliant and remained an issue during the whole trial) whether he had authorized the taking away of the work from the contractor merely stating that he was aware of this. Subsequently, in a letter to the Suppliant's counsel dated July 17, 1961, which letter was produced by consent at the argument as Ex. R-44 when this matter was debated by counsel, the statement is again made by the Minister at line 25 of p. 2 of this letter that "the Department may take the work out of the contractor's hands and have the work completed and, in such case, the contractor shall have no claim for any further payment in respect of work performed, but shall be chargeable with and shall remain liable for all loss or damage suffered by Her Majesty by reason of default or delay", although in the next paragraph he refers again to clause 18 of the contract and there correctly states that the Minister may take all the work out of the contractor's hands "and may employ such means as he, on Her Majesty's behalf, may see fit to complete the works" which, however, is mentioned only to deal with Persons submitting that he had no knowledge of the arrangements made

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by the Department to complete the work, and in no way establishes that the Minister or Deputy Minister took this work out of the contractor's hands.

As a matter of fact, Connolly's evidence in this respect, which has already been referred to, establishes that he alone took this decision when he went to Three Rivers on June 14, 1961, and caused same to be forwarded by letter, not only to the Suppliant but also to his bonder, and incidentally it was forwarded to the wrong bonding company at that.

Now, although ordinarily within the various Government departments, the Minister, or Deputy Minister, acts through his employees or servants, it would seem that on certain subjects involving matters of policy or of importance, the Minister, or Deputy Minister, alone is called upon to take the final decision. This appears to be the case within the Department of Transport as chapter 79 vol. II of the *Revised Statutes of Canada,* which sets up this Department, differentiates between the latter acting through its employees and the Minister and Deputy Minister when it spells out in sections 3, 4, 5 and 6 distinctive and various responsibilities of the Minister, Deputy Minister and engineers. The contract here (Ex. S-1) also distinguishes at various places between actions by the Minister and actions by the engineer and where specifically in clause 18 itself it provides that the final drastic step to be taken in order to remove the contractor from the job be taken by the Minister or (by definition) the Deputy Minister, then it appears clearly that he alone can take it. Now as such was the requirement of the contract, which as already mentioned must be strictly construed, it then became incumbent upon the Respondent to establish in a convincing manner that the decision to take the work out of the contractor's hands had been made by the Minister which, unfortunately, was not done in the present case, and the letter of June 14 (Ex. S-12) cannot be considered as a valid exercise of the powers conferred by clause 18 of the contract. In *Neelon v. The City of Toronto and E. J. Lennox* (*supra*) the Supreme Court of Canada held in a majority decision (on a strict interpretation of the confiscatory clause and the right of the person authorized to take advantage of it) that where the architect was given the power to dismiss the contractor

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and employ other persons to finish the work and did this on his own without the consent in writing of the Court House Committee or Commission, which was required under the general conditions which were specifically stated to form part of the contract except in so far as inconsistent therewith, that his decision was valid and that the architect had power to dismiss the contractor without the consent in writing of the Committee on the basis that this clause in the general condition was inconsistent with the contract and that the latter must govern.

I must, however, still go further on this matter of default, and hold for an additional reason that the Respondent did not bring Herself within the terms of clause 18 of the contract so as to effectively place the Suppliant in default in that (and I have already touched upon this subject *supra*) no specific default or delay was mentioned in the Respondent's notice of June 1, 1961, the latter merely requiring that he put an end to his default and delay in diligently executing the works to be performed under the contract.

Now, although as submitted by the Respondent, the Suppliant should have known what to do and did not have to await any instructions written or otherwise from the Respondent to proceed with the job, I still feel that the notice (Ex. S-9) in the very general terms it is couched, does not meet with the requirements of clause 18 of the contract and should have set down specifically the defaults or delays "in commencing or in diligently executing any of the works or portions thereof to be performed or that may be ordered under this contract to the satisfaction of the Engineer" and I say that this would apply particularly in the present instance when the Suppliant had been promised a schedule of work which, as already mentioned, arrived the very day the Suppliant was taken to be in default. In *Frank L. Boone v. His Majesty the King*[1] the Court, dealing with this very same clause, stated:

> On a fair construction of this language it must, I think, be taken to presuppose the existence of some specific, definite default or delay on the part of the contractors in diligently executing any of the works or portions thereof to the satisfaction of the Engineer, of which complaint has been made to them; otherwise what effect can be given to the words of the notice "to put an end of such default or delay"?

[1] [1934] S.C.R. 457 at 469.

and further down at p. 469:

> The words of clause 19, under which the Department purported to act, clearly contemplate that the contractor shall be made aware of the default or delay with which the Engineer is dissatisfied, otherwise, how could the contractor reasonably be expected to put an end to such default or delay within six days.

I would indeed think it reasonable that in the circumstances of the present case, the Respondent could have discharged the onus of justifying it was entitled to take advantage of clause 18, by including in the notice of June 1, 1961, the schedule of work set down in Corish's document of June 12, 1961.

Having thus determined that the Respondent has failed to bring Herself within the terms of clause 18 of the contract, it then follows that the ousting of the contractor from the work, becomes a breach going to the root of the contract and the remedy of the contractor in such a case is therefore to do what he did, i.e., bring an action for the actual value of the work and labour done and materials supplied up to the time his machinery was ordered off the site by the engineer, which here took place on July 6, 1961, and claim damages.

Before dealing with the amounts claimed for work completed prior to December 21, 1960, it would be in order, I believe, to point out here that the Suppliant is not entitled to a larger compensation than that stipulated in the contract and that the Court is governed by section 47 of *The Exchequer Court Act*, R.S.C. 1952, c. 98:

> 47. In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow
>
> (*a*) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein, or
>
> (*b*) interest on any sum of money that the court considers to be due to the claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown.

Counsel on both sides appear to have agreed that the cause of action having arisen in the Province of Quebec, wherein the work was to be performed, the law of that province applies. Counsel for the Respondent submitted in argument that they could rely on articles 1690 and 1691 of the *Quebec Civil Code* wherein it is stipulated

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(1) that a contractor cannot claim any additional sum upon the ground of the change from the plan and specifications of an increase in the labour and materials unless such change or increase is authorized in writing and the price thereof is agreed upon with the proprietor, in all cases where the construction of the works is by contract, upon a plan and specifications and at a fixed price, and

(2) (article 1691) "The owner may cancel the contract for the construction of a building or other works at a fixed price although the works have been begun, on indemnifying the workman for all his actual expenses or labour and paying damages according to the circumstances of the case"

which damages, in the case where the recourse under article 1691 is taken advantage of, are not the profit which the contractor could have made under the cancelled contract in the event the works would have been completed, but only the profit the contractor could have made on another contract which he might have executed but which he has missed because of the cancelled contract. The present contract, while a construction contract, is not a "contrat à forfait", to wit: a contract according to plan and specifications at a fixed price but one remunerated on the basis of a series of unit prices set forth in the contract. The contractor is, therefore, not subject to the provisions of article 1690 C.C. or article 1691 C.C. and I cannot accept the submission made by counsel for the Respondent that the case of *Quebec v. Dumont*[1] is an authority establishing the principle that when a contract is made at a unit price and not at a fixed price, the terms of article 1691 C.C. may still be applicable if the contract contains a clause providing that extras may be authorized in writing as I am not able to draw this conclusion from the reading of this decision.

This does not, however, mean that the Suppliant here is entitled to claim from the Respondent the cost of any additional work not provided for in the contract or the specifications which it may have performed as the rights of the parties must be determined having regard to the terms of the contract.

[1] [1936] 1 D.L.R. 446.

I now turn to sections 33 and 34 of the Petition of Right where an amount of $180,397.59 is claimed for work completed prior to December 21, 1960. Section 34 reads as follows:

		VALUE OF THE WORK DONE
1	Stumping & grubbing	$ 14,260 00
2.	Removal of fences	300 00
3.	Common excavation	22,929 39
4	Smoothing & rolling	4,800.00
5.	Open ditch	3,943 20
6.	Clean & Deepen existing ditches	1,655.25
7.	Consolidating sub-soil	3,540 00
8	Access Road	3,500 00
9.	Hold back	16,760 00
10	Clean & Deepen existing ditches	4,965 75
11.	Re-excavate open ditches	9,471 50
12	Excavate black muck southwest end of runway	39,560 00
13.	Move black muck from stockpile & spread	27,412.50
14	Delay on Easement ditch	27,300 00
		$180,397 59

The amount was arrived at by using the quantities calculated by S. L. Toczyski & Associates, consulting engineers, and produced in a report as Ex. S-45. A summary of this claim (S-75) produced in connection with the assignment to the Royal Bank of Canada sets out a description of the contract, the quantities allowed by the Department, the quantities claimed by the Suppliant, the quantities claimed and not paid the unit cost and, finally, the total value of the claim.

Before going into the various items listed above, it would be useful to point out that the Suppliant here has the burden of justifying his claim of having been underpaid for work actually done and I may say that his evidence in this regard left much to be desired; he was not able to produce an actual calculation made by his engineers in the field and, therefore, could hardly show any errors in the complete books and records kept by the Respondent. As a matter of fact, the greater part of the evidence dealt with the examination or cross-examination of the Respondent's witnesses by counsel for the Suppliant in an attempt to either discredit the Respondent's records, the work done by its engineers or sometimes the engineers themselves.

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Taking this claim in order, and dealing with item No. 1 in paragraph 34 of the Petition of Right, "Stumping & grubbing—$14,260.00" which Mr. Toczyski calculated at 234 acres, it does appear that the latter was not too sure how he arrived at this figure as he states in volume 9, p. 1365 of the transcript:

> A. ...I think I am not sure, but we either roughly measured where they were beyond the area of the ditches pushed into the rough side.

He later, in cross-examination, admitted that the total time he spent on the site was one day, June 19, 1961 (cf. vol. 9, p. 1433) and that the specifications for stumping and grubbing called also for the disposal of the trees together with the taking out and disposal of roots (cf. vol. 9, p. 1434).

At p. 1436, volume 9 of the transcript, he stated, in answer to the following question:

> Q. How could you tell, say for example, the quantity of roots that still had to be removed? How could you estimate that?
>
> A I don't think I could estimate the quantity of roots to be taken out, if there were any to be taken out.

Dabrowski, one of the Suppliant's employees, also testified on this item. His evidence in this regard is not too satisfactory either, nor can he establish with any certainty the amounts of stumping and grubbing done by the contractor. He states that when he arrived on the site in September, 1960, there was some 10 per cent to 15 per cent to 25 per cent of stumping and grubbing still to be done. He then mentioned that some 6 to 7 acres were done while he was there without, however, being able to produce any calculations on which these figures were based. When he left the site on December 1960, there would have been, according to Dabrowski, 10 to 15 per cent of clearing to be done with some trees left and some 2,000 feet of stumping and grubbing. He also stated that there were also stumps left on the ground. Finally, in cross-examination, he indicated that perhaps 25 per cent stumping and grubbing could have remained to be done as of the date of his departure.

Brossard, an engineer of the O'Connell firm, which completed the contract, stated that the stumping and grubbing operation was done by his firm over a period of 26 days, which does not necessarily mean that there were 26 days of work to be done as the evidence also discloses that the

equipment for this work was used as it became available. It still indicates, however, that a good portion of stumping and grubbing was still required to be done.

Corish estimated that roughly half the amount of stumping and grubbing had been done by Persons. Actual measurements later showed that a total of 255.2 acres were done by both contractors and as Persons was credited and paid for the equivalent of 110 acres after taking into consideration the hold back of approximately 10 per cent, he would have received 47 per cent of the total on this item. In my view, the Suppliant has not been able, by cogent evidence, to establish that he is entitled to be paid for any additional acres to the 110 acres he has already been paid for.

Item No. 2, removal of fences in an amount of $300 was conceded by the Department in Connolly's letter of May 18, 1961, and the Suppliant is entitled to this amount.

The second contentious matter is item No. 3, "Common excavation" for which an additional $22,929.39 is claimed. This claim was also based largely on Toczyski's findings, (Ex. S-45-cf. vol. 9, p. 1422 *et seq.*) of quantities of 69,483 cubic yards at .33c. a yard.

Mr. Dujay, an engineer of the Department of Transport, gave evidence regarding Toczyski's basic calculations of 244,483 cubic yards and produced his comments and notations as Ex. R-41. Dujay in his evidence (cf. vol. 23, p. 3634 and following) pointed out a number of errors in addition and multiplication in Toczyski's figures, relating the fact that a planimeter had been used to calculate the areas on the drawings, which instrument is estimated as 5% inaccurate and is commonly used only for estimating rather than for final measurements. It also appears that Toczyski had added additional yardage for the removal of top soil (cf. pp. 3640-3643, vol. 23) thereby creating an excessive yardage of 2,560 cubic yards; he also added the quantities from seven borrow pits, whereas borrow pit No. 1 was used exclusively for the access road and also paid for under that contract item, thereby adding a quantity of 7,575 yards. Furthermore, instead of using the written elevation figures in calculating the borrow, Toczyski used the plotted figures (cf. vol. 23, pp. 3650-3654). A proper figure, therefore, for common excavation would be 213,214 cubic yards and not the figure 244,483 used by Toczyski in his report. The total

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quantities, however, claimed by Persons and which appear on Ex. S-75 are 287,483 and therefore in excess of those calculated by Toczyski. On the figures arrived at by Dujay, and assuming that Persons had completed the contract specifications for common excavation, he would be entitled to a payment of approximately $70,000, which in fact is less than the amount he received on estimate No. 6, which was $71,940. Consequently, the Suppliant can have no claim here, particularly in view of the fact, as testified by Davies, that the most expensive element in the specification for common excavation which was the bringing to grade (cf. vol. 6, p. 936) was not done by the Suppliant but by O'Connell.

The next contentious item is No. 4 "smoothing and rolling" for which $4,800 is claimed by the Suppliant and for which no quantities have been allowed by the Department. Neither Biscari, Persons' foreman, (cf. vol. 1, p. 110) nor Potvin, the Suppliant's engineer (cf. vol. 2, p. 426) can remember whether the Suppliant had done any smoothing and rolling on this job. Davies on the other hand (cf. vol. 6, pp. 951-952) after examining the cross-sections taken after Persons had left the job stated that it appeared the grading had not been attained on the side strips. The only evidence adduced by the Suppliant in this regard is that of Toczyski and Dabrowski. Toczyski after stating that some 80% of the smoothing and rolling had been completed by the Suppliant, later in cross-examination had to admit that smoothing and rolling could take place only after the area had been brought to a certain contour and it would seem that the smoothing and rolling he was talking about was work done prior thereto and dealt with levelling off required either because of the weather or for other reasons. Dabrowski on the other hand, (cf. vol. 10, p. 1582) is not too helpful either:

BY MR. STALKER:

Q. Had any smoothing and rolling been done on the shoulders?

A. Yes, it was.

Q. Can you give us any estimate as to...

A. I don't remember now.

I must therefore conclude here also that the Suppliant has not succeeded in establishing this claim.

The next item to be dealt with is "open ditch" (item 5), "clean and deepen existing ditches" (item 6) and "access road" (item 8). The suppliant here relies on the evidence of Toczyski and on a letter of Connolly to Persons of May 18, 1961 (Ex. S-7) which has already been referred to.

Toczyski indicates at vol. 9, p. 1367 of the transcript, that the items "open ditch" and "clean and deepen existing ditch" were derived from calculations based on the progress drawings. Dujay, in Ex. R-41, as well as in his evidence (vol. 23, p. 3670 *et seq.* of the transcript) deals with the accuracy of these calculations. Here also there were errors in Toczyski's calculations and instead of 39,716 cubic yards for the item "open ditch", Toczyski should have arrived at the mathematical figure of 37,886 cubic yards. The Department's figure for this contract item based on actual measurements would be, however, 39,186 cubic yards and as the quantities allowed by the Department were 20,000 cubic yards the Suppliant would, therefore, be entitled to 19,186 cubic yards at 20 cents a yard, i.e., $3,837.20 for this item.

With respect to the item (6) "Clean and deepen existing ditch", there appears to be a very small difference between the Department's figure and that obtained by Toczyski and the Suppliant would, therefore, be entitled to the amount of $1,655.25 claimed for this item.

With respect to the access road, Toczyski indicated (cf. vol. 9, p. 1368) that he merely took the quantity allowed in Connolly's letter of May 18, 1961 (cf. Ex. S-7) and did not know where the additional 14,000 yards came from. The evidence discloses here that although Connolly, in his letter dated May 18, 1961, allowed an additional 14,000 yards for the access road, it is clearly stipulated in the paragraph which appears at p. 2 of this letter that the quantity allowed is "subject to remeasure as due to weather conditions, accurate calculations were not possible". It therefore appears that the quantity allowed is merely an estimate as explained by Connolly, made in an effort to induce the contractor to get back to work (cf. vol. 1, p. 297; vol. 3, p. 567; vol. 4, p. 788) and was subject to correction. It would indeed appear to me that this allowance of quantity was subject to an adjustment to be made from the final payment and cannot be construed as a commitment by the

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Department to pay these quantities to the Suppliant when the final measurement established that the exact figure was 19,117.74 cubic yards and not a total of 32,000 cubic yards arrived at by adding the 14,000 additional to the 18,000 already granted. The Suppliant here, therefore, would be entitled only to 1,117.74 additional yards at 25 cents a yard, i.e., $279.44.

The Suppliant's claim under item 7, paragraph 34, namely "Consolidating sub-soil", cannot be sustained either. It is based on the contractor's understanding that once he had been allowed a 6-inch layer of granular material in December 1960, the Respondent must have accepted the subbase as being compacted (cf. vol. 9, p. 1368). The evidence clearly establishes that there was no compaction by the Suppliant here of the 6-inch granular material which, in fact, was done later by O'Connell.

I now turn to items 10 and 11, "Re-Cleaning and deepening existing ditches" and "Re-excavate open ditches". Corish (cf. vol. 7, p. 1185; vol. 20, p. 3162 to 3164) and Silverwood (cf. vol. 19, 2947 and cross-examination p. 3028) who were both on the site constantly, denied that this work had even been done. Persons, on the other hand, stated that he had done this work (cf. vol. 11, p. 1676) although he admitted that he "never knew what the quantities were or what came out of those ditches, he never had any records".

Dabrowski testified that the Suppliant had dug and cleaned certain ditches but it is difficult to see how, having arrived on the job in September or October 1960, he would know that the work would be done for the second time (cf. vol. 10, p. 1549). Dabrowski further admitted that he took no measurements and that he would have to estimate. It would appear here that Toczyski merely used the Department of Transport cross-sections for excavation of ditches and presented them as a claim for re-excavation on the basis of the information given him by Dabrowski (cf. vol. 9, p. 1461, 1462 *et seq.*):

BY MR. OLLIVIER:

Q. This figure of 37,886?

A. This figure is based on the cross-sections of the open ditches.

Q. Before the subsidence?

A. I don't know when the subsidence took place.

Q. But you did not calculate a quantity of subsidence by cross-section, did you?

A. No.

...

Q. Did you have cross-sections before the filling in and after the filling in which would permit you to determine by cross-sections the quantity of filling in?

A. No.

The evidence, therefore, is insufficient to sustain the above claims for items 10 and 11. There is, however, a further reason for rejecting them in that even if the Suppliant had proven that this work had been done, the work being necessitated by the subsidence of material as a result of weather conditions, any claims, therefore, would be barred by the terms of article 20 of the contract which states that the risk thereof is to be borne by the contractor.

I now come to two items (12 and 13) which took up a considerable part of the evidence, namely, the question of black muck. Black muck, although a more expensive material to remove than earth or sand was paid as common excavation under item 14 of the specifications of the contract. Item 16 deals with what common excavation entails and states specifically that the unit price includes all cost in carrying out the operations as well as the full and complete disposal of all materials as specified or as directed by the engineers. The Department, in accordance with the above specifications, considered the black muck as an integral part of common excavation.

On these two items (item 12 "excavate black muck southwest end of runway" and item 13 "move black muck from a stockpile and spread") the suppliant submits (1) that as there was no indication of black muck on the west end in the prebid plans and although he and his men examined the site prior to tendering and estimated that there was a certain amount there, they did not and could not ascertain the large quantities of muck involved in this area; (2) he is entitled to the black muck removed from beyond the paved area; (3) the quantities of muck he removed were more than those allowed by the respondent and, finally, (4) he is entitled for the black muck that was moved from stockpiles and spread on the shoulders.

Suppliant's complaint that the prebid plans did not indicate that there was muck in the southwest area of the

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strip and that he is entitled to a claim under this heading cannot, in my view, be countenanced in the face of article 52 of the contract which clearly sets down that the contractor has the onus of fully investigating and satisfying himself with the character and topography of the ground and the nature of the work to be executed and cannot rely on "any statement, representation or information made, given by, or derived from quantities, dimensions, tests, specifications, plans, maps or profiles made, given or furnished by Her Majesty or any of Her officers, employees or agents; and...that no extra allowance will be made to the contractor by, and the contractor will make no claim against Her Majesty for any loss or damage sustained in consequence of, or by reason of, any such statement, representation or information being incorrect or inaccurate, or on account of excavating in rock or other difficult ground, or of unforeseen difficulties of any kind".

He cannot be successful either with respect to the black muck removed beyond the paved area of the strip as there is uncontradicted evidence on behalf of the Respondent that the black muck beyond the paved area was not required to be removed. Davies states that it should not have been removed beyond the paved area and so does Silverwood (cf. vol. 19, p. 3055):

BY MR. STALKER:

Q. What did he (Corish) want from the point of view...I am thinking now with reference to the removal of the black muck on the east end?

A. He wanted the black muck removed from underneath the hard surface.

Q. Not from the shoulders?

A. Definitely not.

BY THE COURT:

Q. Underneath the central portion?

A. Yes, underneath the hard surface, the 150 foot wide of asphalt.

Q. The instructions were to leave that on the shoulders?

A. Exactly.

BY MR. OLLIVIER:

Q. Do you know that?

A. Yes.

Q. Was that in fact what was done with it?

A. Well, the contractor's men seemed lost for a while until the resident engineer came down on the site himself and told them exactly, again on the site, what he wanted, because they had

machinery completely out of the graded areas and they were pushing way out. So he told them that they were doing it the wrong way. So he explained to them again what he wanted done.

The Suppliant has also failed to establish that he was entitled to a greater quantity of black muck than the quantity allowed by the Department. The latter took actual measurements in the field evidenced by cross-sections produced whereas the Suppliant's evidence in this respect consists of the testimony of Suppliant's employees who in most cases estimated visually the extent of the muck. There was controversy regarding the depth of the muck removed but the figures stated by the Suppliant's witnesses cannot be accepted without qualification due to the fact, as testified by Corish, that in several instances the contractor went way beyond the depth necessary to remove muck and removed sand.

Biscari, one of the Suppliant's men, at p. 87 of the transcript, did not measure the black muck, merely saying:

A. Really, I did not measure. But it was more than 2 or 3 feet. I did not measure, but it was high, all right.

It also appears that the figure of 43,000 cubic yards for which $39,560 is claimed under item 12 was based on what Toczyski called "Dabrowski notes" which appear from the evidence of Dabrowski himself to have been a doubtful basis for an accurate calculation. He is questioned on this point by respondent's counsel at p. 1531 of the transcript:

Q. Now Mr. Dabrowski, what amount of black muck did you calculate or estimate whichever it was, was excavated from the southwest end of the runway?

A. It was plenty anyway. I should say something about 40,000.

Q. Something about 40,000?

A. Around, it might be less, it might be more.

Q. Was this...

A. About 30,000 perhaps.

Q. Can you tell us whether this...

A. Anyway, plenty.

I must now deal with the last aspect of the muck question, which is the alleged stockpiling and double handling of the muck by the contractor. Although there was considerable and conflicting evidence on this point, it appears that the instructions of the resident engineer were that the muck be removed to a point outside of the line of the ditch which paralleled the edge of the area and wasted. This, for some reason, however, was not done and the

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resident engineer later allowed 95 per cent of this material to be placed on the shoulders under 2 feet of sand. The position taken here by the Department was that the incorporation of this dried up muck into the shoulders was a concession made to the contractor and that the latter was thus saved a further operation of obtaining fill from the borrow pits.

Now, although the above is true, it is also true that had the contractor delivered fill in lieu of this dried up muck, he would have been entitled to charge 33 cents a yard for it.

The Respondent also took the position here that the black muck taken out from under the paved area was considered as common excavation and was paid for and that it was not stockpiled and brought back in a second operation but merely spread over the shoulders. Now although this is partly true for the black muck stockpiled or laid on the shoulders, this cannot apply to that portion of the muck moved back on to the shoulders from beyond the ditches, as established by the evidence.

Dabrowski is examined in this respect at vol. 10, p. 1632 by counsel for the respondent and states:

Q What had been done with that quantity which was removed before you arrived? Where was it?

A. Well, some was piled up.

Q. Where was it piled?

A. Somewhere on the shoulders and then it was over here or somewhere and then it was partly dispersed on the shoulders when it was dried out, whatever was good.

Q. So it was on the shoulders, is that right?

A. The shoulders or the other side of the shoulders. They pushed it on the other side of the ditch, over here and there was one pile over here and here, somewhere.

Q. Well, that was roughly 20,000?

A. I did not weigh it. Roughly I should say, perhaps twenty perhaps twenty-five thousand.

Q. What proportion of that was on the shoulders and what proportion was beyond the shoulders?

A. I should say half and half.

It therefore appears to me that a reasonable appraisal of the dried muck moved from beyond the shoulders to the shoulders and usefully used in the Respondent's strip could be arrived at by taking Corish's estimate, that 95 per cent of the black muck had been usefully used in the strip of

which, if Dabrowski's figures are taken, half was brought back into the shoulders from beyond the ditches. On this basis it would then appear that the Suppliant here would be entitled on this item 13 to half of 95 per cent of 36,550 cubic yards at 33 cents a cubic yard, i.e., the sum of $5,762.21.

I now come to item 14, "Delay on easement ditch", which I have already touched upon and which relates to an occasion when, it would appear, the Suppliant did suffer some inconvenience. The latter here is claiming $27,300 for loss of time of approximately three weeks on the basis that the machinery on the job was not working during that period. Now although it does appear that the Suppliant was hindered somewhat because of this delay, and this appears from Corish's progress reports, he did not lose three weeks as submitted by the Suppliant. Corish indeed stated that there had been no delay on this job because of the easement ditch and that the contractor worked on other parts of the job such as the east end of the strip and the access road. Now, although Persons maintains that his machinery was inactive during the period of three weeks, his own witnesses state that during the work, there had been no unusual long delay which they could hardly have said if the machines had been stopped completely for three weeks. It is not therefore possible, in view of the evidence, to allow any amount under this heading.

The Suppliant, under paragraph 34 of the Petition of Right, would therefore be entitled to the following amounts:

Fences	$300 00
Open ditch	3,837.20
Clean and deepen ditches	1,655.25
Hold back	16,760.00
Access road	279.44
Move black muck and spread	5,762.21
	$28,594 10

I will now turn to paragraph 36 of the Petition of Right whereby the Suppliant claims damages in an amount of $312,000.00 "as consequences of the illegal and wrongful actions of the Minister of Transport, the Honourable Leon Balcer, and the said Department of Transport, its

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employees, officers and representatives representing the Respondent and as herein more fully set out the Suppliant has suffered and will suffer the following damages:

(*a*) Loss of profit which Suppliant would have made had the contract been carried through to completion	$45,000.00
(*b*) Value of work done in June and July, 1961	12,000.00
(*c*) Damages to reputation as a result of actions of Respondent's representatives	100,000.00
(*d*) Loss of profits on future contracts lost as a result of the actions of Respondent's representatives	100,000 00
(*e*) Additional financial costs incurred as a result of actions of Respondent's representatives and interest incurred on suppliers' accounts	30,000.00
(*f*) Engineer, Investigation and Legal Costs and Administrative Costs	25,000.00
	$312,000 00"

Before dealing with the various items listed under this heading, the following articles of the *Quebec Civil Code* which govern claims arising "*ex contractu*" should be set down. Articles 1073, 1074 and 1075 provide as follows:

Art. 1073 The damages due to the creditor are in general the amount of the loss that he has sustained and of the profit of which he has been deprived; subject to the exceptions and modifications contained in the following articles of this section.

Art. 1074. The debtor is liable only for the damages which have been foreseen or might have been foreseen at the time of contracting the obligation, when his breach of it is not accompanied by fraud.

Art. 1075. In the case even in such the inexecution of the obligation results from the fraud of the debtor, the damages comprise only that which is an immediate and direct consequence of its inexecution.

Repeated enunciation of the case law on this subject of damages, and in some cases approved by the Supreme Court (*Société Naphtes Transport v. Tidewater Shipbuilders Limited*[1]) is to the effect that a claim for damages must be rejected in all cases where the prejudice alleged is not certain and where the claimant does not evaluate in figures what he considers to be the value of his real prejudice. In all cases where there is no fraud on the part of the debtor, damages are restricted to those only which the parties have foreseen at the time of contracting or which they might have foreseen at that time. In the case of fraud, however, the debtor is liable even for unforeseen damages.

[1] (1925) 40 Q.B. 151; [1927] S.C.R. 20.

The common law on the subject of damages "*ex contractu*" is similar to the above rule if one refers to the leading case of *Hadley and another v. Baxendale and others*[1] where it is stated:

...Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

Now, although subsequent thereto there were some variations therefrom, such as in *Weld Bendell v. Stephens*[2] where it was decided that even in matters *ex contractu* damages whether foreseen or foreseeable may be claimed as long as they flow directly from the breach in the chain of causality, the case law in England has now returned to the original view in a recent case of *Overseas Tankship v. Morts Dock*[3] where at p. 415 it is stated:

Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is "direct". In doing so, they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen.

The reasoning in Quebec on this point, although expressed somewhat differently is very similar. The obligation to pay damages is based on a tacit clause by which the debtor is supposed to promise to indemnify the creditor of the damages caused by the failure to carry out the obligation and this presumed and tacit contract can only deal with those damages which would naturally be in the minds of the parties at the time of contracting.

Damages in Quebec are then limited also by article 1075 C.C. in that even in the case of fraud they are restricted to those which are an immediate and direct consequence of the failure to carry out the obligation. As pointed out by Mignault (cf. *Droit Civil Canadien* t. 5 (1901) p. 420):

[1] (1854) 9 Ex. C.R. 341 and 354.
[2] [1920] L.R.A.C. 956.
[3] [1961] 1 All E.R. 404 (PC).

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La loi ne veut pas que les juges, marchant de déductions en déductions, suivent le dol du débiteur dans toutes ses ramifications, ils doivent négliger les conséquences médiates et éloignées et ne s'attacher qu'au dommage auquel il a pu donner naissance, qui en est une suite directe et immédiate.

The first item to be dealt with under paragraph 36 of the petition is the amount of $45,000.00 claimed by the Suppliant (under art. 1073 C.C.) as the loss of profit he alleges he would have made had the contract been carried through the completion. The details of the method of calculation of this amount of $45,000.00 was explained primarily by Mr. Duke, the suppliant's auditor and accountant, and by Persons himself. Duke, in this connection, produced the result of his calculations on this item as Ex. S-61, which is obtained by adding the estimates allowed for the work done with non paid estimates claimed under the contract of $54,927 and then deducting therefrom costs to December 31, 1960 of $209,254, thus obtaining a profit to December 31, 1960 of $13,273 to which he added an anticipated net profit to complete contract of $45,000.00.

The $45,000.00 profit was arrived at by taking the estimated profit on asphalt which still remained to be done after December 31, 1960, deducting the estimated loss on granular and deducting $2,525 for contingencies.

It therefore appears that Duke's calculations under this heading are his estimates of the Suppliant's claims under the contract which he fixed at $54,927.00, but which, having now been established at $11,834.10 (i.e., $28,594,10 less $16,760 hold back) would, instead of being a profit of $13,273 to December 31, 1960, result in a loss of $30,978.78. This loss would be still greater if the unnecessary work done by Persons in excavating the black muck beyond the paved surface is considered. Furthermore, his estimates were calculated from quantities which he obtained from either Mr. Persons or his men and which he did not, and could not, verify himself. This indeed appears clearly from p. 2525 *et seq.* of the transcript:

> Q. Just two short questions, if I might. With reference to your statement S-61, which shows the forty-five thousand ($45,000) dollars anticipated profit on the remainder or balance of the contract, you said that this figure had been obtained three (3) or four (4) years ago in discussions and formed the foundation or part of the foundation of the claim. To reiterate, however, was this the

figure, which was, in fact, given you by Persons and his associates, or did you have any knowledge of the validity and work out the actual figures themselves.

A. We discussed the figures and worked them out.

Q. You discussed them, I know, but were you responsible for the figures or were these figures given to you and you just worked out the calculations?

A. I had to obtain the information to work out the figures, yes. The information was given to me.

And further down, at p. 2527 of the transcript, he confirms this in answer to the following question:

Q. But the information was given to you, it was not you who determined whether profit or losses were going to be made.

The cost of granular, including transport, together with the required compaction and levelling off would also have cost more than the estimated figures made by Duke in his calculations.

It also appears that the figure of $251,983, which he uses in Ex. S-67 as the costs to complete project, according to contract items if the Suppliant was allowed to finish schedule, must also be regarded with suspicion and, in my view, cannot and does not represent the amounts which would have been necessary to complete the job under the requirements of the contract. This figure also was calculated by Duke taking quantities from Persons and his men which, not being an engineer, he could not verify.

I must, therefore, under this heading, come to the conclusion not only that the amount of loss of profit claimed is too uncertain to be recovered, but even go to the extent of saying, and this, in my view, appears from the evidence reviewed in this lengthy case, that the Suppliant would have lost money on this job had he been permitted to terminate it. This amount of $45,000 cannot, therefore, be sustained.

The second item under paragraph 36 of the petition is an amount of $12,000.00 claimed for value of work done in June and July of 1961 prior to the notice of June 1 (Ex. S-9) and subsequent to the letter of June 13 by Connolly (Ex. S-13) stating that the Department was taking the work out of the hands of the contractor and giving it to H. J. O'Connell Limited. At the time of the receipt of the above letter, the Suppliant took the position that the notice was illegal as well as the letter and that, accordingly, he was entitled to

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continue to work on the contract and to be paid for work actually done in June and July of 1961. The illegality of the removal was brought to the attention of the respondent by a telegram on June 14, 1961 sent by the attorneys for E. J. Persons.

In view of the manner in which the Suppliant was put off the work, it does appear that he was entitled to consider the notice received as invalid and continue working up until the date he was told to remove his equipment from the site which occurred on July 6, 1961. This involves a period of one month for which the Suppliant claims $12,000.00 on a rental basis for the machinery on the site during this period, i.e., two bulldozers at $3,000.00 a piece per month for two months. At p. 2359 *et seq.* of the transcript, Duke admits that the period should be for six weeks and not two months which would reduce the claim here to $9,000.00. It also appears that the claim is based on a rental basis, and although the machines, prior thereto had been rented, in June and July 1961, they belonged to the Suppliant. To apply the full rental rate to the use of these two machines for six weeks when some of the time subsequent to the 13th of June 1961, they were not used but only remained available while awaiting whether the contractor would have to leave the job, would be unreasonable.

In view of the impossibility of determining exactly what work was done by the Suppliant during this period, as no sections were taken or hours of work recorded, it would seem that a reasonable indemnity for the work performed in June and July 1961 could be assessed at one-half of $9,000.00, which would be $4,500.00, and such is the amount allotted for this item.

Item (*c*) of paragraph 36 deals with a claim of $100,000.00 for "Damages to reputation as a result of actions of respondent's representatives" and although some evidence in this regard was given by Persons, Duke and Leonard, there was no specific evidence given as to the precise value of any damages suffered under this heading, the appreciation of the amount of damages, if any, being left to the Court.

Duke was examined on this point by counsel for the Suppliant and stated at p. 65 of vol. 13-A of the transcript

of November 16, 1964; the effect the cancellation of the contract would have on Persons' reputation:

A. With my own experience in connection with Mr. Persons' affairs, he certainly had no problems prior to nineteen sixty (1960) and nineteen sixty-one (1961).

As far as carrying on his various businesses, particularly his construction business, he had no particular problem with his suppliers. There were certainly slow payment periods, the same as any other contractor would have. But I think that his overall position and prestige was such that he could easily negotiate with suppliers and carry on his business.

However, when he was thrown off this contract, there was a completely different attitude developed toward him and he found it very difficult to carry on his construction business because many of the suppliers required cash for materials they were supplying.

The banks put a certain amount of pressure on him as far as extending a line of credit and I think...

However, as (from p. 67 of vol. 13-A of the transcript of November 16, 1964) it appears that this bank still maintained the same line of credit he had had previously, and in the same amount, it is difficult to see how his credit could have been affected:

Q. What was his line of credit with the bank, prior to nineteen sixty (1960)?

A. His personal line of credit was one hundred and fifty thousand ($150,000) dollars.

Q. And subsequent to the taking away of the contract, how much was this?

A. They would not extend this line of credit beyond the one hundred and fifty thousand ($150,000) dollars. I mean, this is what he used before.

. . .

A. It was still maintained at one hundred and fifty thousand ($150,000) dollars in his own personal name, yes.

With regard to the damages caused to the Suppliant with his suppliers, Duke was not able, from memory, to mention any suppliers being uncooperative because of the cancellation of the contract merely stating at p. 68 of vol. 13-A of the transcript:

A. I could not right off hand, but we could obtain a list of the suppliers that demanded cash for the materials they supplied.

This is the extent of the evidence adduced by the Suppliant with regard to the quantum claimed in paragraph (*c*) and it is obviously not sufficient to allow any determination of an amount under this heading although I might add that had an amount been established, it would have been of doubtful quality having regard to the opinion of

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this Court, which, however, at best is merely an assumption and cannot be anything else (as it will never be known whether the Suppliant would have corrected his default and proceeded with terminating the contract in accordance with its terms and to the satisfaction of the Respondent) that there is considerable doubt as to whether the Suppliant would have remedied his default of not proceeding diligently with the job if clause 18 of the contract had been properly exercised and he would have, through his own fault, therefore, been faced with the same situation he is in today. The damages claimed here are, therefore, in my view, too uncertain, are based on speculation, have not been established in any amount and, therefore, preclude any award being made.

Paragraph (*d*) claims another amount of $100,000.00 as "Loss of profits on future contracts lost as a result of the actions of Respondent's representatives".

The only evidence with regard to specific contracts lost because of the impossibility for the Suppliant to obtain bonds is given by Duke and deals with a number of contracts which a construction company called B & M, of which the Suppliant was the principal shareholder, could have obtained if performance bonds could have been procured. This company indeed was the lowest bidder on two jobs for the town of Bedford and had commitments as paving sub-contractors for Janin Construction Company and Atlas Construction Company which it lost because it could not, through the Suppliant, produce the required bonds because the bonding companies would no longer, because of the Three Rivers cancellation, issue a bond to the Suppliant or his construction company.

Now whether the above is true or not, it does appear that in any event the Suppliant cannot claim in the present action for a loss of profit sustained by another entity even though he might be its principal shareholder and this should be sufficient to deal with the claim. However, even if the proper party had claimed on the above loss of profit or the Suppliant were entitled to some compensation for no longer being able to obtain performance bonds necessary to obtain contracts, the company or the Suppliant would still have to establish that had he obtained the jobs he would have made a profit on them.

With respect to the paving contracts, Duke states that a profit of 10 percent would have been realized and he believes that some profit might have been made on the town of Bedford contracts. Now, although this might be so, it also appears that it is based on assumptions that because profits on other similar contracts had been made in the past, profits would also be realized on these contracts.

There is, however, also the possibility that money might also be lost on these jobs and bearing in mind Persons and his company's contracting activities and loss records in 1959 and 1960 as well as the low bid price on the present contract, a possible assumption that there might have been a loss sustained on these jobs instead of profits can be made.

I cannot find here that reasonable degree of certainty necessary to award damages even if the Suppliant has sustained damages through not being able to obtain bonds and any amount I might take would be mere speculation.

I now come to subparagraph (*e*) of paragraph 36 of the petition where the Suppliant claims $30,000.00 as "additional financial costs incurred as a result of actions of the respondent's representatives and interest incurred on suppliers' accounts". The amount of $2,800.00 claimed in the incidental demand as additional financial costs "representing 6% on $70,000 for a period of 8 months which suppliant had to borrow in order to use as security for a contract for which he was unable to secure a bond because of the present contract" might also be dealt with under this heading. Evidence under this item was given by Duke at p. 68 *et seq.* of the transcript of November 16, 1964, who stated that the Suppliant had to "personally put up $50,000 dollars for a sewer job that was being carried out by B & M Construction in Three Rivers and also because he could not obtain bonds, he had to put up an additional seventy thousand dollars ($70,000) on a penitentiary job in Cowansville. This was a personal guarantee that he had to give to the bank.

The above amounts were therefore borrowed from the bank by B & M Company and guaranteed by the Suppliant and although it may have cost the B & M Company more to proceed in this fashion than to obtain bonds (on which, however, there is no evidence) I fail to see, here also, how

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the Suppliant can claim any interest in this regard as it would appear that the only possible claimant here could be the B & M Company and not the Suppliant whose only interest can be that of a shareholder and whose loss (if any) qua shareholder must be established.

At p. 73 of vol. 13-A of the transcript, Duke further states that Persons, in 1961, borrowed $75,000 from a finance company which was used directly in his business at what he thought was 10 or 11 percent interest. He later explained that this amount had been borrowed:

> A. For the purpose of carrying on his construction activities and to ease the situation, his working capital position when he did not receive this money from the the Government.

He then, at p. 74 of vol. 13-A of the transcript, states that in connection with the $30,000.00 claimed in subparagraph (*e*) above:

> A. There was probably three (3) years on this loan at ten percent (10%).

It therefore appears that the basis of this claim is the allegation that the Department was illegally withholding a large amount claimed as work done prior to December 1960, i.e., $180,397.59. However, as the amount to which the Suppliant was entitled has now been reduced to $28,-594.10 it would seem that the Suppliant would still have had to borrow the amounts whether the amount he was entitled to was paid or not and here again this claim cannot be accepted.

The Suppliant's claim for $2,800 representing 6 percent interest on $70,000 for a period of eight months which Suppliant had to borrow to use as security for a contract for which he was unable to obtain a bond because of the present action, cannot be accepted either, as from the evidence of Duke it appears that this interest was the amount charged as the result of a loan made to B & M Construction by the bank which had been guaranteed by Persons. Here again, this may have cost the B & M Company more money than if it had obtained a bond (although even this, as already mentioned, is not certain, as there was no evidence adduced to indicate that a bond would be cheaper than a loan), but if any loss was sustained, it can be claimed by the company only and not by the Suppliant.

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I now come to a last amount of $25,000 claimed by the Suppliant in subparagraph (*f*) of paragraph 36 of the petition as: "Engineer, Investigation and Legal costs and administrative costs", which comprises bills submitted by Mr. Duke, Toscan Design Services Ltd., amounts paid to Paul E. Lafontaine, Q.C., and Suppliant's counsel for a total amount of $23,343.95.

The amounts claimed under this heading are for engineering, negotiation with the Department of Transport, legal and accounting services rendered in connection with the Suppliant's difficulties with the Department with respect to the Three Rivers job.

In Quebec, where the services of experts are retained for purposes of pending litigation to support the claim of a party before the Court, the party who retains them, if successful, can recover from the opposite party only the fees prescribed by the tariff for expert witnesses.

The same rule applies to this Court where under the tariff experts (p. 125) may be granted a special *per diem* fee.

The above is the only provision where some compensation can be given either under Quebec law or under the rules of this Court, although in one Quebec case the fees of experts properly retained at the outset in order to supervise repairs following upon the wrongful act of another, were held to be recoverable as part of the damages resulting from the wrongful act even if they were called as witnesses at the trial (cf. *Gingras v. Quebec*[1]; *Laplante v. Deslauriers & Fils Ltée*[2]).

I however, feel that in the present case a certain proportion of some of the amounts claimed under paragraph 36(*f*), although they might be considered as expenses, could also be considered as a necessary and valid cost of obtaining justice in the present case, as some of the work of preparation of these experts was absolutely essential to the proper prosecution of the Suppliant's rights and would be a reasonable cost of the technical assistance required, commensurate with the remedy obtained and to which the Suppliant is entitled.

The Suppliant has been only partly successful in this case and having regard to this success, I would think that a

[1] [1948] Q.K.B. 171. [2] [1951] Q.S.C. 93.

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fair assessment of the value of what was essential to the proper prosecution of this case could be made in the amount of $5,000 which,under the authority of Rule 261 of the Rules of this Court I hereby establish in this amount.

In view of the maintenance of the principal action, rejection of the cross-demand follows.

There will, therefore, be judgment in favour of the Suppliant for the sum of $33,094.10 together with costs, an amount of $5,000 being awarded as part of the costs to cover the value of the engineering and accounting work done prior to trial and found necessary for the preparation for trial. The Suppliant was unsuccessful in his incidental demand and it will be rejected with costs; the Respondent was unsuccessful in Her cross-demand and it also will be rejected with costs. As the evidence, however, was common to the principal action, the incidental demand and the cross-demand, there will be one counsel fee at trial only.

Calgary 1965

Oct. 12-16, 18-20

Ottawa Dec 9

BETWEEN:

FRANK HOPSON .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Suspension and dismissal of civil servant—Defamation—Privilege—Threats of criminal prosecution—Suggestions of criminality—Whether torts—Whether suspension and dismissal lawful—Right to be heard—Cash gratuity—Whether mandatory—Damages—Amount of—Civil Service Act R.S.C. 1952, c. 48, s. 52—Civil Service Regulations, s. 73(1) and (5), 118(1) and (2)—Exchequer Court Act, R.S.C. 1952, s. 32.

1. On November 19th 1958 A. M. Swan, an official of the Department of Defence Production, began an inspection of the Calgary purchasing office, of which suppliant was in charge, and on November 23rd told suppliant and his wife after dining at their home that suppliant's chief subordinate was guilty of bribery and could get 5 to 20 years for it.
2. On November 26th H. R. Kotlarsky, the Departmental Director of Administration, wrote suppliant a letter stating that suppliant was suspended for "incompetence as an office administrator in failing to be aware of existing conditions in his office" and that in accordance with s. 118(1) of the Civil Service Regulations he had ten days to state his side of the case to G. F. McKay, the officer in charge of the Edmonton purchasing office.
3. On November 27th T. J. Woods, a government security officer engaged in the investigation, delivered Kotlarsky's letter of November 26th to suppliant, who had come to Woods' hotel room with his wife. In an

ensuing discussion Woods said "there were irregularities in (suppliant's) office" and that Woods' job was to ferret out communists employed by contractors for the Defence Department.

4. On December 1st suppliant wrote McKay protesting the nebulous character of the charges against him as set out in Kotlarsky's letter of November 26th but he made no representations. On December 10th McKay informed suppliant that his dismissal had been decided on. In the course of a heated discussion which followed McKay told suppliant that he had been subjected to a full scale investigation by the R.C M.P. and had better resign.

5. On December 17th Kotlarsky in Ottawa wrote suppliant that the Deputy Minister intended to dismiss him for "mismanagement of staff and failure to administer properly the work of the office" and for "deliberate and repeated failure to carry out prescribed purchasing practices". Kotlarsky read the letter by phone to McKay in Calgary in order that he might pass the contents on to suppliant to enable him to resign before being dismissed.

6. Later in December suppliant was interviewed in Calgary by G. W. Hunter, the Assistant Deputy Minister, who had been appointed under s. 118(2) of the Civil Service Regulations to hear his side of the case before dismissal. Hunter took up with suppliant some but not all of a number of complaints which were set out in a document supplied to Hunter by the Department, but the document was not shown to suppliant The complaints not taken up with suppliant were however taken as established and formed part of the material upon which Hunter's recommendation was based.

7. On January 14th 1959 in accordance with Hunter's recommendation the Governor in Council approved a Treasury Board minute recommending suppliant's dismissal from the government service effective December 31st 1958.

8. On January 16th the Departmental Chief of Personnel wrote suppliant of the optional pension benefits available to him, and enclosed a form in which he had filled in a blank space stating "inefficiency" as the reason for suppliant's retirement from the service.

9. On January 14th 1960 the Departmental Chief of Personnel, in reply to an inquiry from a prospective employer of suppliant, wrote that suppliant left the Department "under unfortunate circumstances" and in reply to a request for an explanation of that phrase stated "mismanagement of staff due to complacency".

10. By his petition of right suppliant claimed damages for defamation, for suggestions of criminality on his part and threats of criminal prosecution if he did not resign his office, for wrongful suspension and dismissal, and for not having been given prior to his suspension and dismissal an opportunity to present his side of the case. He also claimed a cash gratuity under s. 73(5) of the *Civil Service Act* equivalent to three months' pay.

11. Suppliant had also brought an action against T. J. Woods in the Supreme Court of Alberta for defamation arising out of the first incident described in paragraph 3 above.

12. It was agreed by the parties prior to the hearing of suppliant's petition, *inter alia*, that suppliant had been suspended on November 26th 1958 and dismissed by the Governor in Council on December 31st 1958.

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Held: (1) Suppliant was entitled to damages, which were calculated at $400, for not having been given an opportunity to present his side of the case prior both to his suspension and to his dismissal. It is fundamental to the power to suspend and dismiss under s. 118 of the Regulations made pursuant to s. 5 of the *Civil Service Act* that the employee be advised of the subject matter relied on for his suspension and/or dismissal. Kotlarsky's letter of November 26th was insufficient for this purpose and the interview with Hunter in December similarly failed to provide suppliant an opportunity to present his side of the case. *Zamulinski v. The Queen* [1956-60] Ex C.R. 175 followed; *Shenton v. Smith* [1895] A C. 229 and *R. Venkata Rao v. Sec'y of State for India* [1937] A.C. 248, considered.

(2) Suppliant's claims for defamation failed. (*a*) The claim arising from Woods' statement that "there were irregularities in the office" was barred by s. 32 of the *Exchequer Court Act* because of the action brought by suppliant against him in Alberta. Woods was "acting under the authority of the Crown" within the meaning of s. 32 at the time he made his statements on November 26th 1958. (*b*) The statement that Woods' function was to ferret out communists, etc., was not spoken of or concerning the suppliant and did not imply that he was a communist. (c) In the other instances either the alleged publication was not proved or the defence of qualified privilege prevailed, there being no proof of malice. *Lecarte v. Board of Education of Toronto* [1959] S.C.R. 465, per Locke J. at p 471; *Osborn v. Boulter* [1930] 2 K.B. 226, per Scrutton L. J. at p. 232, applied.

(3) Suppliant's claim for damages for allegations of criminality and threats failed because in every alleged instance one or more of the ingredients of the tort was lacking, to wit: (1) that a Crown servant in the course of his employment wilfully did an act calculated to cause physical harm to the suppliant, (2) that there was no legal justification for the act, and (3) that the act in fact caused physical harm to suppliant. *Janvier v. Sweeney* [1919] 2 K B. 316; *Wilkinson v. Downton* [1897] 2 Q.B. 57, per Wright J. at p. 58, applied.

(4) In view of the agreement of the parties that suppliant was suspended on November 28 1958 the Court must take it for the purposes of this proceeding that the power to suspend under s. 51(1)(*a*) of the *Civil Service Act* had been validly exercised although, *semble*, the ground given by Kotlarsky for the suspension in his letter of November 26th was neither of the grounds specified in s 51(1)(*a*), *viz*, misconduct or negligence in the performance of duties. Similarly, the parties having agreed that suppliant was dismissed on December 31st 1958 by authority of the Governor in Council (no question having been raised as to the retroactive effect of the order in council), this brought suppliant's employment at pleasure to an end whether any reason existed or not. There was accordingly no legal basis for a claim for damages either for unlawful suspension or for unlawful dismissal.

(5) Suppliant's claim for a cash gratuity failed as s. 73 of the Civil Service Regulations made pursuant to s. 47 of the *Civil Service Act* was permissive only.

PETITION OF RIGHT.

Daniel M. McDonald for suppliant.

R. L. Fenerty, Q.C. and *P. M. Troop* for respondent.

THURLOW J.:—This petition of right, and the several claims for damages and other relief asserted thereby, arise from a succession of events the central incident of which was the suppliant's dismissal from the service of the Government of Canada by an Order in Council passed on January 14, 1959. The suppliant had been employed in the government service from 1941 to 1946 on loan from the Canadian Pacific Railway Company and thereafter from 1946 to the end of 1958 as a member of the Civil Service of Canada and had risen by promotion to the classification of Defence Production Officer Grade 5 in that service. For two years, as District Puchasing Agent, he had been in charge of the district purchasing office of the Department of Defence Production at Calgary, his employment in that post having been of a permanent nature. By his petition of right he asserts that he was improperly and unjustly suspended from his office on or about November 28, 1958, that subsequently he was improperly and unjustly dismissed by the Order in Council already mentioned, that he was deprived of the opportunity to which he was entitled under the Civil Service Regulations to present his side of the case prior to his dismissal, that he has been defamed on numerous occasions (since limited to four such occasions) and that he has suffered damage on numerous occasions (since limited to three) by suggestions and insinuations of criminality on his part and by threats of criminal prosecution if he did not resign his office. By the portions of his prayer for relief which were not abandoned in the course of the trial he claims:

1. A declaration that his suspension and dismissal from the Civil Service of Canada were contrary to Section 118 of the Civil Service Regulations and Sections 51 and 52 of the *Civil Service Act*;

2. damages for wrongful suspension and wrongful dismissal and loss of earnings;

3. damages for mental anguish and physical suffering, injuries to his career, reputation and good name, and loss of earnings as a result;

4. an order that the Department of Defence Production pay to him a cash gratuity consisting of salary at the rate in effect on his last day of active duty for the period of three (3) months, to which he has a right as a result of performing over fifteen (15) years of pensionable service;

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5. damages for not having been given, prior to his dismissal, an opportunity to present his side of the case to a senior officer of the Department nominated by the deputy head.

In addition it was submitted in argument on his behalf that he was entitled to damages for not having been given a proper opportunity to present his side of the case in respect of his suspension and counsel for the Crown stated that as evidence and argument had been directed to that question it as well might be treated as before the Court.

In all, eleven separate incidents or matters, forming parts of a much larger story, are relied on in these proceedings as giving rise to liability on the part of the Crown and in what follows I shall first outline the several events in the order in which they occurred and then deal with them in a somewhat different order depending on the nature of the claim asserted.

The events in question began several days after the arrival in Calgary on November 19th, 1958 of A. M. Swan, the Assistant Supervisor of the District Offices Division of the Department of Defence Production, to conduct a routine inspection of the Calgary District Office. Certain new equipment and new or improved procedures which formed part of what was referred to as the District Office Improvement Program had recently been put into operation at the Calgary District Office and one of Mr. Swan's objects was to inspect the working of this program. By Friday, November 21st complaints respecting the conduct of C. L. Wright, the chief buyer, had been made by and written statements had been taken from Duncan Little and Murray Standish, both of whom were employed in the office as junior buyers, and on the following day Swan and the suppliant had visited the local office of the Royal Canadian Mounted Police where these statements and some eighteen purchase files, which has been produced by Little and Standish in support of their allegations, had been reviewed with Superintendent Porter of the Royal Canadian Mounted Police. On the evening of November 23rd, a Sunday, Swan and his wife were guests at the suppliant's home for about four hours during which, according to the suppliant and his wife, Swan talked of nothing but the subject matter of these complaints and matters pertaining to the office. While having dinner, Swan, in the presence of

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his wife and of the suppliant and his wife, uttered the words "Wright is guilty of bribery and could get five to twenty years for this." The uttering of these words by Swan is the first of the events in respect of which relief is sought. The suppliant swore that since he was in charge of the office and Wright was directly under him the possibility existed that he might be linked with Wright because of his association with him and be found guilty as well, that he did not "relish the idea of going to the penitentiary" and that he "was quite frightened" by Swan's statement.

The next event in respect of which relief is claimed occurred on or about November 26th when, as a result of reports received from Swan, the first of which may have been received as early as November 21st, D. M. Erskine, the Director of the Regional Purchasing Branch of the Department of Defence Production at Ottawa, whose field of responsibility include the operations of the district offices as well as the work of Swan and of Swan's immediate superior, recommended to D. A. Golden, the Deputy Minister of the Department that the suppliant be suspended from his office. Mr. Erskine says that he communicated his recommendation to the deputy minister and obtained his approval to pass it on to Mr. Kotlarsky, the Director of Administration of the Department whose duties included that of informing personnel of the Department of anything that affected their future employment. On November 26th Mr. Kotlarsky wrote and sent to Swan for delivery to the suppliant a letter which read as follows:

PERSONAL & CONFIDENTIAL OTTAWA, 26 November 58

Mr. F. Hopson,
Department of Defence Production,
Room 731, Public Building,
Calgary, Alberta.

Dear Mr. Hopson:

Mr. D. M. Erskine, your Director, has recommended your suspension from this Department as of Friday, 28th of November, for the following reason:

Incompetence as an office administrator in failing to be aware of existing conditions in his office.

Your suspension will be in force until the completion of all investigations.

The following is to advise you of the provisions of Section 118 of the Regulations which read as follows:

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118(1) An employee who has been suspended pursuant to Section 51 of the Act shall, within ten days of the commencement of a suspension, be given an opportunity to present his side of the case to the Deputy Head or to a senior officer of the Department nominated for that purpose by the Deputy Head.

If you intend to take advantage of section 118 you should so inform the undersigned before a period of ten days from commencement of your suspension and arrange a time satisfactory to you to present your side of the case to Mr. G. F. McKay the officer of the Department who has been nominated by the Deputy Minister for this purpose.

DATED AT OTTAWA, Ontario, this 26 day of November, 1958.

LF: MJM
c.c. Mr. A. Swan
c.c. D. M. Erskine

H. R. Kotlarsky,
Director,
Administration Branch.

The legality of this suspension is challenged and the suppliant claims damages for wrongful suspension.

The third event upon which a claim for relief is based occurred on November 27th. On receiving Mr. Kotlarsky's letter, Swan had passed it to T. J. Woods for delivery to the suppliant. Mr. Woods was a field representative of the Industrial Security Branch of the Department who had been sent to Calgary to assist in an investigation of matters which Swan had reported. He had arrived in Calgary on the morning of November 25th and had interviewed several members of the staff of the Calgary District Office and in a telephone conversation with the suppliant on the evening of November 26th had asked him to come to the Palliser Hotel the following morning saying that he wanted to talk to him. He also wanted to deliver Mr. Kotlarsky's letter. The suppliant, accompanied by his wife, accordingly attended at Mr. Woods' hotel room on the following morning when Woods introduced himself to them and delivered the letter. Woods knew its purport but had not read it. After opening and reading it and passing it to his wife the suppliant asked Woods if he was in a position to tell him "what these existing conditions were" and in what way his "failure to be aware of these existing conditions constituted incompetence" whereupon (according to the suppliant) Woods "railed" at him for having retained Wright as a member of the staff, questioned him as to whether he had ever had occasion to take Wright to task for anything and on receiving an affirmative reply asked why the suppliant had not made a record of each instance when he had taken Wright to task and sent it to Ottawa. Either then or after

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some further discussion Woods said "There were irregularities in the office" and when asked to define the irregularities said, "There were irregularities in the office and that is all I am going to tell you." According to the suppliant, Woods at some point in the conversation in response to a question as to what his function in the Department was replied that he was an investigator of the Industrial Security Branch of the Department, that he was located in Toronto and that "his function was to ferret out communistic activities among employees of plants and factories engaged in the production of material or supplies ordered by the Department of Defence Production on behalf of the Department of National Defence". The suppliant claims damages in respect of both statements by Woods on the grounds that they were defamatory, the first in implying that the suppliant tolerated or condoned irregularities in the office and the second in implying that the suppliant was a communist. He also claims damages in respect of the latter statement on the basis of its having given him the impression that searching out communists might be part of the investigation which Woods had come to Calgary to conduct and that he, the suppliant, was suspected of being a communist or of having communistic tendencies. The suppliant says that he was emotionally wrought up at the time, that he became quite ill and that the uttering of these words by Mr. Woods aggravated his condition.

The fourth matter in respect of which complaint is made is that the suppliant was not given an opportunity to present his side of the case with respect to his suspension, to a senior officer of the Department nominated for that purpose by the deputy minister as required by s. 118(1) of the Civil Service Regulations. Mr. Kotlarsky's letter, it will be recalled, had quoted the regulation and had named Mr. G. F. McKay as the officer nominated by the deputy minister. Mr. McKay was well known to the suppliant having been employed under him for some years in the Calgary office prior to being transferred to Regina and subsequently to Edmonton where he had reached the same classification as the suppliant and had been placed in charge of the Edmonton District Purchasing Office of the Department. On November 24th, at the request of Swan, Mr. McKay had come to Calgary to take over the

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management of the office there while the investigation which had been instituted was being carried out. Whether Mr. McKay's appointment as a Defence Production Officer Grade 5 was senior to that of the suppliant does not clearly appear but he was plainly junior to Mr. Swan on the strength of whose reports the suppliant had been suspended. I mention this because one of the points taken on behalf of the suppliant was that Mr. McKay was not a "senior officer of the department" within the meaning of the Regulation. However, on November 28th the suppliant replied to Mr. Kotlarsky's letter and among other things said to him:

> You are hereby informed that it is my intention to take advantage of s 118 of the Regulations, and that I will be making representations to Mr. G F McKay shortly.

Thereafter on December 1st the suppliant, after having spoken with Mr. McKay by telephone and having been told that he might present his side of the case either orally or in writing, sent the following letter to Mr. McKay.

339 Scarboro Avenue,
Calgary, Alberta,
December 1, 1958.

Mr G. F. McKay,
c/o Department of Defence Production,
Room 725, Calgary Public Building,
Calgary, Alberta

Dear Mr McKay:

With reference to Mr. Kotlarsky's letter of November 26, 1958, I hereby submit my appeal against the suspension, based on the following reasons:

(1) The charge is nebulous, as it does not state specifically what "existing conditions" are referred to. I can only assume that what is meant is the clash of personalities of some of my male subordinates, a condition of which I was quite aware and had instituted corrective action which was effective until the matter was revived during Mr Swan's visit.

(2) My suspension was unnecessary, as no accusations had been levelled against me. Any investigation of allegations against other members of the staff could have been carried out while I was on duty in the office.

(3) No definite time limit has been placed on the suspension, as it is stated that it "will be in force until the completion of all investigations".

(4) My unexplained absence from my office could undermine the confidence of the requisitioning officers (DND) in the department (DDP).

(5) I am not bruiting my absence about—in fact, I am endeavoring to keep it a secret Phone calls from suppliers, who receive evasive answers from the staff, are resulting in unnecessary publicity of

the simultaneous absences of the two senior members of the Calgary district office. None of our suppliers is simple enough to accept without reservation the dubious explanations offered, as evidenced by the phone calls Mr. Wright and myself are receiving at home. All this is creating a public awareness of differences which could and should be self contained and resolved within our department.

(6) If my suspension is not lifted retroactive to its effective date, it will represent a fine levied prior to investigation or proving of charges. Penalties imposed before conviction are illegal.

(7) I feel no necessity to apologize for my actions with reference to a squabble between two members of my staff. My steadfast resolve was that there should be an awareness of the rights of each and every individual on my staff, with no preconceived judgments nor opinions without just grounds or before sufficient knowledge had been acquired.

As I do not have copies of the Regulations and the Act referred to in Mr. Kotlarsky's letter, I have no guide to proper procedure. Therefore, it should be understood that this letter is a protest only against my suspension, which I urge be lifted immediately retroactive to its effective date. Furthermore, this letter is not intended as a defence against any charges, and I reserve my defences against the time when it may be decided to set up a board or other authority for the purpose of questioning or examining me.

Yours very truly,
"F. Hopson"
Frank Hopson

Mr. McKay, who regarded his appointment under s. 118 (1) as involving the authority to recommend either that the suspension be lifted or that it be continued but, in view of matters in the office which had come to his attention since he had taken charge, "saw no point" in recommending that the suspension be lifted, treated the letter as a protest rather than as a presentation of the suppliant's side of the case. He held the letter for a day as Mr. Swan who had gone to Vancouver would be passing through Calgary on his return journey and passed the letter to him to take to Ottawa "to see what would be appropriate for the occasion".

According to the suppliant the letter of December 1st represented what he wanted to say to Mr. McKay and no further statement by the suppliant of his side of the case was made to Mr. McKay though it is clear that Mr. McKay would have been prepared to receive any oral or written representation which the suppliant might have wished to make. On December 4th after telephoning Mr. McKay to find out what disposition had been made of his letter the suppliant telephoned Mr. Kotlarsky and was told that the letter had been received and that it was not what was wanted of the suppliant. Mr. Kotlarsky, who also gave

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evidence, stated that in the course of the conversation the suppliant referred to the letter of suspension and to what he considered the unfairness of the investigation and expressed the hope he would have an opportunity to answer specific charges and to come to Ottawa to do so. Mr. Kotlarsky also said that he told the suppliant of a proposed meeting with the deputy minister to be held on December 8th and suggested he write a letter outlining his feelings about the investigation and that he, Kotlarsky, would present it to the meeting. The suppliant wrote no letter but on December 7th he again telephoned Mr. Kotlarsky and according to Mr. Kotlarsky said that he had been unable to get a letter off and suggested that he was prepared to fly to Ottawa on December 10th in the hope that he might see the deputy minister to convey his impressions of the investigation and present his feelings about it and the general charges and to try to get more details about the specific nature of the charges. He was told that the proposed trip would be of little use as the deputy minister would be away from Ottawa on December 10th and it was then left with Mr. Kotlarsky to try to present the suppliant's feelings at the meeting on the following day. The meeting was held and resulted in a decision by the deputy minister to take steps to dismiss the suppliant immediately. The suppliant takes the position that he was not afforded the opportunity to present his side of the case provided for by s. 118(1) of the Regulations and that he is entitled to damages for the denial of his right.

The next incident relied on as a basis for a right to relief occurred on December 10th. Following the meeting at Ottawa on December 8th Mr. Kotlarsky had telephoned the suppliant and had told him that action was to be taken to dismiss him but that as an alternative he would be given an opportunity to resign. The call was a lengthy one and several matters were discussed including the suppliant's right to present his side of the case with respect to his proposed dismissal and the advantages which might be gained by the suppliant resigning, one of which was that under s. 73 of the Civil Service Regulations he would be eligible for a cash gratuity in lieu of retiring leave. The suppliant regarded the suggestion that he would be eligible for the gratuity if he resigned as an attempt to bribe him to

obtain his resignation and reacted against it. Mr. Kotlarsky on the other hand, while endeavouring to make it clear that the opportunity to resign was a concession he had obtained for the suppliant at the meeting and that he thought it would be the better course for the suppliant to take, got the impression that the suppliant was under great stress and was unable to believe that so harsh a decision could have been made against him. On the following day, Mr. McKay had been requested by Mr. Drouin, the supervisor of District Offices to contact the suppliant and in a friendly way to tell him that a recommendation for his dismissal was to be put forward and if possible to indicate to him the advantages of resigning rather than being dismissed. Accordingly on December 10th Mr. McKay telephoned the suppliant and passed on this message whereupon the suppliant expressed his view that this required talking over in person and arranged to come, with Wright, whose dismissal was also to be recommended and who had been given the like opportunity to resign, to McKay's office. When they arrived McKay called in Little to witness what might take place and a discussion began. As McKay had once been under the suppliant and Little had been one of Wright's accusers it is not surprising that tempers should flash and that is what appears to have occurred. McKay became angry as a result of a remark made by the suppliant and the suppliant agreed that he was angry as well. At one point in the discussion McKay, according to the suppliant, said to him: "Like Wright you have been subjected to a full scale investigation by the R.C.M.P. and you had better resign. I will have the stenographer type out your resignation and all you will have to do is sign it." This utterance by McKay is relied upon as a threat entitling the suppliant to damages.

The sixth event relied on was the alleged publication by D. A. Golden, the Deputy Minister of the Department to Mr. Kotlarsky and the publication by Mr. Kotlarsky, in the course of writing a letter to the suppliant and advising certain persons in the department of the grounds upon which a recommendation for the suppliant's dismissal was to be made. The letter read as follows:

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DEPARTMENT OF DEFENCE PRODUCTION

REGISTERED
AIRMAIL
SPECIAL DELIVERY

OTTAWA, December 17, 1958

Mr. F. Hopson,
339 Scarboro Avenue,
Calgary, Alberta.

Dear Mr. Hopson:

Further to my letter to you of November 26, 1958, this is to inform you that the Deputy Minister has considered the situation which existed in the Calgary District Office prior to your suspension and, as a result, has instructed that steps be taken to dismiss you from office on the following grounds:

1. Mismanagement of staff and failure to administer properly the work of the office.
2. Deliberate and repeated failure to carry out the prescribed purchasing policies and practices of the Department and permitting others to fail to carry out such policies and practices, including failure to adhere strictly to the policies and practices of the Department governing invitations for, and handling of, competitive tenders.

Accordingly, a recommendation for dismissal is being made to the Governor-in-Council under Section 52 of the Civil Service Act, Revised Statutes of Canada 1952, Chapter 48. Your suspension without pay, which commenced on November 28, 1958, will continue until the matter has been dealt with by the Governor-in-Council.

In accordance with Section 118 of the Civil Service Regulations (a copy of which Section I sent you on December 1, 1958) Mr. G. W. Hunter, Assistant Deputy Minister, has been designated as the senior officer to whom you may present your side of the case. Please advise me by collect telegram before Tuesday, December 23, 1958 if you intend to proceed under Section 118.

Yours truly,
"H. R. Kotlarsky"
H. R. Kotlarsky,
Director,
Administration Branch.

The suppliant's complaint in respect of this item is that he has been defamed by the publication by Mr. Golden to Mr. Kotlarsky and by Mr. Kotlarsky to others of the words contained in the subparagraphs numbered 1 and 2. The evidence shows that the letter was composed by three persons, viz., Mr. Erskine, the Director of the Regional Purchasing Branch of the Department, Mr. Waddell, the Director of the Legal Branch of the Department and Mr. Kotlarsky, the Director of Administration of the Department within a day or two after the meeting of December 8th when the deputy minister had decided that action should be taken to have the suppliant dismissed. At the meeting Mr. Kotlarsky had interceded on behalf of both

the suppliant and Wright and had obtained the approval of the deputy minister of their being given an opportunity to resign, and the events of December 8th and 10th to which I have already referred had followed. On December 17th, as the suppliant had not resigned, Mr. Kotlarsky sent the letter to the suppliant but on the same day, in order to give the suppliant a final opportunity to resign, he also telephoned Mr. McKay and asked him to communicate the contents of the letter to the suppliant so that the suppliant would know the contents before he received it and be able to resign if he wished to do so before it arrived. It was apparently suggested that if the suppliant should resign he might return the letter unopened. In order to insure that the suppliant would be acquainted fully with the contents of the letter Mr. Kotlarsky read and dictated the letter verbatim by telephone to Mr. McKay's stenographer who was instructed to transcribe it without making additional copies and to destroy her shorthand notes. She accordingly prepared a single copy which later that day Mr. McKay passed to the suppliant. The publication of the contents of the letter to Mr. McKay, to his stenographer, to Mr. Kotlarsky's stenographer and to other members of the staff of the Department at Ottawa is complained of and is relied on as entitling the suppliant to damages for defamation.

The seventh matter of which complaint is made is that the suppliant was denied a proper opportunity to present his side of the case in respect of his dismissal. Following receipt of Mr. Kotlarsky's letter of December 17th, there had been an exchange of telegrams in which it had been proposed at first that the suppliant go to Ottawa at public expense to present his side of the case to Mr. Hunter but the suppliant had replied that it would be impossible for him to fully present his side of the case in Ottawa and that it was imperative that a hearing be held in Calgary as he proposed to call witnesses and to refer to documents located at Calgary. Mr. Hunter had thereupon agreed to come to Calgary to hear the suppliant and arrangements had been made for the suppliant to meet him at his suite in the Palliser Hotel. The interview lasted about an hour and a half in the course of which the suppliant first presented an eleven page closely typewritten letter which he had prepared as a chronicle of events which had transpired since

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Mr. Swan had arrived on November 19th to make his inspection. Mr. Hunter read the letter and about an hour was taken up in doing so and in discussing with the suppliant some of the matters mentioned therein. After reading the letter Mr. Hunter asked the suppliant if it represented his full side of the story and he replied in the affirmative. However, as the letter had not covered certain points of the grounds upon which dismissal action was to be taken Mr. Hunter then proceeded to invite the suppliant to comment in turn on a number of subjects which were set out in a memorandum prepared for his use by officers of the Department stating details of respects in which breaches of departmental policy and procedures were alleged to have occurred. The memorandum which was marked "secret and confidential" and applied to both the suppliant and Wright, was set up under five headings as follows.

1. VIOLATION OR COMPLETE DISREGARD OF DEPARTMENTAL PURCHASING POLICY AND PROCEDURES REGARDING THE RECEIPT, CUSTODY AND OPENING OF TENDERS. THE CORRECT PROCEDURE HAS BEEN CLEARLY DETAILED IN THE DEPARTMENTAL MANUAL, BRANCH DIRECTIVES AND BULLETINS.

Under this heading six sets of details were noted and the suppliant was asked to comment on or explain his position with respect to each of them in turn.

2. FAILURE TO COMPLY WITH THE DISTRICT OFFICE IMPROVEMENT PROGRAM, WHICH WAS IMPLEMENTED IN SEPTEMBER 1958.

Under this heading there were four sets of details the first two of which were discussed with the suppliant. The other two were:

(*c*) Service unit employees were performing buyers functions such as filing copies of contracts and closing the files.

(*d*) The flexowriter tapes which were provided when the district office improvement program was implemented were altered.

Mr. Hunter stated in evidence that he did not discuss these with the suppliant, that they were borne out as matters of fact and he saw no special reason to discuss them.

3. FAILURE TO TRAIN AND SUPERVISE STAFF.

Under this heading there were four sets of details the first two of which had been discussed while going over the suppliant's letter. The remaining two were not discussed. They were:

(*c*) Employees other than Messrs. Hopson and Wright were not permitted to read the departmental manual, bulletins and directives from this headquarters.

Messrs. Standish and Little (present employees) and Mr. Dove

(former employee) stated that this compelled all junior staff to secure individual guidance and direction from Messrs. Wright and Hopson. The Bulletins and Directives were not indexed which would appear to support this charge.

(*d*) The Civil Service Commission representative, Mr. Alex. McKinnon, reports receiving numerous complaints from present and former employees of DDP, Calgary, regarding the treatment they received from Mr. Wright and Mr. Hopson took no action to correct this situation.

With respect to (*c*) Mr. Hunter said he mentioned to the suppliant that in his tour of the office he had noticed that manuals and departmental directives were kept in the suppliant's office and that the staff were not given very ready access to them but he did not recall any discussion of the item with the suppliant. He does not appear to have mentioned to the suppliant that this was one of the grounds upon which action was to be taken to dismiss him. With respect to (*d*) Mr. Hunter said he felt he would discuss the subject with Mr. McKinnon, which he did later, but he did not discuss it with the suppliant.

4. INFLATING WORKLOAD STATISTICS.

5. FAILURE TO ADMINISTER THE WORK OF THE OFFICE.

There were three sets of details under the heading numbered 4 and two sets under the heading numbered 5 none of which were discussed with the suppliant as they seemed to Mr. Hunter to be matters of fact and he assumed that further discussion of these matters would not help.

After discussing the matters mentioned as having been discussed Mr. Hunter told the suppliant he had covered the points he had and asked if the suppliant had anything further he would like to add either to the matters referred to in his letter or to the points which he (Hunter) had raised. According to Mr. Hunter the suppliant then expressed himself as satisfied that his side of the case had been presented. Earlier in the course of the interview the suppliant had asked if he would be permitted to call witnesses but had been told that the terms of reference were for Mr. Hunter to see the suppliant and such other persons as he thought necessary. The suppliant had then asked that Mr. Hunter see a Mr. French who was a former employer of Little, and Mr. McKinnon. As previously mentioned Mr. McKinnon was interviewed by Mr. Hunter before he left Calgary. The suppliant's account of what occurred at his interview with Mr. Hunter is not so full and

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differs in some details from that given by Mr. Hunter, the material parts of which I have summarized. In view of the conclusion I have reached on the question it does not appear to me to be necessary to set out the suppliant's account, a particular feature of which was that Mr. Hunter at the conclusion of the interview assured him that he (Hunter) would be calling Mr. Golden that afternoon and that the suppliant would soon be back at his job. This is denied by Mr. Hunter who also said that most of the explanations given by the suppliant in respect to the matters which he raised with him were unsatisfactory and that on his return to Ottawa he wrote a report to the deputy minister recommending that the dismissal action proceed. The suppliant's position is that his right to an opportunity to present his side of the case was denied and that he is entitled to damages.

Following the interview with Mr. Hunter the action to dismiss the suppliant did proceed, a recommendation, said to have contained wording similar to that of the paragraphs numbered 1 and 2 in Mr. Kotlarsky's letter, went forward and on January 14th, 1959 the Governor in Council approved a Minute of a meeting of the Treasury Board recommending that the suppliant be dismissed from the Government Service, effective December 31st, 1958. On the question of the validity of the suppliant's dismissal it was conceded in the course of argument that if a Civil Servant may be dismissed without cause the question would be answered in favor of the Crown and no point was made with respect to the retroactive feature of the dismissal. It was not, however, conceded that the suppliant's dismissal was lawful and the claim for wrongful dismissal must accordingly be dealt with in its turn.

A further ground relied on by the suppliant as entitling him to relief is that he was not disentitled under s. 73(5) to the cash gratuity provided for by s. 73(1) and that he is entitled to recover it. It is not in dispute that if entitled thereto the amount of such gratuity would be equal to three months salary. The suppliant's right to recover the gratuity is thus another matter to be determined.

The tenth matter relied upon as a basis for relief occurred shortly after the approval by the Governor in Council of the suppliant's dismissal. On January 16, 1959,

G. E. Radbourne, the chief of the personnel division of the Department of Defence Production, wrote to the suppliant a letter outlining the optional benefits available to him under the *Public Service Superannuation Act* and with it enclosed a form for use in making his election, which had been partially completed at the top by inserting particulars relating to such matters as the suppliant's name, date of birth and term of service. This form had been prepared and some of these details had been typed in it by the superannuation section of the personnel division of which Mr. Radbourne was the chief and it had then been passed on to him. Before sending it to the suppliant Mr. Radbourne had his secretary type in a space headed "Cause of Retirement" the word "Inefficiency" and in the ordinary course of dealing with the matter a copy of the form was thereafter sent to the Public Service Superannuation Branch of the Department of Finance and another copy would have been seen by the head of the superannuation section of Mr. Radbourne's division and by a clerk who would have had occasion to put it on file. The suppliant asserts that the publication by Mr. Radbourne of the word "inefficiency" in these circumstance was defamatory and he claims damages.

The last of the events relied on occurred about a year later. The suppliant had applied to Pillsbury of Canada Limited for employment and in so doing he had disclosed that he had been dismissed from the government service and had given the personnel division of the Department of Defence Production as the branch of the Department to which an enquiry for a reference might be made. The following correspondence ensued.

PILLSBURY OF CANADA LIMITED
CALGARY—CANADA

January 14, 1960

Mr. G. E. Radbourne,
Chief Personnel Division,
Department of Defence Production
No. 2 Temporary Building,
Ottawa, Ontario.

Dear Sir:

Mr. Frank Hopson of 339 Scarboro Avenue, Calgary, Alberta, has made application for employment with this company, and has given the Department of Defence Production as his most recent employer.

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It will be very much appreciated if you would kindly let us know whether, in your opinion, Mr. Hopson would make a suitable employee, having particular reference to his character, habits, ability and cause of his separation from the government service.

With thanks in advance for your courtesy, we are,

Yours very truly,
"D. C. Campbell"
Assistant Manager

D. C. Campbell:ew

OTTAWA, January 27, 1960.

Mr. D. G. Campbell,
Assistant Manager,
Pillsbury of Canada Limited,
CALGARY, Alberta.

Dear Sir:

RE Mr. Frank Hopson.

Mr. Hopson worked with this Department from its inception in April, 1951 to December 31, 1958. He was in charge of our Calgary District Office and as such, was responsible for the procurement of a large number of commodities for the local military units. He was a skilled buyer and was generally considered to have performed his buying duties in an acceptable manner.

Although Mr. Hopson left the Department under unfortunate circumstances, I personally feel that he has much ability and could be usefully employed in an organization such as yours. Although you have not indicated in your letter the position for which he has applied, I feel that he could be profitably considered for any position for which his knowledge and experience qualifies him.

Yours very truly,
G. E. RADBOURNE,
Chief, Personnel Division

PILLSBURY OF CANADA LIMITED
CALGARY—CANADA

February 1, 1960

Mr. G. E. Radbourne,
Chief, Personnel Division,
Department of Defence Production,
Ottawa, Ontario.

Re: Mr. Frank Hopson

Dear Sir:

Many thanks indeed for your letter of January 27th replying to our enquiry regarding the above Mr. Hopson from whom we have received an application for employment.

If at all possible would appreciate your enlarging on the unfortunate circumstances under which Mr. Hopson left the employ of the Department. We of course do not desire to give employment to anyone if there is a possibility that they might have to leave our employ also under similar unfortunate circumstances. If you are able to furnish us with this information it would certainly be appreciated.

Yours sincerely,
"D. G. CAMPBELL"
Assistant Manager.

D.G.C.:ew.

OTTAWA, February 11, 1960.

Mr. D. G. Campbell,
Assistant Manager,
Pillsbury of Canada Limited,
CALGARY, Alberta.
Dear Mr. Campbell:

RE Mr. Frank Hopson.

Mr. Hopson was released from this Department because of mismanagement of staff. In my opinion, this was due to complacency on his part; the result of being in the same position for eighteen years.

I personally, feel that the complacency will not happen again.

Yours very truly,
G. E. RADBOURNE
Chief, Personnel Division

Complaint is made of the publication to Mr. Campbell of the words "Mr. Hopson left the Department under unfortunate circumstances" in Mr. Radbourne's letter of January 27th, 1960 and of the words of the first paragraph of his letter of February 11th, 1960 as being defamatory of the suppliant and entitling him to damages.

I shall deal first with the several claims for damages for defamation, beginning with that arising from the two statements said to have been uttered by T. J. Woods at the Palliser Hotel on November 27th, 1958. Neither in this instance nor in any of the other instances of alleged defamation nor in any of the three instances of alleged threats does any issue arise as to the liability of the Crown under the *Crown Liability Act* for the damages sustained if the particular person alleged to have committed the wrong is liable therefor, the Crown having admitted that in each case the person was a servant of the Crown for whose tort the Crown would be liable under the statute.

With respect to the alleged statement "there were irregularities in the office" the evidence of all three persons who were present, that is to say, the suppliant, Leona Hopson, his wife, and Woods himself shows that Woods uttered these words at least once in the course of the interview. It is, however, admitted that the suppliant has an action pending against Woods in the Supreme Court of Alberta in which damages are claimed for defamation by the uttering of these words on the occasion in question and s. 32 of the *Exchequer Court Act* is raised in bar of the suppliant's claim in this Court.

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The section provides:

> 32. The Court shall not entertain any claim in respect of which the claimant has a suit or process against any person pending in another court, if such person, at the time when the cause of action alleged in such suit or process arose, was, in respect thereof, acting under the authority of the Crown.

This provision was first enacted by S. of C. 1887, c. 16, s. 19, which also for the first time imposed on the Crown liability for the tortious act of a Crown servant and though I doubt that the vicarious liability of the Crown under the *Crown Liability Act* for the tort of a Crown servant is necessarily limited to cases in which it can fairly be said that the person was in respect of the cause of action "acting under the authority of the Crown" in the present case there was evidence that Woods had been sent to Calgary to take part in an investigation relating to personnel of the Calgary office, of whom the suppliant was one, and that besides wanting to deliver Mr. Kotlarsky's letter, as he had been instructed by Swan to do, he wanted to talk with the suppliant. There is also evidence that he enquired about the suppliant's supervision of Wright. I would accordingly infer that the interview was part of the investigation which Woods was making pursuant to his instructions and that what he said to the suppliant was said in the course of carrying out those instructions. I might add that it was not disputed by the suppliant that in making the statement Woods was acting under his instructions. I therefore find that Woods was acting under the authority of the Crown in respect of the alleged cause of action and that because the suppliant has a claim pending against Woods in another court in respect of it the jurisdiction of this Court to entertain the claim is barred by s. 32 of the *Exchequer Court Act*.

There is a conflict of testimony with respect to the other statement allegedly made by Woods. According to the suppliant at some point in the conversation Mr. Woods stated that his visit to Calgary was not prompted by the immediate dissatisfaction of Little and Standish but that he had been alerted by Mr. Swan to be prepared to come to Calgary at a day's notice as there was going to be trouble in the Calgary office, and that in answer to a question as to what his function was in the Department, Woods replied that he was an investigator of the Industrial Security

Branch of the Department of Defence Production, that he was located at Toronto and that "his function was to ferret out communistic activities among employees of plants and factories engaged in the production of material or supplies ordered by the Department of Defence Production on behalf of the Department of National Defence".

Leona Hopson's evidence varies somewhat from this. She says that Woods introduced himself and said he was from a branch of the Department, the exact name of which she was unable to remember though she seems to have remembered the word "industrial", that Woods said "actually he had no connection" with the investigation at the Calgary office, that he was a "Commie hunter" and "his usual duties were to check various factories and industries which had got orders for defence contracts to see if they had communist infiltration of their staff", that his visit was not prompted by the complaints of the junior buyers, Little and Standish and that he had been alerted in July by Swan to be ready to come to Calgary at a moment's notice. In cross-examination she testified that Woods said "I am a Commie hunter" and that he started to laugh and that at some point, not necessarily immediately afterwards, he said that it was outside his regular duties investigating or having anything to do with employees of the Department of Defence Production.

Mr. Woods' evidence was that the interview occurred on November 28th rather than on the 27th, that some years earlier his duties had included the investigation of communism but that at that time they had nothing to do with such investigations but were to control the security and protection of information and work in the hands of contractors for the Department of Defence Production and also to investigate on direction, internal matters respecting employees of the Department. He denied having said that he was a communist hunter or what his duties were and he also denied having made any such statement as that attributed to him by the suppliant adding that he had no reason whatsoever to make such a statement. He also said that he had not known Swan before coming to Calgary and denied making any statement that he had been alerted in July by Swan to be ready to come to Calgary on a day's notice.

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Having observed their demeanour in giving their evidence I prefer the evidence of the suppliant to that of Woods and I find that Woods did utter the words attributed to him by the suppliant. In the circumstances described, however, I regard the words as having been uttered as a boast in answer to the suppliant's question as to Woods' function and for the purpose of impressing the suppliant and the suppliant's wife with his experience as an investigator and I do not think the words can reasonably be regarded as having been spoken of or concerning the suppliant or as implying that the suppliant was suspected of being a communist or of having communistic tendencies. Moreover, I am not satisfied on the evidence that Mrs. Hopson in fact interpreted the remark as referring to the suppliant or as implying either that the suppliant was a communist or that he was suspected of being a communist or of having communistic tendencies.

On the issue as to defamation by the uttering of these words I accordingly find for the respondent.

The next matter relied on as the basis of a right to damages for defamation is the alleged oral publication by D. A. Golden to H. R. Kotlarsky on or about December 17th and the publication by Kotlarsky both orally and by his letter of December 17th of the words:

1. Mismanagement of staff and failure to administer properly the work of the office.
2. Deliberate and repeated failure to carry out the prescribed purchasing policies and practices of the Department and permitting others to fail to carry out such policies and practices, including failure to adhere strictly to the policies and practices of the Department governing invitations for, and handling of, competitive tenders.

As previously mentioned these expressions were composed by Messrs. Kotlarsky, Erskine and Waddell following the meeting of December 8th at which the decision to take steps to dismiss the suppliant was made by the deputy minister. On the evidence I see no reason to think that Mr. Golden uttered these particular expressions to Mr. Kotlarsky at or about the time alleged and so far as this alleged publication of them is concerned I find it has not been established. It is otherwise, however, with respect to the alleged publication by Mr. Kotlarsky. There is evidence that he wrote the letter and in so doing dictated it to his secretary. It is not unlikely that a copy may have been seen

as well by one or more clerks who might have had occasion to deal with it in the course of their duties. In respect of the publication to these particular individuals I find that the defence of privilege succeeds. But the publication did not end there. Mr. Kotlarsky also telephoned Mr. McKay at Calgary and read the letter to him and dictated it to Mr. McKay's secretary after enjoining her to make but one transcript and to destroy her notes. I have had some doubt as to whether the publication of the letter to these persons was on an occasion of privilege but I have come to the conclusion that the principle which applies to the other publications applies to these as well.

In *Lacarte v. Board of Education of Toronto*[1] Locke J., speaking for the majority of the court said at page 471:

> The letter was written and the reasons for the termination of the appellant's services stated for the reasons to which I have referred. In the ordinary course of business, the letter was dictated to a stenographer and copies were undoubtedly seen by the filing clerks. The ground upon which the privilege rests in a case such as this is stated by Baron Parke in *Toogood v. Spyring* (1834), 1 C.M. & R. 181 at 193, 149 E.R. 1044. That it is not lost by such communications is shown by the cases referred to by the learned trial judge: *Osborn v. Boulter* [1930] 2 K.B. 226, 232 and *Edmondson v. Birch* [1907] 1 K.B. 371, 380, which, in my opinion, accurately state the law. In the last mentioned case it was said by Fletcher Moulton L. J. (p. 382) that if a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.

In *Osborn v. Boulter*, Scrutton L.J. summed up the law in the following passage at page 232:

> In my view, on the question whether privilege is lost by communicating to a staff of clerks the alleged defamatory matter, the rule we have to apply has been laid down by this Court after a consideration of *Pullman v. Hill & Co.* [1891] 1 Q.B. 524, in *Edmondson v. Birch & Co., Ld.* [1907] 1 K.B. 371, and again adopted in this Court in *Roff v. British and French Chemical Manufacturing Co.* [1918] 2 K.B. 677. In *Edmondson v. Birch & Co., Ld.*, a company in England wrote and cabled to a company in Japan about the character of a person whom it was proposed to employ. The letter and cable, which contained defamatory matter, were, in the ordinary course, communicated to the clerks of the company sending the letter and cable, by dictation, copying and coding. Collins M.R., after considering the previous cases of *Pullman v. Hill & Co.* and *Boxsius v. Goblet Frères* [1894] 1 Q.B. 842, said [1907] 1 K.B. 380: "The result of the two cases to which I have alluded, taken together, appears to me to be that, where there is a duty, whether of perfect or imperfect obligation, as between two persons which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons where that is reasonable and in the ordinary course of

[1] [1959] S.C.R. 465.

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business; and if so, it will not destroy the privilege." Cozens-Hardy L.J. said Ibid. 381: "I think that, if we were to accede to the argument for the plaintiff, we should in effect be destroying the defence of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only. In the ordinary course of business such a document must be copied and find its way into the copy letter-book or telegram-book of the company or firm. The authorities appear to me to show that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business." Fletcher Moulton L.J. said [1907] 1 K.B. 382: "I agree. In my opinion the law on the subject, as laid down in the cases, amounts to this: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business" The same was said in *Roff v. British and French Chemical Manufacturing Co.* If the principle is as there laid down, the decision in *Pullman v. Hill & Co.* is merely that in 1890 it was not a usual and reasonable thing for a member of a business firm to dictate a letter containing defamatory statements to, and have it copied by, a clerk.

In the opinion of the Court of Appeal in that case if a member of a business firm wished to send such a letter he must write and copy it himself. That is a decision of fact. The principle laid down in *Edmondson v. Birch & Co., Ld.*, applies, while the decision on fact is not binding on any Court in 1930. I am glad to find that in Salmond on Torts and in Odgers' Libel and Slander the same view is taken of *Pullman v. Hill & Co.* as an authority.

The question then, as I see it, is whether in the circumstances of this case the communication of the contents of the letter in question to the suppliant by communicating it first to Mr. McKay was a reasonable means of doing so and was in the ordinary course of business. "Business" is perhaps not strictly appropriate in the present situation but I do not think anything turns on that. "Practice" might be more accurate and would, I think, be equally well within the principle. It is, I think, to be taken as well that the question whether the transmission or treatment of the communication is in accordance with the reasonable and usual course of practice is not affected by the fact that the communication may be defamatory of the suppliant. What is reasonable and in accordance with the usual practice in making the particular communication appears to me to depend only on the reasonable and usual course for making communications of the kind in question rather than upon the characteristics of the particular communication.

I turn then to the circumstances in the present case leading up to the communication in question. Mr. Kotlarsky's

evidence is that at the meeting on December 8th he had obtained for the suppliant the concession that he be given an opportunity to resign and that he had formed the opinion that it would be in the suppliant's interest to resign because in that case he would be eligible for a cash gratuity and he would not have a record of dismissal to contend with in seeking employment and because on the other hand he felt that in the event that the suppliant should choose not to resign his chances of retaining his position after presenting his side of the case to a senior officer were forlorn. On December 8th he had called the suppliant and had told him this but had got the impression that the suppliant had not been able to appreciate his situation properly. That seems to have been the last occasion on which he spoke directly with the suppliant. Thereafter arrangements had been made for Mr. McKay to contact the suppliant and in a friendly way to tell him again that a recommendation for his dismissal was to be made and if possible to show him the advantages of resigning rather than being dismissed. To that end McKay had had the conference of December 10th with the suppliant and by December 17th, McKay's position in the matter as described by the suppliant on discovery was that "he was the officer appointed, nominated, and he was acting as the go-between as well. He was occupying my chair and they naturally were in communication with him by telephone". I take it from this that McKay was at that stage regarded by the suppliant as a sort of liaison officer between himself and the Department and that it was not regarded by the suppliant as anything but natural or ordinary that an urgent message for the suppliant from officials of the Department in Ottawa should be transmitted to him through McKay.

When speaking with Hopson on December 8th Kotlarsky had told him that he would have a few days to consider what course he would take but a week had passed and there had been no answer. On the 15th Kotlarsky had phoned McKay to enquire if Hopson had resigned and had been told that he had not but was prepared to fight. Considering that more than the few days he had conceded had elapsed Kotlarsky thereupon decided to put an end to the indefinite period during which it would be open to the suppliant to resign by sending the letter to him. However, in order to

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extend the opportunity to resign to the moment of receipt of the letter and at the same time to afford to the suppliant an opportunity to see in advance and consider the grounds upon which it was proposed to put forward the recommendation for his dismissal, he also decided to make the contents of the letter known to the suppliant before the letter would reach him in the course of post. The occasion to communicate the contents of the letter to the suppliant in advance is the occasion here in question rather than the occasion to formally notify him of the decision to recommend his dismissal and it was, in my opinion, an occasion of qualified privilege. There were, however, at least two methods by which the desired object might have been accomplished. Kotlarsky might have telephoned the suppliant himself and told him all that was necessary. He might also have asked the suppliant to take the letter down in writing so that he could see and reflect on the contents. Had this course been taken there would have been no publication and the present problem might not have arisen. The other course, and the one adopted, was to pass the message to McKay for transmission to the suppliant. This course, as I see it, presented the advantages that McKay could make sure that the suppliant would see the reasons on paper and that McKay being in Calgary might be expected to have a better chance than Kotlarsky of persuading the suppliant that it was to his advantage to resign. In these circumstances having regard to the occasion and to the object of the communication I regard the means adopted for making it as reasonable. Then was the course usual? This to my mind presents the more difficult question of the two but there is the admitted fact that McKay at the time had the character of a "go-between", and the further fact that in case the suppliant should resign, the arrangement proposed, as I understand it, was that the official notice should be returned unopened by sending it to McKay. There is also the evidence that the suppliant on hearing the contents of the letter from McKay by telephone asked if he might come to the office and get a copy of it without prejudicing his opportunity to resign and return the original when it arrived and that he went to the office that afternoon and got possession of the copy which Mr. McKay's secretary had made. From this I would infer both that the suppliant did not regard the method of

communication to him through McKay as anything but usual and that after hearing the contents of the letter he adopted the procedure by taking advantage of the communication without objection as to the method followed. In these circumstances the method of communication used seems to me to have been quite usual and ordinary and had the message not been defamatory I do not think anyone would be prompted to suggest otherwise. Accordingly I hold that the occasion was one of qualified privilege which was not lost by the communication to McKay and it also appears to me that the publication of the letter to McKay's secretary for the purpose of having a copy of it made is protected by the same qualified privilege.

There is no proof of malice on the part of Mr. Kotlarsky. On the contrary I think the evidence establishes that there was no malice on his part and indeed in the course of argument counsel for the suppliant said he would not presume to point to anything malicious in Mr. Kotlarsky's action.

The evidence of Mr. McKay also suggests that a Mr. J. B. Ross, the administrative officer of the Purchasing Branch of the Department, may have been listening on the telephone at the Ottawa end during the conversation between Kotlarsky and himself and thus may have heard the letter read but while McKay seems to have had that impression, he also said that his memory of the transaction was not clear and as there is no other evidence of Mr. Ross or anyone else in Ottawa hearing the letter read, I do not find any such publication proved.

The suppliant's claim accordingly fails.

The third incident of alleged defamation was the publication by Mr. Radbourne of the word "inefficiency" as the cause of the suppliant's retirement. Mr. Radbourne explained that the optional benefits available on retirement differed according to whether the retirement was a voluntary retirement before reaching the age limit or was compulsory because of age or because of disability or was by dismissal in which case the superannuation benefits available differed according to whether the dismissal was for misconduct or was for some other reason. For this purpose the word "inefficiency" was the less serious of the two expressions "inefficiency" or "misconduct" commonly used

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on such forms as indicating the cause of retirement in cases of dismissal. Mr. Radbourne had read the reasons set out in Mr. Kotlarsky's letter of December 17th to the suppliant, which, according to his evidence, were the same as those put forward in the submission to the Governor in Council, and as there was insufficient room to put all these words in the space provided therefor on the form he chose and inserted the word "inefficiency" as being his interpretation of the reasons. A copy of this form would be seen in the ordinary course of their duties by Mr. Radbourne's secretary, by a record section clerk of the Deparment of Defence Production, whose duty it would be to put the copy on file, and by the chief of the superannuation section. In addition a copy was forwarded to the superannuation branch of the Department of Finance where it may be assumed that it was seen by persons having occasion to see it in the course of their duties to deal with the suppliant's rights to superannuation benefits. These are the only publications which have been established and in my opinion they were all publications on privileged occasions. As malice has not been proved the defence of privilege succeeds and the claim fails.

The remaining incidents of alleged defamation are those involved in Mr. Radbourne's letters to D. G. Campbell of Pillsbury of Canada Limited in reply to the enquiries of that company as to the character, habits and ability of the suppliant and the cause of his separation from the government service. Each of these enquiries was addressed to Mr. Radbourne in his capacity as chief of the personnel division of the Department of Defence Production and was answered by him in that capacity in the discharge of duties in the Department which included the answering of such enquiries. The social obligation to answer such enquiries is recognized as affording a qualified privilege for the answer so made and in my view the occasion of making each of the answers here in question was a privileged occasion. As there is no proof of malice on the part of Mr. Radbourne on either occasion the defence of privilege succeeds and the claim fails.

I turn now to the three claims for damages which are based on the principle of *Janvier v. Sweeney*[1] and *Wilkinson v. Downton*[2]. In the *Wilkinson* case[3] Wright J., explained the basis of such an action in the following terms.

[1] [1919] 2 K.B. 316. [2] [1897] 2 Q.B. 57. [3] p. 58.

The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

In that case the defendant as a practical joke had sent word to the plaintiff that her husband had met with an accident and had been seriously injured. The shock of hearing this news had caused the plaintiff to become seriously ill and in the result she recovered damages in respect of the physical harm so occasioned to her.

The passage which I have quoted from the judgment of Wright J., in the *Wilkinson* case was expressly approved by the Court of Appeal in *Janvier v. Sweeney* where the facts were somewhat more closely akin to those in the present instances in that the latter are all put forward in respect of the application of the alleged statements to the suppliant himself rather than as statements in respect of some other person so near to the suppliant in family or other relationship that his injury or peril could be expected to cause harm to the suppliant. In the *Janvier* case the plaintiff was a French woman living in England who for some years prior to 1917 had been engaged to marry a German. The German had been interned in the Isle of Man and the plaintiff had visited him on two occasions and had corresponded with him there. In order to persuade the plaintiff to obtain for them certain letters in the possession of another person which the defendants wished to see, one of the defendants said to the plaintiff: "I am a detective-inspector from Scotland Yard and represent the military authorities. You are the woman we want, as you have been corresponding with a German spy." The plaintiff became seriously ill as a result of this utterance and at trial obtained a verdict for damages which was upheld on appeal.

In order for the suppliant to succeed in an action of this kind, it would thus be necessary to find (1) that some servant of the Crown (in the course of his employment) wilfully did an act calculated to cause physical harm to the suppliant; (2) that there was no legal justification for the

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act; and (3) that the act in fact caused physical harm to the suppliant.

The first of the incidents relied on as giving rise to such a cause of action is the uttering by A. M. Swan while at dinner at the home of the suppliant on November 23rd of the words "Wright is guilty of bribery and could get five to twenty years for this". That these words were uttered by Swan is not in doubt. Both the suppliant and his wife stated in evidence that Swan had spoken them and in Mr. Hopson's version besides the words mentioned, Swan also said that he was going to see that he (Wright) got it. Swan was not called as a witness.

However, in my opinion the utterance of these words was not calculated to cause physical harm to the suppliant. Assuming that there was no justification for Swan uttering them the words whether true or not (and there is no evidence that they were true) referred not to the suppliant or to any peril that he or anyone near or dear to him might be in but to Wright. While the uttering of the remark on the particular occasion or even the discussing of matters which were under investigation in the suppliant's office on that occasion may be regarded as having been of questionable delicacy and may have been calculated to cause embarrassment to the suppliant, particularly in view of the fact that Swan was senior to him in the Department, the embarrassment, which I think the remark was calculated to produce, is a long reach from physical harm and in my view the first of the conditions for maintaining such an action is not fulfilled. I am, however, also of the opinion that the third condition is unfulfilled as well. The suppliant testified that since he was in charge of the office, there was a possibility of his being linked in some way with Wright's actions and that he might be charged and might even be found guilty and that he was quite frightened by the remark. Accepting this as true, it is, in my opinion, quite inadequate to found a claim for damages for personal harm. A passing fright resulting from reflection upon possible implications of the statement but not producing illness or other describable injury does not appear to me to be sufficient to sustain such a claim.[1]

[1] Cf Pollock on Torts, 15th Ed., pp. 37-39; Salmond on Torts, 13th Ed., pp. 16, 419; Fleming on The Law of Torts, 3rd Ed., pp. 33-35.

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The claim therefore fails.

The second of the matters relied on occurred in the course of the interview at the Palliser Hotel on November 27th when Mr. S. J. Woods delivered the notice of suspension to the suppliant. While there is evidence that Mr. Woods did not want to discuss the letter of suspension it appears to me that he wanted to accomplish more than merely to deliver it and this is, I think, indicated not only by the fact that Woods told the suppliant that he wanted to speak with him but by the circumstance that he asked the suppliant to come to the hotel to see him. Moreover, it seems probable that in the course of the interview, which was said to have lasted about half an hour, much more conversation took place than that deposed to by Woods and I discount as well his evidence that he had very little to say. The complaint is with respect to the uttering by Woods of the statement that "his function was to ferret out communistic activities among employees of plants and factories engaged in the production of material or supplies ordered by the Department of Defence Production for the Department of National Defence" and, as already mentioned when discussing this incident in connection with the suppliant's claim for defamation, I find that Woods did utter the words in question. As it was no part of Mr. Woods duties to investigate communists, or communistic infiltration, I would infer that the words were spoken for the purpose of giving the suppliant the impression that he (Woods) was a man of experience in dealing with difficult kinds of investigations who would not be easily satisfied and that he wished to produce this impression in order to put the suppliant in fear of him in the hope of eliciting from the suppliant some statement which would form part of his report to his superior. He stated at one point in his evidence that the suppliant had said that he could possibly have been more strict in the supervision of his office but that was a matter which could have been straightened out between him and Mr. Swan and in my view the hope or expectation that he would be able to elicit remarks of that nature was the reason why he wanted the interview with the suppliant as well as the reason why he uttered the words in question. In this case, the words complained of as having been spoken by Woods were, in my opinion,

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calculated to produce fear in the suppliant which if severe enough to produce bodily harm would have been sufficient to sustain the claim. Moreover, it is, I think, plain that there was no legal justification for the uttering of such a remark. I am, however, of the opinion that the third of the conditions required for recovery has not been met. Instead of raising fear and shock with resultant bodily harm, according to the suppliant, it produced resentment. The suppliant's evidence is that Woods' statement "kind of gave [him] the impression that possibly this was part of his investigation out here and that [he] was suspected of being a communist or of having communistic tendencies," and that in his mind he resented the implication. He also said that he was in a wrought up state and that the utterance of this remark added to his wrought up state, that he was "quite upset and quite ill at the time", and that his physician, who attended him at his home, prescribed sedatives and bed rest and enjoined him to try living one day at a time. Having regard to the fact that he was already in a wrought up state as a result of the investigation going on in his office and that he had just received a notice of his suspension, which in my view would be a much greater source of stress than the statement here in question, I find the evidence unsatisfying and insufficient to establish either that the illness which he described was due to the utterance by Woods of the words in question or that the suppliant in fact suffered shock or consequent physical injury as a result of their utterance.

The claim accordingly fails.

The remaining incident in respect of which relief is sought on this basis was the occasion in Mr. McKay's office on December 10th when, according to the evidence of the suppliant, McKay said to him "Like Wright you have been subjected to a full scale investigation by the R.C.M.P. and you had better resign. I will have the stenographer type out your resignation and all you will have to do is sign it." Mr. McKay, while conceding that he may have uttered the second of these two sentences at some point during the course of the interview, denies having spoken the first sentence and he also denies having said anything in the nature of a threat to the suppliant. Neither Wright nor Little was called by either party. On the question whether

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the statement was uttered by McKay, I prefer the evidence of the suppliant and find that McKay did utter the words attributed to him. I also find that the words were intended to be and constituted a vague threat and that they were used in the hope of persuading the suppliant to resign his position. They were, however, uttered while tempers were aroused and under the provocation of what McKay regarded as an unwarranted suggestion by the suppliant that he (McKay) was in some way responsible for the difficult position the suppliant was in and that he (McKay) ought to be grateful to the suppliant for interceding on McKay's behalf in times past to prevent his being dismissed. In these circumstances, I do not think that the uttering of such a threat can properly be regarded as the basis of a cause of action for damage but in any case, it does not appear to me that any damage was sustained. I do not doubt that the suppliant was annoyed by the remark, but he did not impress me as being a person who can be easily frightened and I do not think that the remark caused him either fear or bodily harm. This conclusion is I think borne out by the statement in his description of the incident in his letter of December 28th, 1957, to Mr. G. W. Hunter that "around 5 p.m. we parted from Mr. McKay on an apparent note of cordiality". This claim as well accordingly fails.

I turn next to the question of the legality of the suppliant's suspension and of his subsequent dismissal from his office, both of which turn on provisions of the *Civil Service Act*[1] then in force.

That statute, which has since been replaced by S. of C. 1960-61, c. 57, provided in s. 3 for the establishment of a Civil Service Commission the members of which were to be appointed by the Governor in Council and, subject to certain express provisions, were to hold office during good behaviour. It also provided in s. 5 for the appointment by the Governor in Council of a deputy head for each department to hold office during pleasure. The authority to appoint or promote other persons to positions in the Civil Service and the procedure for so doing were prescribed in sections 18, 19 and 20 which read as follows:

18. Except as otherwise provided in this Act or in any regulation, neither the Governor in Council nor any minister, officer of the Crown,

[1] R.S.C. 1952, c. 48.

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board or commission, shall have power to appoint or promote any employee to a position in the Civil Service.

19. Except where otherwise expressly provided, all appointments to the Civil Service shall be upon competitive examination under and pursuant to this Act, and shall be during pleasure;

20. (1) Every deputy head shall notify the Commission of every vacancy in any position in his department immediately after the vacancy occurs, and when such vacancy is to be filled, the deputy head shall request the Commission to make an appointment.

(2) The Commission shall thereupon appoint the person whose name stands highest upon the Commission's list of eligible persons for the class in which the position is found and who is willing to accept the appointment; . . .

The effect of these provisions was that in general, except for the appointment of the members of the Commission and deputy heads of departments, the power to make an appointment to the Civil Service was withdrawn from the Governor in Council and from ministers, officers, boards and commissions and was vested in the Civil Service Commission which was itself restricted in the exercise of the power to doing so only at the request of the deputy head of a department and by appointing (subject to rejection under the probationary provisions of s. 23) the person whose identity was to be ascertained by reference to s. 18(2). Turning to the question of the power to dismiss persons who had been appointed to the Civil Service it is to be observed that while dismissal is referred to in ss. 35, 36 and 55, which, however, have no application to the present situation, no express power of dismissal was conferred by the statute on the Commission or on any head or deputy head of any department or on any other officer. Once appointed a Civil Servant became a servant of the Crown holding office during pleasure and in my opinion (save to the extent that a person holding an appointment of a temporary nature may have been subject to dismissal by the Treasury Board in the exercise of authority conferred by regulations made under s. 5 of the *Financial Administration Act*) the power to dismiss remained vested in and only in the Governor in Council. That this was the situation appears to be borne out by the stringent provisions of s. 51 with respect to suspension authorizing only a minister, or in particular instances certain other officials, to suspend an employee of his department for cause and by s. 52 which expressly refers to the power of the Governor in Council with respect to dismissal. These sections provided:

51. (1) The head of a department, and in his absence the deputy head, or in respect of officers, clerks or employees employed in any remote district, any officer of the department authorized in that behalf by the head of the department, may

(a) suspend from the performance of his duty any officer, clerk or employee guilty of misconduct or negligence in the performance of his duties, and

(b) remove such suspension,

but no person shall receive any salary or pay for the time or any part of the time during which he was under suspension unless the Commission is of opinion that the suspension was unjust or made in error or that the punishment inflicted was too severe.

(2) All cases of suspension, with the reasons therefor, shall be reported in writing by the deputy head to the Commission.

52. Subject to section 3, nothing herein contained shall impair the power of the Governor in Council to remove or dismiss any deputy head, officer, clerk or employee, but no such deputy head, officer, clerk or employee, whose appointment is of a permanent nature, shall be removed from office except by authority of the Governor in Council.

In the scheme of the statute s. 51 appears to me to confer on the persons therein mentioned a power to suspend which in the absence of such a provision such persons would not have and that the power so conferred is exercisable only within the limits of and in the manner prescribed by the section. In contrast with this the first part of s. 52 appears to have been enacted to expressly preserve the existing authority of the Governor in Council to terminate the service of any member of the Civil Service, other than a member of the Civil Service Commission, whether for any stated cause or without cause, and to do this notwithstanding the fact that such civil servant may have been lawfully appointed in the exercise by the Commission of powers committed to it by the statute.

In the present case, while the ground set out in Mr. Kotlarsky's letter of November 26th does not appear to me to be an allegation of either misconduct or neglect in the performance of duties, it was expressly agreed between the parties that the suppliant was suspended from his office on November 28th, 1958 and this, on reflection, appears to me to admit of no conclusion but that the power to suspend him was validly exercised since otherwise the purported suspension would be beyond the power conferred by s. 51 and therefore of no effect whatever in law. In view of the agreement therefore I am unable to reach the conclusion that the suppliant's suspension was illegal or that he has any cause of action for damages for illegal suspension.

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It was also expressly agreed that the suppliant was dismissed on December 31st, 1958 by authority of the Governor in Council and it appears to me to follow from this that from the time of the exercise of the authority by the Governor in Council the suppliant's employment at pleasure was at an end whether any reason for such termination existed or not. *Vide Zamulinski v. The Queen*,[1] *Peck v. The Queen*[2] and *Ridge v. Baldwin*[3]. The minute, a copy of which was appended to the agreement indicates that the Governor in Council did not in fact approve of the suppliant's dismissal until January 14th, 1959 but no issue was raised with respect to the purported retroactive effect of the Order in Council and in view of the agreement I can see no reason to think that the suppliant was not lawfully dismissed or that he has any cause of action for damages for wrongful dismissal.

This brings me to the suppliant's claims for damages "for not having been given" "an opportunity to present his side of the case to a senior officer of the Department nominated by the deputy head" both in respect to the reason for his suspension and in respect of the reasons for his dismissal. These claims arise under s. 118 of the regulations made by the Commission pursuant to s. 5 of the Act which authorizes the making of such regulations as the Commission deems necessary or convenient for carrying out the Act. At the material time s. 118 read as follows:

> 118. (1) An employee who has been suspended pursuant to section 51 of the Act shall, within ten days of the commencement of the suspension, be given an opportunity to present his side of the case to the deputy head or to a senior officer of the department nominated for that purpose by the deputy head.
>
> (2) An employee shall, before being demoted or dismissed, be given an opportunity to present his side of the case to the deputy head or to a senior officer of the department nominated for that purpose by the deputy head.

This regulation differs from the corresponding regulation which was considered in *Zamulinski v. The Queen*[4] and *Peck v. The Queen*[5] mainly in that unlike the earlier regulation it contemplates that in the case of a suspension the opportunity for the employee to present his side of the case is to be afforded after the suspension has occurred. The

[1] (1957) 10 D.L.R. (2d) 685. [2] [1964] Ex. C.R. 966.
[3] [1964] A.C. 40 at p. 65.
[4] (1957) 10 D.L.R. (2d) 685. [5] [1964] Ex. C.R. 966.

question whether s. 118(1) of the regulations is not *ultra vires* insofar as it may purport to abrogate the right of a civil servant arising by implication of law[1] under s. 51 of the statute to an opportunity to be heard as a preliminary to the exercise of the power of suspension was not raised, both parties having proceeded on the basis of the regulation being *intra vires* and having treated the issue of liability as turning on whether the opportunity contemplated by the regulation for the suppliant to present his side of the case had been afforded or denied.

The nature of the opportunity to which an employee was entitled under the earlier regulation was discussed in *Peck v. The Queen* where Cattanach J., said at page 996:

> To paraphrase Lord Loreburn's expression in *Board of Education v. Rice* [1911] A.C. 179, there must be an opportunity to present the case and a fair opportunity to controvert statements prejudicial to the suppliant's point of view.
>
> Such an opportunity may be denied where the adverse case is not made known. The nature of the allegations against the suppliant must have been clearly specified beforehand so that she may have had a proper opportunity to prepare her defence, but the degree of particularity may vary according to the degree of informality with which the proceedings are conducted and even when they are inadequately specified, the defect may not be fatal if the suppliant was not thereby prejudiced, e.g. because she was already conversant with their general nature.

To my mind it is fundamental to the sufficiency of any such opportunity that the case of which the employee is to have an opportunity to present his side be brought to his attention so that he may know what it is that he is to answer. It may be that the opportunity required by the regulation need be neither a trial nor a quasi trial. It may also be that it need involve neither the presentation of evidence in the employee's presence nor an opportunity to cross-examine those who may have made statements detrimental to his side nor an opportunity to call witnesses to establish his case. With respect to these features no concluded opinion appears to me to be necessary in the present case. But the minimum that is required is that the employee be advised what the subject matter is that is relied on as the reason for his suspension so that he can present his side of that question. Until this much is in some way

[1] Cf *Ridge v. Baldwin* [1964] A.C. 40 at p. 66; *Bernard Randolph et al. v. The Queen* [1966] Ex. C.R. 157.

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made known to him no opportunity to speak can be regarded as an opportunity to present his side of the case even by the minimum and most elementary standards.

The facts in the present case present an example of what in my opinion is not a proper or sufficient opportunity within the meaning of the regulation. I leave aside the question whether Mr. McKay was an officer of the Department who was eligible for appointment by the deputy minister under s. 118(1) as there is evidence from which waiver by the suppliant of his right to object thereto might be implied. But I would not infer from anything in the evidence that the suppliant ever waived his right to be told the reason for his suspension. By Mr. Kotlarsky's letter he was advised that the reason was:

> Incompetence as an office administrator in failing to be aware of existing conditions in his office.

In this he was being accused of incompetence in failing to know something the identity of which the accuser was not prepared to disclose and the suppliant was being left to guess at what the reason was. How the suppliant could know from this statement what the reason for his suspension was I am at a loss to understand and I am also led to wonder how the composer of the words would have reacted to a similar accusation made against himself.

The suppliant's reaction to this was what might have been expected. He asked Woods, who delivered the letter, if he was in a position to tell him what was referred to. He wrote a letter to Mr. Kotlarsky asking for the regulations. He wrote to Mr. McKay complaining of the nebulous character of the accusation and declined to attempt a defence. Several days later on December 4th he telephoned Mr. Kotlarsky and expressed the hope he would have an opportunity to answer specific charges and as late as December 7th when he again telephoned Mr. Kotlarsky he pointed out that he still had no charges to reply to and that all he could do was to protest and he proposed that he would come to Ottawa at his own expense in the hope of seeing the deputy minister when he might convey his impression of the investigation and present his feelings about it and try to get more details about the specific nature of the charges. If indeed there were considered to be existing conditions in the office of which the suppliant had

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failed in a duty to be aware I do not see why the conditions referred to were not notified to him but he does not appear to have ever been informed of what the existing conditions referred to in the letter were. There is a considerable volume of evidence given by Mr. McKay of conditions which he found in the office when he took charge of it but I am unable to conclude on the evidence that these or any of them were the conditions referred to in the letter or that the suppliant was ever informed that they or any of them were the ones of which he was charged with having failed to be aware. I am accordingly of the opinion that the suppliant was not afforded a fair or any opportunity to present his side of the case in answer to the stated reason for his suspension and that on the authority of *Zamulinski v. The Queen*[1] he is entitled to recover the damages occasioned to him thereby. I should add that if anything but the reason as stated was in fact the reason for the suspension (as Mr. Erskine's evidence suggests) the conclusion that the suppliant was not given an opportunity to present his side of the case applies *a fortiori*.

The assessment of damages for the denial of such a right is, as Thorson P. points out in the *Zamulinski* case, one of some difficulty. The possibility of course exists that the failure to afford the suppliant a proper opportunity to present his side of the case with respect to his suspension may have had a direct causal connection with the subsequent decision to recommend his dismissal since it is impossible to say that the suppliant might not have been able to answer whatever the accusation was and in that case the likelihood of such a decision being made might have been decreased, but the evidence leaves me unsatisfied that the decision to dismiss the suppliant resulted from the failure to give him a proper opportunity to present his side of the case with respect to his suspension and a conclusion to that effect would I think be based on nothing but speculation. I am therefore unable to take such a possibility into account. The possibility also exists that the suppliant might have been able to satisfy the person hearing his side that the suspension was unwarranted and should be removed and that in that case the Commission might have acted to restore his right to pay for the period of his suspension but

[1] (1957) 10 D.L.R. (2d) 685.

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that too in my view is mere speculation. Moreover, the evidence indicates that he later received his pay for all but three days of the period during which he was under suspension.

On the whole I see no firm basis on which the suppliant's damages may be measured and as I see it I can take into account only the probability that there was some expense incurred by the suppliant for telephone calls and the fact that the suppliant's right was denied in the circumstances which I have related coupled with the consideration that the denial of such a right is something to which encouragement should not be lent by making the award of damages trifling in amount. Taking these matters into account I assess the suppliant's damages at $200.

Turning next to the opportunity afforded to the suppliant to present his side of the case prior to his dismissal, I am also of the opinion that the opportunity afforded him in his interview with Mr. Hunter was not adequate to satisfy the requirement of s. 118(2) of the regulations. Apart from the undefendable generalities set out in Mr. Kotlarsky's letter of December 17th the suppliant was not furnished with details of the several matters upon which steps were to be taken to dismiss him until about an hour after the interview with Mr. Hunter began. Even then the suppliant was not provided either with a statement of the matters in question or with a copy of the memorandum on which the matters were stated nor does it appear that he was told that these were the matters in respect of which an opportunity was being afforded to him to present his side. Moreover, about half of the matters stated in the memorandum were not raised or discussed. It is apparent from Mr. Hunter's evidence that the matters which were not discussed were regarded by him as established facts and it is therefore, I think, to be inferred that they were taken into account by him along with the other facts and explanations in reaching his conclusion and making his recommendation. It may be that the same conclusions would have been reached and the same recommendation made even after hearing what the suppliant had to say about them but, that, as I see it, is not the point. The material fact, in my view, is that these matters were not brought to his attention so that he would know they formed part of the case of which

he was being given the opportunity to present his side and this to my mind admits of no conclusion but that he was denied the opportunity for which s. 118(2) provides.

It would follow from this conclusion that on the authority of the *Zamulinski*[1] case the suppliant is entitled to recover such damages as may have been occasioned by the denial of the opportunity to which he was entitled. Counsel for the Crown, however, submitted that when regulation 118(2) is interpreted, as the corresponding regulation was in the *Zamulinski* case, that is to say, as conferring a legal right upon a civil servant to an opportunity to be heard, it operates as a clog upon or an impairment of the right of the Governor in Council to dismiss the servant without cause, that even the probable delay in effecting a dismissal, which was the basis for the calculation of damages in the *Zamulinski* case, would be an impairment of the right to dismiss without cause and that as interpreted in the *Zamulinski* case regulation 118 was repugnant to the statute and was therefore *ultra vires*, that s. 52 was not drawn to the attention of the Court in the *Zamulinski* case or in the *Peck*[2] case and that on the authority of *Shenton v. Smith*[3] and *R. Venkata Rao v. Secretary of State for India*[4] the correct interpretation of s. 118(2), if it is *intra vires*, is not that it creates a legal right in favor of the civil servant but that it simply prescribes administrative procedure the breach of which confers no right of action on the servant but merely leaves the person committing the breach accountable to higher authority therefor.

Regardless of what conclusion I might have reached on this question had the matter been unaffected by the decisions of this Court in the *Zamulinski* and *Peck* cases (and I do not wish it to be taken that I have reached any concluded view on the question) I do not think on the whole that I would be justified at this stage in treating the *Zamulinski* case as incorrectly decided and I shall therefore follow it and hold that the suppliant is entitled to such damages as have been occasioned by the denial of the opportunity to which he was entitled. On the material before me, however, I see no reason to think that the loss of his position can be regarded as having been caused by the denial of such

[1] (1957) 10 D.L.R. (2d) 685.
[2] [1964] Ex. C.R. 966.
[3] [1895] A.C. 229.
[4] [1937] A.C. 248.

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opportunity nor can I see anything to take into account in assessing his damages beyond the fact that his right was denied him in the circumstances related, that he incurred some further expense for telephone calls and that the importance to be attached to the right in this instance is greater than in the case of the right to present his side with respect to suspension. Taking these elements into account I assess his damages at $200.

The remaining matter to be dealt with is the suppliant's claim for the cash gratuity for which provision is made in s. 73 of the Civil Service Regulations.

Section 47 of the *Civil Service Act* provided as follows:

47. (1) The Commission, with the approval of the Governor in Council, shall make regulations under which the deputy head may in case of illness or for other sufficient reason grant leave of absence to any officer, clerk or employee for the period or periods, with or without pay, or with reduced pay, during such period or periods, or such part of the same, as the regulations may prescribe.

(2) The Commission, with the approval of the Governor in Council, may make regulations providing that whenever any officer, clerk or other employee may be granted a period of leave of absence with pay on his retirement from the Service, he shall, in lieu of such leave of absence with pay, be paid out of the Consolidated Revenue Fund a gratuity equal to the amount of his salary for the period of such leave of absence, and, in such case, the position occupied by him shall become vacant as from the date of payment of the gratuity.

Regulation 73 which was made pursuant to the authority of s. 47, read in part as follows:

73. (1) A deputy head may grant retiring leave or a cash gratuity in lieu thereof to an employee who is being retired, but such grant may not in any case exceed the maximum amount of retiring leave or cash gratuity specified hereunder, nor shall it in any case exceed the unexpended portion of the employee's accrued sick and special leave:

. . .

(2) A cash gratuity shall consist of salary at the rate in effect on the employee's last day of active service for the period indicated, less the amount, if any, of the immediate allowance set under the provisions of the Public Service Superannuation Act.

. . .

(5) Retiring leave or cash gratuity shall not be granted to an employee whose service is terminated because of inefficiency or misconduct.

The position taken by the suppliant was that he was entitled to a cash gratuity under s. 73(1) unless it was established in evidence that his service was "terminated because of inefficiency or misconduct" within the prohibition of s. 73(5). To reach this position it is necessary to read the word "may" in s. 73(1) as mandatory and counsel

submitted that such was its proper interpretation. For the argument to succeed it would also seem to be necessary to read as mandatory the word "may" in s. 47(1) of the Act, where both "shall" and "may" are used. Counsel for the Crown on the other hand while admitting that if the suppliant were entitled to a cash gratuity the amount would be three months' salary, submitted that the granting of retiring leave or of cash gratuity in lieu thereof was discretionary and that even if mandamus might lie to compel the deputy head to exercise his discretion no right to enforce the granting of either leave or gratuity existed.

In my opinion the Crown's position on this issue is sound. Apart from the conclusion suggested by the word "gratuity" that the payment is a matter of grace rather than of right, I am unable to see either in s. 47(1) of the Act or in s. 73(1) of the regulations any basis for interpreting the word "may" otherwise than as enabling and as importing an authority to the deputy head to grant, if he sees fit to do so, rather than as creating a right in an employee to insist on the leave or the gratuity. To my mind the only thing that militates in favor of the suppliant's position is what I assume to be the regularity with which the power is exercised in favor of retiring employees but this plainly cannot affect the interpretation to be put upon the law[1].

As the result of this conclusion is that the suppliant's claim must fail it is not strictly necessary for me to deal with the question whether payment of the gratuity was barred by s. 73(5) of the regulation but as this was pleaded as a defence and as it is not inconceivable (particularly in view of the proposal to pay the gratuity if the suppliant had resigned) that the belief that s. 73(5) applied may have been the only reason why action was not taken to grant the gratuity I do not think I should part with the matter without expressing my view on it. For the purpose of considering the matter it may I think be assumed that the person who put forward the recommendation to the Governor in Council believed that the grounds set out in Mr. Kotlarsky's letter of December 17th were true in fact. It may even be assumed that they were true

[1] Cf *Matton v. The Queen* (1897) 5 Ex. C.R. 401; *Balderson v. The Queen* (1897) 6 Ex. C.R. 8, affirmed (1898) 28 S.C.R. 261; *Miller v. The Queen* [1931] Ex. C.R. 22.

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in fact. It may also be taken that they were the reasons why the person putting the recommendation forward recommended the suppliant's dismissal and that it was so stated in the submission. One may I think go one step further and assume that the representation to the Governor in Council of the facts so set out had some bearing on the final decision. But even when all this has been assumed it would in my opinion be mere speculation to say that the suppliant was dismissed by the Governor in Council for the reasons set out in the submission when the Order in Council does not say so. What the minute says is that the Governor in Council approved the recommendation, that is to say, the recommendation that the suppliant be dismissed, but the reasons why the Governor in Council did so, when not set out in the Order are unsearchable and all that may properly be affirmed is that the Governor in Council for reasons not stated considered it expedient to dismiss the suppliant. To my mind it is quite impossible to say in this situation that the service of the suppliant was "terminated because of inefficiency or misconduct" within the meaning of the prohibition of s. 73(5) of the regulation. While the Court is not in a position to review the matter or to give the relief claimed, if the only reason why the gratuity was withheld was a belief that the granting of it was prohibited by s. 73(5) the matter ought to be reconsidered by the appropriate authority on the basis that s. 73(5) did not apply[1].

In the result there will be judgment declaring that the suppliant is entitled to damages in the total amount of $400 being part of the relief claimed in his petition of right. The suppliant is also entitled to the costs of the respondent's motion to amend made on the opening day of the trial, to the costs, fixed at $200 awarded him during the course of the trial and to the general costs of the petition and proceedings thereon but subject with respect to the last mentioned costs to a deduction of two-thirds to cover the costs of issues on which he did not succeed and is therefore not entitled to costs and the costs to which the Crown would otherwise be entitled on those issues.

[1] *Vide R. Venkata Rao v. Secretary of State for India* [1937] A.C. 248 at 257-8.

BRITISH COLUMBIA ADMIRALTY DISTRICT

Vancouver 1964
Sept. 15-17
Oct. 9

BETWEEN:

ANGLO CANADIAN TIMBER PRODUCTS LTD. .....PLAINTIFF;

AND

GULF OF GEORGIA TOWING CO. LTD. and RAYMOND McCULLOUGH .....DEFENDANTS.

Shipping—Barge damaging wharf—Action by wharfinger against barge owner and master—Jurisdiction—Admiralty Act R.S.C. 1952, c. 1—Supreme Court of Judicature Act (U.K.) 1925, c. 49, s. 22(1)(a)(iv).

Plaintiff brought action against the owner and master of a tug boat alleging negligence by them in docking a barge at plaintiff's scow berth without notifying plaintiff that the barge had been damaged in a collision earlier in the same day, as a result of which the barge on being loaded took on water, listed to starboard, and crashed into plaintiff's scow berth, causing damage. The writ was headed "Action for damage by collision". Defendant master moved for dismissal of the action against him on the ground that the Exchequer Court had no jurisdiction.

Held, dismissing the motion, the claim was "for damage done by a ship" as provided by s. 22(1)(*a*)(iv) of the *Supreme Court of Judicature (Consolidation) Act U.K.* 1925, c. 49, which was adopted by s. 18(2) of the *Admiralty Act* R.S.C. 1952, c. 1. *The Zeta* [1893] A.C. 468, per Herschell L C. at 478 and 485 followed; *The Queen v. The Judge of the City of London Court* [1892] 1 Q.B. 273; *The Normandy* [1904] P. 187 distinguished.

D. Shaw for plaintiff.

V. E. Hill for defendant McCullough.

NORRIS D.J.A.:—This is an application made on behalf of the defendant Raymond McCullough, Master of the tug *Grapple* owned by the defendant Gulf of Georgia Towing Co. Ltd., "for an order that the action of Anglo-Canadian Timber Products Ltd. as against Raymond McCullough be dismissed for want of jurisdiction in the Exchequer Court of Canada, the British Columbia Admiralty District, in regard to any and all claims set forth by the Plaintiff in its Statement of Claim herein".

The claims against the defendants are set forth in Paragraphs 4, 5, and 6 of the Statement of Claim as follows:

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4. On or about the 22nd day of December, 1961 whilst a barge "STRAITS 43" which is registered at the Port of Vancouver under No. 198073, being of 540 tons register, was in the exclusive care, custody and control of the Defendants or either of them, their servants, agents or employees, the said Defendants negligently cause the said barge to collide with an object or objects unknown thereby damaging the barge.

5. On the same day as aforesaid the Defendants or either of them, their servants, agents or employees docked the said barge at the Plaintiff's scow berth at 369 Esplanade East aforesaid and failed to advise the Plaintiff Company that the barge had been damaged in collision earlier the same day.

6. Subsequently on or about the 2nd day of January, 1962 and as a further consequence of the negligence of the Defendants or either of them, their servants, agents or employees the barge during the course of the loading took on water and listed over to starboard; the starboard side of the barge then fell away and crashed into the east side of the said scow berth and the barge then drove into the west side of the said scow berth causing further loss and damage.

Counsel for the applicant argues that as the writ is headed "ACTION FOR DAMAGE BY COLLISION" and as the particulars of negligence are appropriate to a collision action this Court has not the jurisdiction to cover the case of a barge striking a dock. He relies particularly on the cases of *The Queen v. The Judge of the City of London Court*[1] and *The Normandy*[2]. Counsel for the applicant submits that "collision" means a collision between ships. The first of these cases is not relevant to the facts in this case because it turned on the question of the jurisdiction of the High Court of Admiralty to entertain an action *in personam* against a pilot in respect of a collision between two ships on the high seas occasioned by his negligence. The second case is to be distinguished on the grounds set forth by Gorell Barnes J. at p. 200 of the report as follows:

> In the present case the difficulty does not arise upon any question as to the jurisdiction of the High Court. It is clear from the terms of the Admiralty Court Act, 1861, and the decisions thereon, that the High Court has Admiralty jurisdiction in respect of this claim as being damage done by a ship: see *The Uhla*, L.R. 2 A. & E. 29, n.; *The Excelsior* (1868) L.R. 2 A. & E. 268; but the question is whether the wording of the Act of 1868 is sufficient to give similar jurisdiction to the county court within the limited amount in such a case.

While the writ is headed "ACTION FOR DAMAGE BY COLLISION" the claim as set forth in the Statement of Claim is sufficient to bring it within the meaning of the words in Sec. 22(1)(*a*)(iv) of the *Supreme Court of*

[1] [1892] 1 Q.B. 273. [2] [1904] P.187.

Judicature (Consolidation) Act, 1925 of the United Kingdom: "(iv) Any claim for damage done by a ship", as that section was adopted *mutatis mutandis* by Sec. 18(2) of the *Admiralty Act* of Canada.

I am satisfied that the words "damage done by a ship" in the subsection referred to are broad enough to include the claim set out in the Statement of Claim herein: See *The Zeta,*[1] Lord Herschell L.C. at p. 478:

> It is enough to say that the proposition that the Act of 1861 applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to question.

and at p. 485:

> For the reasons I have stated I have come to the conclusion that it is impossible to maintain the proposition that the word "damage" was, according to the well-understood meaning of the phrase in the Admiralty Court, confined to damage due to collision between two ships.

Most of the cases cited by counsel in support of the application were concerned with the statutory jurisdiction of the County Court in Admiralty and may be distinguished as indicated by Gorrell Barnes J. in *The Normandy, supra.*

The other grounds advanced by counsel in support of the application turned on the first or basic ground referred to. Considered by themselves they do not go to the question of jurisdiction but may be an appropriate subject for consideration at the trial.

The application is dismissed with costs.

[1] [1893] A.C. 468.

Vancouver 1964

Sept. 14-16, 21, 22

Oct. 28

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

GEORGE PERDIA .....PLAINTIFF;

AND

KINGCOME NAVIGATION CO. LTD. ....DEFENDANT.

Shipping—Collision of ships in Vancouver Harbour in dense fog—Apportionment of fault.

Plaintiff seiner *Western Spray* of 55 tons collided with defendant tug *Ivanhoe* of 168 tons near the First Narrows Bridge in Vancouver Harbour. *Western Spray* was inbound at 3 knots and *Ivanhoe* outbound at 4 to 4½ knots. Both ships sounded fog horns. *Ivanhoe* (but not *Western Spray*) was radar-equipped. Neither was aware of the other until they were about 50 feet apart when both put their engines full astern. *Ivanhoe's* master and helmsman were in her wheelhouse but there was no lookout forward of her wheelhouse, her mate and 4 other crew members being otherwise engaged. *Western Spray's* master was in her wheelhouse and had one lookout forward and other crew members nearby. *Western Spray* was close to mid-channel at the time.

Held, Ivanhoe was 85% at fault and *Western Spray* 15% at fault for the collision. The position of difficulty was created by *Ivanhoe* due to bad seamanship of her master (1) in proceeding at an immoderate speed under the circumstances; (2) in failing to observe the radar or alternatively to have it in good condition; (3) in failing to maintain a proper lookout forward of the wheelhouse; and (4) in not having the mate available to relieve him from some of his manifold duties in the wheelhouse and to make proper use of the balance of the crew. The master of *Western Spray* was at fault only in proceeding too close to mid-channel. In the conditions of fog he should have proceeded well to the south of mid-channel.

John I. Bird, Q.C. for plaintiff.

R. Hayman for defendant.

NORRIS D.J.A.:—This action concerns a collision between the seiner *Western Spray* owned by the plaintiff and of which he was the master at the time of the collision, and a tug *Ivanhoe* owned by the defendant company of which the master was one Arthur Forrest. The engine of the *Western Spray* was a 150 H.P. diesel. That of the *Ivanhoe* was a heavy duty Union six cylinder 600 H.P. engine which had a fly-wheel weighing 4 to 4½ tons being about 4½ feet in diameter. The engine turned at full speed 240 revolutions per minute. The *Western Spray* is registered at 55 tons gross tonnage, being 66 feet in overall length, and carried a

crew of six including the master. The *Ivanhoe* was 168 tons gross tonnage, was between 110 to 115 feet overall, and carried a crew of seven including the master.

The collision took place at 10:00 A.M. on September 20, 1962, in Vancouver Harbour just outside the First Narrows Bridge. At the time of the collision a dense fog prevailed in Vancouver Harbour and in particular in and around the point of collision. The *Western Spray* was inward bound from a fishing ground. The *Ivanhoe* was outward bound without a tow. The *Western Spray* had no tow but it was carrying the fishing equipment usual for such a seiner. The *Western Spray* was fitted with the following navigational aids: magnetic compass, echo sounder, radio-telephone and fog whistle. It did not carry radar equipment. The *Ivanhoe* had the same navigational aids, save for the echo sounder, and in addition was fitted with a radar set.

As the vessels approached the First Narrows Bridge there was no wind. The condition of the sea was flat calm. The visibility was about 50 feet. The tide was flowing west to east against the *Ivanhoe*, the tide being between two and three knots, having reached the last half of the flood. The masters who were navigating their respective vessels claimed to having been sounding proper and regular fog signals but neither heard the other. The master of the *Ivanhoe* gave evidence that he did not see the *Western Spray* in his radar at any time. The vessels were some 50 feet apart when each was observed by the other.

I find that while the master of the *Ivanhoe* rang his telegraph full speed astern on sighting the *Western Spray*, the *Western Spray* being much more manoeuvreable and the engines being controlled by a throttle in the wheelhouse, it took much longer for the master of the *Ivanhoe* to take off the way on his vessel than it took the master of the *Western Spray*, who, on sighting the *Ivanhoe*, put his engines "full astern".

Peter Wilson who was service supervisor of the Canadian Marconi Company gave evidence for the defendant company. I accept his evidence as that of a fully qualified and experienced expert on radar equipment. He testified that the radar set on the *Ivanhoe* was a set supplied by his company and installed on October 29, 1956 and inspected from time to time in 1962 (as well as earlier

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and later) in accordance with a contract with the company which covered rental of the equipment and servicing, and the supply of parts. He testified that on July 19, 1962, tubes in the set and a rectifier were replaced and a broken lead repaired; that on October 31, 1962 the set was inspected and it was found that the power supply was low and that the echoes were weak. He could not say as to how long this condition existed. At that time two rectifiers and a crystal were replaced. His evidence was to the effect that a weak echo would affect the ability of the operator to get results from the unit, that if the master did not see the *Western Spray* when the *Ivanhoe* was on the east side of the bridge, the cause must have been either that the set was not being properly observed or that the set was not properly tuned or it was not in good working condition. He testified that the First Narrows Bridge would not offer any real interference and that to get useful results from the radar, the operator must observe it continuously.

Captain Forrest of the *Ivanhoe* gave evidence that he used his radar continuously from the time he backed away from the dock until the collision. He further testified as follows:

Mr. HAYMAN:

Q. What did you turn on?

A. I turned the radio on and I called somebody, I forget now, called just for a radio check, and turned the radar on and it worked; it worked perfectly as far as I am concerned.

* * *

Q. Did you see the vessel the "WESTERN SPRAY" on your radar before the collision?

A. No, I did not. I didn't see the "WESTERN SPRAY" until it was right there.

Q. How far away was it when you first saw it?

A. Oh golly, maybe fifty feet, maybe less than that. Fifty feet I will say.

* * *

Mr. BIRD:

Q. Now, were you getting constant checks from the bridge signalman?

A. Yes, from Burnaby Shoals, yes.

Q. Were you pretty well in continuous communication with the bridge signalman from Burnaby Shoal out?

A. Yes, I would say yes, because he kept calling us and telling us our position.

Q. Did you at any time tell the bridge signalman that your radar was not working properly?

A. No, I did not.

Q. I don't want to labour this, I just want you to answer this, if your radar was working properly have you any explanation for your constant checks with the bridge signalman on his radar?

A. I didn't ask for the checks. He just called us and told us where we were. I didn't ask for them. I just told him where we were when we were at Burnaby Shoal and what we were going to do, and he kept giving us a radar check which was something I didn't ask for at all at any time.

Fletcher, the bridge signalman, did not agree with this last mentioned evidence. He testified as follows:

A. I called out "tug off Brockton Point. First Narrows calling", and immediately the "IVANHOE" answered and identified himself.

Q. Yes?

A. I stated his position.

Q. You stated his position?

A. I stated where on my set he was showing too far over to the south of mid-channel.

Mr. HAYMAN:

Q. Carry on, please.

A. The reply from the "IVANHOE" was a cheery "okay" but his radar—would I keep an eye on him, his radar wasn't working too well.

As to the speed of the *Ivanhoe* and the time to take the way off the vessel, the Chief Engineer, W. J. Rant, testified as follows:

Q. What speeds do you recall being rung down to you at between the ferry dock and the time of the collision?

A. After I backed out we got "half ahead" and stayed "half ahead".

Q. To the point of collision?

A. Yes.

* * *

Q. But as to the bite of the propeller in the water at the moment of impact, what would you say?

A. Oh, I don't think it had a chance to take any way off the vessel. It couldn't have been more than a second or two from the time I hit the air until the engine caught and started to rev up and when we hit.

* * *

THE COURT:

Q. What speed would the vessel be going at?

A. I would estimate between four and a half and five knots through the water at the 180 revs.

* * *

MR. BIRD:

Q. I think you also said that between the time the "full astern" order came down and the time the impact occurred there was no time for

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the astern action to have any effect on the forward action of the ship?

A. No. because with that engine running at half speed it would take between 25 and 30 seconds before that engine could come to a stop before you could start it astern. The revolving parts of that engine alone must weigh 18 tons, the moving parts. To bring that to a stop before it can go astern would take I would say 25 seconds.

Q. Almost half a minute?

A. Yes.

Q. Was that known to the master?

A. Oh, yes, definitely.

The master, Forrest, gave the following evidence on discovery which was put in as part of the plaintiff's case.

204 Q. Did you alter speed at all from the time you left the jetty? I think you said you were on slow speed.

A. Slow speed all the way up.

205 Q. All the way out?

A. All the way up.

206 Q. Until what point?

A. Till we hit.

207 Q. Till you hit the "WESTERN SPRAY"?

A. Yes.

208 Q. So there was no order on the telegraph, or change of engine speed until after the collision?

A. After the collision, then it was rung down "full astern".

Q. Yes I see.

* * *

229 Q. Did your vessel respond to the helm change prior to the collision?

A. Just, just, because she's a big, heavy ship.

230 Q. She responds slowly, does she?

A. Slowly.

On the matter of speed, I accept the evidence of the engineer where it conflicts with that of the master, whose evidence was at best uncertain on other matters such, for example, as his compass course out of Vancouver Harbour, about which he should have no difficulty. I find that immediately before the collision the *Western Spray* was travelling at a speed of not more than 3 knots and that the *Ivanhoe* was travelling at a speed of 4 to 4½ knots at that time.

Immediately before the collision there were present in the wheelhouse of the *Ivanhoe* the master, Forrest, and a deckhand Suveges, who was the helmsman. The mate Bettis was lying on his bunk below and other members of the

Ivanhoe crew were stowing gear or otherwise engaged and none of them were on lookout. There was no lookout forward of the wheelhouse. On the *Western Spray* there was present in the wheelhouse the master, Perdia. Forward on the vessel some 15 feet from the stem there was a lookout, one Pavlich, a seaman, and close to the wheelhouse and aft of where Pavlich was standing there was a seaman, Martin, standing relaying messages to the master. In addition, on the *Western Spray* one Shewchuk, a seaman, was on the dodger above the wheelhouse. With him there was another man, since deceased.

In the collision the stem of the *Ivanhoe* struck the *Western Spray* some 18 feet aft of its stem. The course of the *Western Spray* was given by the master, whose evidence I accept, as 70° magnetic. As I understand that, his evidence in this regard was of his general course with such incidental deviations as conditions and good seamanship warranted. Both masters knew the Vancouver Harbour, and particularly the vicinity of the First Narrows, well. Both had gone in and out of the harbour in fog on previous occasions. The master of the *Western Spray* was navigating from fog signals and using his echo sounder for the safety of his own vessel and as a matter of good seamanship. The master of the *Ivanhoe* gave evidence that he was navigating by the use of the radar and without request by him, received certain directions from the bridge tender, Fletcher, stationed on the First Narrows Bridge.

At the time of the collision, Pavlich, the seaman who was on deck of the *Western Spray* passing messages, clambered aboard the *Ivanhoe* and made fast a line to that vessel. The *Western Spray* was towed to the north shore where she sank, subsequently being raised. The *Western Spray* suffered heavy damage, not only to the vessel itself, but also to the fishing equipment.

There is a conflict of evidence between the master of the *Western Spray* and the master of the *Ivanhoe* as to the point of collision, the master of the *Western Spray* placing it about mid-channel immediately to the west of the First Narrows Bridge, and the master of the Ivanhoe placing it at the northern extremity of the channel, immediately off the First Narrows beacon. On the evidence of Perdia, the master of the *Western Spray* as accepted, he was not at

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fault in relation to the collision, save perhaps to some minor extent in connection with a failure to call the bridge tender on the correct radio channel. On the whole of the acceptable evidence, while the point of collision cannot be fixed exactly, Perdia had navigated his vessel so as to get his vessel into the First Narrows channel. I find that as a matter of wise precaution he should have kept more to the south of the channel in view of fog conditions, but I do not find on the evidence that he was in the north half of the channel.

The master of the *Ivanhoe* gave evidence as to the relative position of the two vessels at the time of the collision, as follows:

MR. BIRD:

Q. You recall being examined for discovery:

"Q. I see. When did you first see the 'WESTERN SPRAY'?

A. About 45 or 50 feet ahead of us.

Q. Yes, and how was she lying relative to your position? Oh well, were you end on?

A. Just about end on.

Q. Yes, just about end on?

A. About end on, yes."

You recall being asked those questions and giving those answers?

A. Yes.

Q. Are they true?

A. Yes.

Q. Continuing at Question 222:

"Q. Yes, and what did you observe from then until the collision with respect to the 'WESTERN SPRAY'? What did you see after that?

A. You will have to—how do you mean that one?

Q. Well, did the position of the two vessels with respect to each other alter in any respect?

A. Do you mean what could have been done or—

Q. No, did the 'WESTERN SPRAY' appear to continue to come on end on?

A. Oh yes, yes.

Q. Did you make any alteration of helm?

A. I altered hard to starboard."

Do you recall being asked those questions and giving those answers?

A. Yes.

Q. Are they true?

A. Yes.

The evidence of Perdia, the master of the *Western Spray* with reference to the relative positions of the vessels is to the effect that the two vessels were end on.

Captain Forrest was unable to give his compass course, a matter on which a master of his experience and knowledge of Vancouver Harbour should have been able to testify to without hesitation. He gave evidence that after leaving the Kingcome dock and getting out into the fairway he followed a steady course north of mid-channel and passed under the bridge at a point practically to the extreme north edge of the channel. He remembered previously passing a Vancouver Tug and Barge vessel which he thought was the *Joan Lindsay*. As to passing this vessel his evidence is as follows:

THE COURT:

Q. When you were off Brockton Point?

A. Yes, the bridge tender told us there was a tug inbound with a scow, which was Vancouver Tug.

* * *

MR. HAYMAN:

Q. .... all I want you to do with the balance of your evidence is tell the Court anything you remember about the Vancouver Tug and Barge. Do you remember passing the Vancouver Tug and Barge?

A. Oh yes, remember passing it. In fact, I could even see it, it was so close to us. I remember hollering at him, but naturally he couldn't hear us because according to our radar he was too close to the North side of the channel.

Q. How were you relative to the north side of the channel at that point?

A. Oh, I figured about half way between middle of the channel and the north side of the channel, which we were—

THE COURT: What did he say, Mr. Hayman?

MR. HAYMAN: At the time of passing Captain Forrest thinks he was between the middle of the channel and the north side of the channel, and then he made some remark about I would say where he was or something to that effect.

Fletcher gave the following evidence as to this passing:

A. Yes, my lord. Also inbound was the tug "JOAN LINDSAY" with a covered barge or vanbar, Vancouver Barge. He was slightly north of mid-channel. I warned the "JOAN LINDSAY" or rather told him that he was north of mid-channel and his reply was that he had just noticed that and would correct it.

Q. Did you see his movements?

A. Yes, sir. The tug "IVANHOE" came in a bit and I noticed that when approaching Calamity Beacon, which is about half a mile

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from—I apologize, you already know where the beacon is. The "JOAN LINDSAY" inbound and the "IVANHOE" outbound I considered were on reciprocal courses.

Q. You saw the "IVANHOE" come in?

A. The "IVANHOE" was coming out, my lord.

Q. But turned in you said to the channel?

A. Yes, but the "JOAN LINDSAY" with his barge and the "IVANHOE" were on reciprocal courses. I warned both vessels and suggested they both go to starboard.

Q. Then what did you see?

A. Then they both turned to starboard and were clear of each other. The "IVANHOE" I contacted. I was thanked by both vessels. I told the "IVANHOE" that he was abeam of Calamity and gave the traffic west of the bridge.

This witness gave evidence that he saw both vessels on his radar screen approaching each other to the point of collision. He fixed the point of collision slightly to the west and little north of that fixed by the plaintiff. The courses of the respective vessels as plotted by him in Court on the chart (Ex. 1A) show that the two vessels were following parallel courses east and west until the *Western Spray* reached a point almost to the south of the point of collision as fixed by him, when, according to the evidence of this witness:

> ...This fish boat, it seemed to be as if it just swung around almost 90 degrees, just went across like that on the radar. Now, that wasn't a distinct echo when he was going over. It was just as if—something from a distinct echo to a blur is the only way I can explain it. He was very clear there and when he suddenly went swishing over to port I would say 70 degrees. I know it is a lot, but I would say it was as bad as that.

THE COURT:

Q. You say it wasn't clear on the radar?

A. No, sir, I said he was clear until he turned to port suddenly.

Q. But you said something about your radar.

A. I said the echo on the radar was distinct up to that point.

Q. And then—

A. The turn was so sudden that it just shows a streak going across to port.

He went on to give evidence as follows:

Q. Just so we have that clear, your range rings enable you to tell with reasonable accuracy how far a vessel is away from your position on the bridge?

A. Yes, sir.

Q. But it is quite another matter to attempt to determine how far two vessels that you see on the radar are apart?

A. It is in this case, except as I stated before there is one, and that is the heading markers—anything close to them is a pretty good guide...

* * *

MR. BIRD:

Q. When you observed the "IVANHOE" going out and the "WESTERN SPRAY" coming in you weren't thinking there was going to be a collision at that time, were you, until just before it happened?

A. I was concerned with the fish boat leaving the other two and coming across, but at that time if he had kept his course he would have still—I must not say that, but on the radar I say that he didn't keep his course, he swung "round to port", but if he had maintained his course nothing would have happened at all because the "IVANHOE" as far as I could see was heading out perfectly normally.

Q. But this is how it appeared to you on the radar, isn't it?

A. Yes, on the radar.

* * *

Q. Let us go this far, you thought from what you observed on the radar that the ships were approaching one another on reciprocal courses, did you?

A. No, sir, the ships were clearing until this fish boat swung to port.

Q. You thought she swung to port?

A. Yes, sir, I would say I am pretty convinced that she swung to port because if she had maintained the course—

Q. You have answered my question, but go ahead if you have something to add?

A. If the boat concerned we will say maintained his course he would still show on my radar, but when that blur went across it wasn't.

* * *

THE COURT:

Q. Just a moment, I want to get one thing clear. You said 100 feet before the point of impact that you saw this turn made. Now, when you said 100 feet, you mean 100 feet from—

A. From the vessel to the point of turn, sir.

Q. East and west?

A. Yes, sir.

Q. That is to say, a projection of 100 feet, not the course of the turn?

A. No, sir, the projection of 100 feet.

I regret that I am unable to accept the evidence of Fletcher, the bridge tender, as being helpful in deciding where the fault lay in the matter of this collision. It is to be remembered that he was testifying as to events which happened in September, 1962, some two years before the trial. Because of the fog he, of course, did not have a direct view of the vessels. Quite understandably he did not plot their courses as they appeared on the radar screen. He did not make log entries of the crucial happenings. His evidence

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was based on his recollection of what he saw on the radar screen that long ago—of the relative courses of the vessels, of positions and of the distances between vessels in close quarters as they appeared on the screen. He was quite voluble in examination-in-chief and irritable under cross-examination. He gave evidence in a positive manner of what he stated the radar screen showed two years ago as to courses, short distances between vessels and position without the benefit of any record with which he might refresh his memory. Of much of the matter on which he testified he could not possibly have real recollection. I am satisfied from his evidence and from the manner in which he gave it that while doubtless he thought that he was being honest, he was merely giving a reconstruction—his theory of what he imagined had occurred. As an example, he said that there was a blur on the radar which indicated that the *Western Spray* changed course from a perfectly safe and proper course in the south of the channel to a course from south to north which was the cause of the collision. I do not believe that the witness really remembered this blur at the date of the trial, and I am of the opinion, having heard the evidence, that if there were some such blur it was merely the result of the actual collision.

Further, Fletcher gave evidence that when the inbound vessel was at a point, which according to the chart (Ex. 1A) would be over 2,500 feet west of the bridge, he called to him through the loud hailer. His evidence as to this was as follows:

> A. The fishboat carried on and was pretty close to the 287 marker or rather the heading marker, and I got on the loud hailer—there is one on the west and one on the east and they boom out over the bridge, and I called out "inbound fishboat, inbound fishboat mid-channel, I have a tug outbound light under the bridge". I kept yelling that, and of course the "IVANHOE" had got further out now, and then he altered course—as he appeared on the radar he altered course I should say approximately two or three degrees which brought him absolutely parallel with the heading marker. This is the "IVANHOE", my lord.

The witness was observing the vessel only through the radar and as Fletcher had no previous communication with any vessel which he could identify as this "fish-boat" and as many vessels other than fishboats of about the same size pass in and out of the Narrows it would seem that his version of this hailing is purely reconstruction. It will be

noted that his evidence was that when the *Ivanhoe* was off Brockton Point it was south of mid-channel and it corrected its course. This is not in accordance with Forrest's evidence that his course was steady one north of mid-channel. It is to be noted also that Forrest denies that he told Fletcher that his radar was not working well. While Fletcher was observing the course of the *Ivanhoe,* according to his evidence, he was in radio communication with it as well as with a number of other vessels, the *Solander* and the *Joan Lindsay,* an unidentified vessel, and three fishboats, of which, according to his evidence, the *Western Spray* was one. He gave evidence also of the courses of all these vessels as he observed them on his radar screen, save, as regards the *Ivanhoe,* in respect of the short period when it was under or almost under the bridge. I am of the opinion that the witness did not remember all these details with the certainty which he indicated, and that his evidence in this regard, particularly as to the courses of the *Ivanhoe* and the *Western Spray* just before or at the time of collision is the result of reconstruction since the collision, and therefore it is unsafe to accept such evidence.

The master of the *Ivanhoe* testified that he and the helmsman were the only two of the crew of seven who were in the wheelhouse. The fog condition necessitated close attention by the helmsman to his duties, such as watching his compass, and he could not maintain a lookout. Although the mate was in his bunk and other crew members were available, no additional member was detailed as lookout or to assist the master, who was required to navigate the vessel, check the courses steered, engage in conversations on the radio telephone with the First Narrows Bridge and other vessels, keep a lookout, read the radar —looking down into it—and sound the fog signals. While he was thus engaged there was distraction from the hum of the engine, which the master admitted made "quite a noise" and from the voices on the radio, and from static. As he did not see the *Western Spray* on the radar when it was unquestionably there to be seen if the radar was in proper working order, it is clear, either that proper attention was not being paid to it, or it was not operating properly, thus becoming instead of a navigational aid, a menace to navigation, reliance being placed on it.

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I find that the collision took place close to the position marked on the chart (Ex. B1) by the master of the *Western Spray*, which position was on the extension of the course which Fletcher said the *Western Spray* was following before, as he alleged, that vessel turned to port. Such position is not a great distance to the east of the point of collision marked by Fletcher.

I find that both vessels were approaching each other end on and that neither changed course before the respective masters observed the other vessel. It is my opinion that the fact that the *Western Spray* was struck on the starboard bow was probably due to the fact that when the engines were reversed immediately before the collision, and possibly because of the action of the tide as well, this action had the effect of swinging her bow to port.

In determining responsibility for the collision, I adopt, with respect, the principle enunciated by Ritchie J. *per curiam in Imperial Oil Limited and M/S Willowbranch*[1]:

> In my opinion, however, the fault of these two ships is not be be assessed only in terms of their respective actions at close quarters, and I adopt the language used by Wilmer J. in *The Billings Victory* ([1949] Lloyds Rep. 877 at 883), where he said:
>
> > "It appears to me that the most important thing to give effect to in considering degrees of blame is the question which of the two vessels created the position of difficulty."
>
> . . . I am satisfied that "the position of difficulty" would not have arisen at all if the radar sets with which both ships were equipped had been tended with the degree of care to which Rand J. referred in *The Dagmar v. The Chinook* ([1951] S.C.R. 608 at 612, 4 D.L.R. 1) at page 612 where he said:
>
> > "If radar is to furnish a new sight through fog the report which it brings must be interpreted by active and constant intelligence on the part of the operator."

In my opinion the position of difficulty was created by the *Ivanhoe* and was due to bad seamanship, using that term in a comprehensive sense, on the part of the master of that vessel. One fault of the *Ivanhoe* on the matter of seamanship was that it was not proceeding at a speed that was moderate under the circumstances of fog, the narrow passage and other traffic, which was or might be expected in the passage. Again I refer to the judgment of Ritchie J. in

[1] [1964] S.C.R. 402 at 410.

Imperial Oil Limited and M/S Willowbranch, supra at p. 407:

I agree with the following excerpt from Marsden's Work, The Law of Collisions at Sea, 11th ed., page 770:

> "Apart from the regulations, the law requires a ship to be navigated in or near a fog at a moderate speed; the regulations make no alteration in the law in this respect.
>
> Vessels approaching a bank of fog or snow, which they are about to enter, should, as a matter of seamanship, go at a moderate speed. Failure to comply with this duty does not, however, amount to a breach of rule 16; but if, in the result, her speed when she enters the fog is not moderate she may then be in breach..."

It appears to me that the requirement of Rule 16(a) is not designed merely for the purpose of lessening the violence of collisions between ships, but rather that its primary purpose is to prevent collisions altogether by providing that each ship shall go at such a speed as to afford the maximum time for the taking of avoiding action when another suddenly comes into view at a short distance. I can see no answer in the present case to the contention that if the *Imperial Halifax* had started reducing speed four minutes sooner than she did (i.e., when she first sighted the fog), her ability to stop before the collision occurred would have been proportionately increased.

at p. 409:

In this regard, counsel for the *Willowbranch* sought to invoke the provisions of Rule 18 of the Regulations, the opening sentence of which reads as follows:

> "Rule 18: When two power-driven vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other."

It is, I think, important to remember that Rules 17 to 27 inclusive are contained in Part C of the Regulations which is entitled "Steering and Sailing Rules", and which contains the following preliminary paragraph:

> "In obeying and construing these Rules, any action taken should be positive, in ample time, and with due regard to the observance of good seamanship."

Also the passage from the *Willowbranch* case at p. 410 first quoted.

See also *The Ship Clackamas v. The Owners of the Schooner Cape D'Or*[1] Newcombe J. at pp. 335-6:

He says, very justly, that the requisite speed, which, according to the regulations, must be "moderate", should be determined relatively, having regard to the attendant conditions, and he finds that the steamship was going too fast if, by reason of her speed in the fog, she "was unable to avoid a collision with the vessel from which she was bound to keep clear, and the risk of whose proximity she would reasonably be assumed to anticipate under existing conditions". No doubt each case must depend

[1] [1926] S.C.R. 331.

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upon its own facts, but in this general conclusion the learned judge follows a rule which has frequently been enunciated and is well established by authority, *The Resolution* (1889) Asp. M.L.C. 363, *The Campania* [1901] P. 289) a decision of Gorrel Barnes J., which was reviewed and upheld by the Court of Appeal, in which the facts of the case and the authorities are carefully reviewed; reference is made to the fact that in some cases four miles an hour, and in one case three and a half miles an hour, were held to be an improper rate of speed, and it is there laid down as a general rule that

> "speed such that another vessel cannot be avoided after being seen is excessive."

See also *Canada Steamship Lines Limited v. The Ship Maria Paolina G and her Owners*,[1] Fournier J. at p. 220:

> Excessive speed in fog being a statutory fault, a vessel violating this rule has to prove that her speed was not the or one of the causes of the collision.
>
> In *Griffin on Collision,* pp. 312 et seq., it is stated:
>
> > "Since the obligation to go at moderate speed in fog is statutory, a vessel violating the rule has the burden of showing that her speed could not have contributed to the collision,—a burden which can rarely be sustained."

The burden of showing that the speed of the *Ivanhoe* could not have contributed to the collision, as referred to by Fournier J. has not in this case been sustained by the defendant.

The fault in the matter of the failure to attend to the radar, or alternatively, to have it in good condition has already been referred to. The master of the *Ivanhoe* failed to see the *Western Spray* at all. The importance of close attention to radar when vessels are equipped with it is also referred to by Ritchie J. in the passage already quoted from the *Willowbranch* case at p. 410, and at p. 411 he says:

> The echo of the *Imperial Halifax* was detected on the radar two and a half miles away and yet, despite this warning, the course of the approaching ship was never plotted. On the contrary, the *Willowbranch* appears to have adopted a series of courses which resulted in the ship edging her way directly into the path of the *Imperial Halifax.* If the radar information had been "interpreted by active and constant intelligence on the part of the operator", I find it difficult to believe that this action would have been taken.

Similarly I find it difficult to believe that there would have been any collision if the radar on the *Ivanhoe* was being observed and was in working order.

See also *Canada Steamship Lines Limited v. The Ship Maria Paolina G and her Owners, supra,* at p. 219.

[1] [1954] Ex. C.R. 211.

The failure to maintain a proper lookout forward of the wheelhouse is evidence of general bad seamanship on the part of the *Ivanhoe*. I adopt the language of the learned author of the 10th edition of Marsden's Collisions at Sea at pp. 567-8:

> The look-out must be vigilant and sufficient according to the exigencies of the case, and it has been said that a look-out who hears a signal without reporting it might just as well not be there; in crowded waters the look-out cannot report every light he sees, but must report every material light as soon as it becomes material. The denser the fog and the worse the weather the greater the cause for vigilance. A ship cannot be heard to say that a look-out was of no use because the weather was so thick that another ship could not be seen until actually in collision. In *The Mellona* ((1847) 3 W. Rob. 7, 13), Dr. Lushington said: "It is no excuse to urge that from the intensity of the darkness no vigilance, however great, could have enabled the *Mellona* to have descried the *George* in time to avoid the collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed."
>
> In ordinary cases one or more hands should be specially stationed on the look-out by day as well as at night. They should not be engaged upon any other duty; and they should usually be stationed in the bows, or in that part of the ship from which other vessels can best be seen and their signals heard.

Counsel for the plaintiff argued forcibly that the master of the *Ivanhoe* in addition to the matters already referred to, was guilty of bad seamanship in failing to organize his vessel and his crew and their duties so that navigation of the vessel might be attended to by him efficiently and without distraction. I have already referred to these matters and I must find that counsel's submission should be given effect to. Under the difficult conditions and circumstances of the morning in question, proper use was not made of the crew and in particular of the mate who was qualified to and should have relieved the master of some of his manifold duties in the wheelhouse. The necessity for this precaution should have been apparent to the master of the *Ivanhoe* from the outset.

Perdia, the master of the *Western Spray* failed to use his radio properly in endeavouring to call the First Narrows Bridge but in view of my findings as to the evidence of the master of the *Ivanhoe* and of the bridge tender, I cannot find that this contributed to the collision in any way. I do find, however, that while the acceptable evidence does not enable me to fix the point of collision exactly, the master of the *Western Spray* was at fault in proceeding in the fog too

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close to the center of the channel. In other respects he was not at fault. He reduced speed when he got into the fog and was proceeding at a moderate speed at the time of the collision; he was operating the lighter and more manoeuvrable vessel and reversed his engines when the collision became imminent. He was maintaining a proper look-out throughout. He was navigating the *Western Spray* from his knowledge of the channel and the fog signals. Counsel for the defendant submitted that he was "lost in the fog" but there is no evidence to support that conclusion even accepting the evidence of the bridge tender as to his course approaching the bridge, which does not differ in any substantial degree from that of Perdia, subject to what I have said as to the bridge tender's evidence as to the "blur" on the radar screen. He was in the channel at the time of the collision. It is arguable that the position of difficulty would not have arisen at all but for the over-riding negligence of the *Ivanhoe*, but in view of the fact that the exact point of collision cannot be fixed and that the *Western Spray* was in any event very close to the center of the channel, while the condition of fog required him, as a matter of good seamanship, to have proceeded well to the south of mid-channel, I find that his failure in this respect contributed to the collision but to a degree considerably less than that of the master of the *Ivanhoe*. I fix the liability of the *Ivanhoe* for the collision at 85% and the liability of the *Western Spray* at 15%.

There will be judgment accordingly and I direct a reference to the Registrar to assess the damages.

I think that I should express my appreciation for the assistance of my two Assessors, Captain J. Park and Captain E. B. Caldwell, the benefit of whose skill and long experience has been of the greatest value to me.

BETWEEN:

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BURNS & RUSSELL OF CANADA LTD.....PLAINTIFF; April 5-9
April 12-15

June 17

AND

DAY & CAMPBELL LIMITED .....DEFENDANT.

Patents—Infringement—Obviousness of "invention"—Inadequacy of disclosures—Claims excessive—Contra proferentem rule of construction—Assignment—Reservation of rights by assignor—Insufficiency of—Past infringement—Tort—Illegality of assignment.

Plaintiff brought action in June 1962 against defendant for infringement by defendant since 1958 of a Canadian patent for coating masonry units The patent was issued in 1958 to a Maryland company which by two instruments executed on December 21st 1961 purported to assign its rights to plaintiff. The first of these included an assignment of the right to damages or profits for past infringements. The second stipulated, however, that it was "subject to the reservation by [the assignor] of all rights and benefits...." Defendant denied plaintiff's ownership of the patent or that there was any infringement and asserted that the patent was invalid for inutility and obviousness.

The evidence of prior art and available literature established that there was prior disclosure of the composition, of the technique or method, and of analogous uses of substitutionary or alternate materials used to produce a product of essentially the same category as that disclosed in plaintiff's patent, even though the market for such other product was somewhat different.

The court found that the disclosures did not set out the method of constructing, making, compounding, or using a composition of matter in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertained or with which it was most closely connected to make, construct, compound or use it, and that the claims of the patent covered a much wider area than the disclosures.

Held, the action must be dismissed for the following reasons:

(1) The embodiment of the idea to use this known composition for the known use of coating molded masonry units although new was not unobvious to one skilled in the art, and failed to meet the test that it convey "new and useful" knowledge as distinct from merely summoning up old knowledge out of the quiescence of years to those skilled in the art.

(2) On application of the *contra proferentem* rule the words used failed to discharge the statutory duty imposed by s. 36 of the *Patent Act,* and the patent was therefore invalid.

(3) Plaintiff obtained no right to the patent in suit under the assignment of December 21st 1961 in view of the reservation of rights by the assignor.

(4) It is not legally possible to assign a right to sue for infringement of a patent, which is a cause of action in tort. There is no provision in the *Patent Act* which changes the common law in this respect.

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BURNS & RUSSELL OF CANADA LTD. v. DAY & CAMPBELL LTD.

G. F. Henderson, Q.C. and *R. G. McClenahan* for plaintiff.

D. F. Sim, Q.C. and *W. M. Thom* for defendant.

GIBSON J.:—This is an action brought by Burns & Russell of Canada Ltd., plaintiff, against Day & Campbell Limited, defendant, for infringement of Canadian Patent No. 523,-407 issued April 3, 1956, to the Burns & Russell Company of Baltimore City, Baltimore, Maryland, U.S.A., assignee of the inventor, John A. Sergovic, Bloomfield, New Jersey, U.S.A., for "coating masonry units", which was assigned to the plaintiff on December 21, 1961.

The patent discloses and claims a method of coating molded masonry building units and the product obtained thereby.

The chronology according to the evidence is as follows:

The patent in this action issued April 3, 1956.

The convention date is January 22, 1949. (See section 29 of the *Patent Act.*)

The application date for this patent was June 16, 1949. (See section 28(1)(*b*) and (*c*) of the *Patent Act.*)

The plaintiff alleges an invention date of May-June, 1948.

November, 1948, is the date that the inventor, John A. Sergovic, first disclosed in writing his invention. (See Exhibit E, filed.)

About 1956, in the Toronto-Hamilton, Ontario, area, General Concrete Limited, under a licence granted to it dated June 6, 1955 (see Exhibit 25, filed) from the Burns & Russell Company of Baltimore City, Baltimore, Maryland, U.S.A., began marketing the molded masonry structural building block of the patent in this action, under the trade name of "Spectra Glaze".

The defendant began marketing a molded masonry structural building block alleged to infringe about 1958.

The said Burns & Russell Company of Baltimore City, Baltimore, Maryland, U.S.A. (not a party to this action) purported to assign this patent to the plaintiff on December 21, 1961, by two separate contracts of assignment. (See Exhibit 5 and Exhibit G, filed.)

This action was commenced on January 26, 1962, in this Court.

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The trial of this action took place from April 5 to April 15, 1965.

The plaintiff is a limited company having its Head Office in the City of Ottawa, in the Province of Ontario. It was incorporated sometime prior to December 21, 1961, and it has as its only assets some undisclosed amount of cash, and whatever title was transferred to it by the two contracts of assignment from the Burns & Russell Company of Baltimore City, Baltimore, Maryland, both dated December 21, 1961, and which, as stated, were filed in this trial as Exhibit 5 and Exhibit G. The plaintiff has not granted to any third party in Canada any licence to use the patent in suit No. 523,407. (The licence to General Concrete Limited, and all other licences to use this patent were granted by Burns & Russell Company of Baltimore City, Baltimore, Maryland, and the royalties therefor are payable to that company.) The plaintiff has not and does not now carry on any business of any kind.

The defendant is a limited company having a place of business in the Township of Barton and County of Wentworth, Ontario, and it does business in the Toronto-Hamilton, Ontario, area, among other places. It manufactures and sells concrete building blocks and other products.

The plaintiff submits that the essence of the invention in suit lies in (1) the choice of a polyester to achieve a facing and a bonding to a structural building block thereby enabling a new article of commerce to be obtained; and (2) the upside down technique employing a closed system enabling one to get the desired shapes in a single structural building block.

The plaintiff also submits proof of commercial success to sustain the validity of the patent in suit.

The defendant relies on 3 defences, (1) that the plaintiff is not the owner of the patent in suit; (2) that none of the claims relied upon by the plaintiff is infringed; and (3) that all the claims of the patent are invalid on grounds of inutility and obviousness. Anticipation is not raised.

The first task of the Court before considering the matter of infringement, is to read the patent in suit in order to find out first what, if anything, is alleged to have been invented. Then and only then is it necessary for the Court to apply

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the legal tests applicable for the purpose of determining the issues as to invention and utility.

To determine what, if anything, was invented, it is necessary first to read the disclosures to determine what the inventor purports to disclose and the sufficiency of them and then it is necessary to read the claims.

The two, of course, must have unity and coherence for other purposes, and not just for the purpose of determining what, if anything, is alleged to have been invented; and although the Court permits the patentee to be his own lexicographer, the words employed in the disclosures and claims by the patentee must be read with reference to the established rules of interpretation or construction of written instruments among which is the *contra proferentem* rule (interpretation in case of ambiguity against the party who drafted it) which rule in reference to all patent documents is of considerable significance; and the words must also be sufficient to discharge the statutory duty imposed by section 36 of the *Patent Act*.

The disclosures in the patent in suit indicate that the invention relates to a method of coating molded masonry building units, specifically those made from cinders, cement, haytite, clay, or the like, and the product obtained thereby.

The product obtained is and was sold commercially as a substitute for glazed tile clay building blocks, and is alleged to be superior because it can be produced and sold somewhat cheaper, is at least approximately equally resistant to mechanical injuries and temperature changes, is impervious to moisture, eliminates the necessity of a second back-up building unit, and can be produced in different colours, and with any desired surface finish, either smooth pattern or irregular. About the only serious matter making it less desirable is the fact that it soils easier than glazed clay tile blocks do.

The process of the invention is described by the inventor in these words:

> The process of my invention involves the use of a relatively shallow mold or tray which may be made of glass, metal or other suitable material, and which is only slightly larger inside than the dimensions of the face of the building unit to be coated. A quantity of the resinous coating composition to be applied is placed in the mold sufficient to cover the bottom surface thereof. A catalyst or other suitable material may be

added to the composition either before or after it is placed in the mold to start the curing of the resin. After the curing of the resin in the composition has progressed sufficiently, the building block or unit to be coated is lowered into the mold with the face to be coated downward. Thus, the weight of the block itself presses this face against the coating material, and the resin is cured while the block is in this position. This may be accomplished by heating the block in the mold, if necessary, to any suitable temperature such as 150-350°F., and usually requires only a relatively short curing or baking cycle, such as 10 to 45 minutes. The coated block is then removed from the mold, and the coating will of course have an outer surface corresponding in finish to the surface of the bottom of the mold.

The inventor indicates that any type of mold may be used.

The inventor claims this to be a combination patent.

The principal ingredient of the composition used is polyester resin. To this is added a catalyst to produce curing of the resin, a solvent that does not volatize when the resin is cured, a filler, and sometimes a material to make the surface non-combustible.

All of the ingredients of the composition at all material times were commercially available. The disclosures indicate the types preferred by the inventor, but according to the evidence others equally satisfactory were commercially available at all material times.

The inventor then describes how to make the product using the process and instructs that a mold containing this composition has inserted in it a cement or other building block utilizing its weight, and then the whole is placed in an oven or heating chamber for a period of time, ranging from 10 minutes to 45 minutes at temperatures from 150°F to 350°F, when curing or polymerization of the composition takes place; and instructs that no volatile by-products are given off during the curing cycle.

The invention then instructs that the coated building unit when taken out of the oven is then removed from the mold, and nothing further has to be done to it.

The disclosures then state that "The coated products thus made may be made up into wall and building structures in the usual manner by application of mortar to the uncoated sides, and thus produce a structure that requires no surface treatment or finish but that is highly attractive and serviceable."

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The inventor then in his patent makes 11 process claims and 8 product claims for the invention.

Process Claims 1, 5 and 8 represent the main substance of all these process claims and read as follows:

1. A method of coating a face of a molded masonry building unit which comprises placing in a mold a heat convertible polyester resin composition that cures without formation of volatile by-products, introducing said unit into the mold with the face to be coated downward while the composition is in a semi-liquid condition, and curing the resin while said unit is in the mold in contact therewith.

. . .

5. A method of coating one face of a porous building unit such as a cement block, cinder block or the like which comprises introducing into a shallow mold a quantity of a heat convertible resinous coating composition sufficient to cover the bottom thereof, said composition including a polyester type resin and filler, commencing polymerization of the resin in the mold, then introducing the block into the mold with the face to be coated resting on the coating composition, and heating to complete the curing of the resin.

. . .

8. A method as defined in claim 5 in which the coating composition comprises a mixture of flexible and rigid polyester type resins, a curing catalyst, styrene, pigment, antimony dioxide and chlorinated paraffin.

Product Claim 16 (with the inclusion of words describing a product having a non-combustible material added to it) represents the substance of the product claims and reads as follows:

16. A masonry building unit as defined by claim 10 having an integral molded facing layer of a composition comprising the reaction product of a polyester type resin in the nature of an ethylenically unsaturated alkyd resin and a polymerizable vinyl monomer and a finely-divided inert filler, the composition of said facing layer permeating the adjacent surface of said block, said composition being cured to permanently interlock said facing layer and building unit and to form a facing layer having a hard, smooth, abrasion-resistance surface which is resistant to peeling, crazing and cracking due to blows and thermal shock.

The patent discloses two specific examples of the invention numbered 1 and 2 for the purpose stated by the inventor, namely: "In order that my invention may be more clearly understood, ..." Neither of these examples is the best "method of constructing, making, compounding or using ... (the) composition of matter". Indeed, carrying out literally the instructions in the examples will not produce the product of the invention.

So much for what is alleged to have been invented.

It is now necessary to consider the question of invention. This, of course, must be determined in this case as in all cases.

The defendant in this case has put the claims in issue specifically and seeks to discharge the statutory onus prescribed by section 48 of the *Patent Act* by satisfying the Court by evidence that there is no invention in the patent in suit.

The available supply of polyester resin, which, as stated, is the main ingredient used in the composition to make the coated molded masonry building unit which is described in the patent in suit, was entirely used for military purposes during the last war. It was used, for example, for radar housings for aircraft, for fuel cell liners, and for aircraft protective body armour. During the war a number of companies produced this polyester resin for such military uses. Included among these companies were Pittsburgh Plate Glass Limited, American Cyanide Co. Ltd., and Rhom & Haas Ltd. But after the war there was excess capacity for producing this polyester resin. And the evidence discloses that the volume of use in the last year of the war, 1945, was 4,000,000 pounds, whereas in 1946, immediately after the war, it reduced sharply to 400,000 pounds or, in other words, to 10% of the use just one year before.

There was, therefore, great effort made immediately after the last war, by all persons in the industries which had used polyester resins during the war, or which were in any way associated with them, to find new uses for such polyester resins.

The search was for markets for analogous uses to the wartime uses.

It is, therefore, in relation to these facts which existed at the date of the alleged invention, namely, 1948, that the disclosures and claims in the patent must be considered in relation to the prior art and literature available for the purpose of weighing its cumulative effect in the legal test of invention.

The precise relevant period is up to either the invention date the plaintiff alleges, namely, May-June 1948, or the invention date urged by the defendant, namely, November

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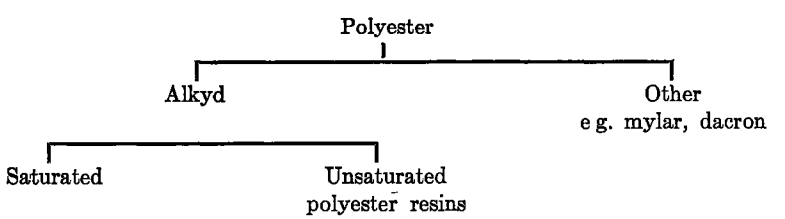
1948, which latter date is the date that the inventor John A. Sergovic first disclosed in writing his invention. Because the period between these two dates is not critical, and nothing turns on it, it is not necessary to determine which date is the true invention date, and adopting either one or other of these dates does not change the result.

Before considering the question of invention, the true meaning of certain terms employed by the witnesses at the trial is now considered and determined.

As mentioned, the main ingredient of the composition used in the application of the patent is an unsaturated polyester resin. As to its categorization in the broad class of polyester, there was disagreement between the plastics expert of the defendant, Mr. Humphrey, and the plastics expert of the plaintiff, Mr. Smith. The area of this disagreement may be stated simply by reference to Exhibit 70 filed, which is reproduced here:

(Exhibit 70)



Mr. Humphrey stated that in the broad classification all resins were polyester resins, and, therefore, the word "resins" should be added to the top of Exhibit 70 after the word "Polyester".

Mr. Smith stated that under the saturated alkyd polyester group you could have resins, but they were not polyester resins, and, therefore, it was incorrect in his opinion to classify broadly all polyesters as polyester resins.

It was common ground between these experts that saturated alkyd polyesters will not work in the process envisaged by this patent; and that the polyesters referred to as other (e.g. mylar and dacron) are irrelevant to the issues in this case in that they have no application to the subject process or products.

I prefer the evidence of Mr. Humphrey who defined polyester resins as including alkyds, both saturated and unsaturated, and the category shown as "other" on Exhibit

70, filed, and, therefore, hold for the purposes of these reasons that in the broad classification all are polyester resins.

I now come to answer the question of invention.

In England, this question (was the alleged invention obvious or not?) is answered in this way, as it is put in Blanco White, Patents for Invention, Third Edition, at p. 126, citing the *Moulinage* case, where it is stated:

> It has been said that an investigation of the question of obviousness has two stages: first, perception of the advance in the art involved in the claim and secondly, evaluation of that advance in terms of inventive ingenuity; the significance of this division being, that a decision on the first point can effectively be checked for accuracy by an appellate tribunal, whilst a decision on the second in general cannot.

This author then states that in England, the proper way of asking this question is settled. The author says it should be put in the form of the "Cripps question".

If this question were to be asked in reference to a Canadian case the form of this question would have to be changed to make it applicable to Canadian law. For this purpose it is necessary to substitute for the date of the patent the date of the invention, because in Great Britain patents are dated as of their filing date. In addition, priority of invention there depends upon filing and not upon priority of invention. In other words, in Great Britain the first to file is the first to get the patent.

In Canada, patents are dated not as of the date of filing but as of the date of issue.

Therefore, there are two matters of difference that necessitate the change in the form of the question, and both are matters of dates, because, to recapitulate, in Great Britain the date of the patent is the same date as firstly, the date of the filing, and also it is the effective date in so far as that date concerns priorities.

The "Cripps question" in Great Britain (as it was put in this case from which its name is derived) is as follows:

> Was it for all practical purposes obvious to any skilled chemist in the state of chemical knowledge existing at the date of the patent which consists of the chemical literature available ... and his general chemical knowledge, that he could manufacture valuable therapeutic agents by making the higher alkyl resorcinols ...?

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If this question were modified so as to put a question in a form complying with Canadian patent law and so as to be applicable to this case for the purpose of determining invention or non-invention, the words "existing at the date of the patent" would have to be changed to the words "existing at the date of the invention".

Using this question as modified may be a proper test to employ in a Canadian patent action in certain cases to determine whether or not invention exists; but in this case I do not propose to draft and employ such a question.

In applying this or any other test, however, consideration must be given to the prior art, available literature, and prior use, if any, as adduced in evidence. Such evidence may be more full and cogent than was available to the examiner at the time the patent issued because it is a reasonable inference that in this or in any other action before any Canadian Court when invention is put in issue, the adversary system of jurisprudence will result in there being adduced in evidence much more of the relevant prior art, available literature and prior user, if any, than it was possible for the examiner in the Canadian Patent Office to consider before issuing the patent whose validity is being attacked on the grounds of no invention. As a result, the extent of the burden of the onus in section 48 of the *Patent Act* is brought into question.

In considering the prior art and literature available in the legal inquiry on the question of invention, of course, it is all the prior art and literature available that may be looked at (providing it would be reasonable to read such matters together—that is the prior information may not be indiscriminately mosaiced); and such is addressed to the hypothetical reagent, the "person skilled in the art or science to which it appertains, or with which it is most closely connected". (See section 36(1) of the *Patent Act*).

This hypothetical reagent or mechanic, the Courts have sometimes equated with the "reasonable man" used as a standard in negligence cases.

At other times, the Courts have applied a standard for this hypothetical person in determining whether or not an invention exists by saying that it is or is not "beyond the expected skill of the calling" or "beyond the skill of the routineer".

It should be noted, however, that although the tests are legal, the problem in all cases is to make them soundly factual; and this must be done always armed with hindsight.

The *Patent Act* does not prescribe any rule to be applied to determine whether or not there has been an invention as such. It only prescribes in reference to invention that the subject matter must be "any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter..."

But it also prescribes in section 48 a *prima facie* presumption of validity; and it thereby puts on the person attacking the validity of a patent in any action, on the ground of non-invention, the onus of satisfying the Court from a reading of the disclosures and claims in the patent itself or by adducing evidence, that there was in fact no invention.

Perhaps out of all the tests, one test that may be employed in most cases to reach a correct factual conclusion, is whether the idea conveys "new and useful" knowledge, or merely summons up old knowledge out of the quiescence of years to those skilled in the art.

Those skilled in the art in this case, that is, the addressees of the prior art and the available literature, may be equated to persons such as Mr. Smith and Mr. Humphrey who are competent plastics experts, familiar with the materials relevant to this patent, as, for example, polyesters, monomers, and catalysts; and it may be also addressed to manufacturers and merchandisers of concrete and other structural building blocks.

The deficiencies of one addressee may be made up by the other. (See *Osram v. Pope's* (1917) 34 R.P.C. 369.)

To those skilled in the art, the following knowledge was available at all material times from this pertinent prior art, according to the evidence.

Exhibit H, being U.S. Patent No. 461,890 issued on the invention of one George Richardson, dated October 27, 1891, relating to a method of forming a concrete block, is the basis of one kind of building unit referred to in the patent in suit in respect of which a cementitious facing of a different kind is applied to it.

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Exhibit J, being U.S. Patent No. 1,162,172 issued on the invention of one Robert M. Jones, dated March 19, 1915, discloses an invention relating to the formation of a stucco face on building blocks, and a method involving the use of a mold in which a preformed concrete block is placed and in which the weight of the block pressing down on the compound that is put in the mold completes the cure thereby producing a facing of stucco material on the concrete block.

Exhibit K, being U. S. Patent No. 1,509,727 issued on the invention of one Theodore Hostetter, dated September 23, 1924, discloses the pouring of a coating material into a mold in a liquid or a semi-viscous condition; recommends the addition of a hardener to the mixture; advises that a pigment may be added for colour; recommends and suggests a wide use of fillers; and when the mixture is partially gelled, discloses the technique of placing the block in the mold; and informs that the product thereby produced has a molded surface.

Exhibit L, being U.S. Patent No. 1,516,890 issued on the invention of one Charles David Pochin, dated November 25, 1924, discloses a method and a product resulting from the manufacture of blocks for paving and other like purposes; discloses a rubber facing instead of a polyester facing as in the patent in suit; and discloses a product resulting from forming in a mold.

Exhibit M, being U.S. Patent No. 1,721, 367 issued on the invention of L. E. Barringer, dated July 16, 1929, discloses a method of applying an alkyd resin facing to a tile, and a method of applying by dipping, spraying or by a powder.

Exhibit N, being U.S. Patent No. 1,953,337 issued on the invention of one F. L. Carson, dated April 3, 1934, instructs how to apply to a wood block plastic materials, which may be bakelite, rubber, cementitious materials or any other plastic material in a great variety of colour effects. (This is a resin in the broad definition of resin found in this case and it includes the saturated alkyd resins.)

Exhibit O, being U.S. Patent No. 2,120,309 issued on the invention of one F. L. Carson, dated June 14, 1938, instructs as to the method of providing a surfacing material for concrete or steel pipes and it discloses the use of a wide

variety of synthetic resins and it discloses as an object of this invention: "to provide a surfacing material of the class described which possesses the property of admixing with and infiltrating into and through this slurry coat by capillary action so as to form what may be termed a fusion bond between the lining or surfacing material and the body of the concrete".

Exhibit P, being U.S. Patent No. 2,193,635 issued on the invention of one Albert E. Marshall, dated March 12, 1940, instructs as to a process in which the body is a calcium sulphate cement and the coating is a thermo-setting resin; and teaches that the coating is placed on top of the body and is molded in heat and pressure to form a facing, and that the product resulting is a unit with a body and a molded plastic surface.

Exhibit Q, being U.S. Patent No. 2,347,233 issued on the invention of one C. G. Abernathy, dated April 25, 1944, relating to a flexible plastic coating for highways discloses that it can be applied to any type of base and that the composition consists principally of a low cost inert aggregate such as sand in a binder together with a colouring material and an agent to provide the desired degree of resilience and that it employs an alkyd resin (which is a polyester resin within the meaning found in this case).

Exhibit S, being U.S. Patent No. 2,413,901 issued on the invention of one C. G. Abernathy, dated January 7, 1947, relating to a method of applying surfacing materials to a bituminous base in surfacing roads, teaches that the coating is an inert aggregate such as sand and a binder such as alkyd resin with or without modifiers and that it is applied by painting or spraying.

Exhibit I, being U.S. Patent No. 999,792 issued on the invention of one John C. Henderson, dated January 12, 1909, discloses a method of facing artificial stone and applying a cementitious facing to it, and instructs that the technique is that of turning the face down and using it to complete the method (as in the patent in suit) and that water is used in this process acts as a catalyst.

To those skilled in the art, there was also available at all material times the pertinent literature Exhibit U, filed, being an excerpt from "Modern Plastics", periodical issue of October 1947.

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This excerpt is an article on polyester resins. In it there is a complete description of resins, catalysts, pigments and all the other materials disclosed in the patent in suit which go to make up the composition used. There is also a suggestion that this composition could be applied to a cinder block to provide a bonded facing in colour for decorative building work and could be applied by using a mold and be manufactured in essentially the way described in the patent in suit and in the Henderson patent, Exhibit I.

Considering, therefore, this prior art and the said available literature in relation to the disclosures and the claims in the patent in suit, the conclusion is unequivocal that there was a prior disclosure of the composition, of the technique or method, and of analogous uses of substitutionary or alternate materials used to produce a product of essentially the same category of product as the product disclosed in patent in suit, even though the market for these other products may be somewhat different.

The inventor himself, Mr. Sergovic, according to the evidence, was generally familiar with all this at the material time. He, however, saw a means of merchandising the product disclosed in the patent by adapting and utilizing this knowledge, and was shrewd enough to envisage that it could be marketed in competition with structural glazed tile.

Mr. Humphrey said that having regard to the existing state of the art and available literature at the material time he would have had no difficulty in fabricating the product envisaged by the patent in suit. He said that the article in Modern Plastics, above referred to, would have been sufficient to teach him what to do at the material time.

Mr. Smith was not asked specifically about whether making this product would have been obvious to him, but it is a reasonable inference to draw from his evidence that it would have been. For example, when Mr. Smith was asked what his reaction was when he first saw a sample of this product his reply was as follows:

Q. Had you ever seen anything like it before?

A. No, I hadn't.

Q. Did it make any impression on you?

A. Yes.

Q. Would you tell the Court your impression?
A. I was surprised and delighted at it.
Q. Why were you delighted?
A. Because it looked like a very good application that could lead somewhere
Q. Good application of what?
A. Of the polyester resins.

In my opinion, Mr. Smith's "surprise" and "delight" was caused by the new market outlet for the polyester resins which were then in excess supply, and not by the application of the inventive mind.

In my opinion, therefore, the embodiment of the idea to use this known composition for the known use of coating molded masonry units although new was not unobvious to one skilled in the art, and employing the test above referred to, namely, "whether the idea conveys 'new and useful' knowledge, or merely summons up old knowledge out of the quiescence of years to those skilled in the art", on the evidence the defendant has satisfied me that the inventor did not make a useful addition to the stock of human knowledge and gave no consideration to justify the granting of a monopoly; and it follows that the product obtained by adapting this known composition to this new use does not entitle the plaintiff to a patent.

In my opinion, also, the disclosures and the claims in the patent in suit do not have unity and coherence. The disclosures do not set out the method of constructing, making, compounding or using a composition of matter in such full, clear concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most closely connected to make, construct, compound or use it. But the claims following the disclosures are broad and cover a much wider area than the disclosures and do not read in unison with them. Therefore, the *contra proferentem* rule applies with the result that the words used do not discharge the statutory duty imposed by section 36 of the *Patent Act* and, therefore, for this reason also, the plaintiff is not entitled to a patent and it is invalid.

The commercial success, which the plaintiff stressed, in my opinion on the evidence was due to a number of matters, and it is difficult to specifically allocate any precise weight to each of these matters. Among such matters,

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firstly, was the merchandising ingenuity of Mr. Sergovic and of Mr. Alexander H. Russell, the president of the plaintiff company, and of Burns & Russell Company of Baltimore City, Maryland, who saw the commercial possibility of the product disclosed in the patent by using the polyester resins then in excess supply; secondly, the fact that there was a material change in the conditions of the market in that there was a tremendous market after the recent war for the product and the analogous product, viz., structural glazed clay tile, which it was sought to substitute, by merchandising the product disclosed in the patent, in the new schools, factories, etc., which were being built in great numbers, and in the construction of which these products were mainly used and which was an expanding market at the time; thirdly, that the product produced utilizing the invention was marketed under the trade name "Spectra Glaze" which received wide acceptance among architects and builders because of good quality control, and all the licences under the patent in suit were coupled with licences to use this trade mark; and fourthly, all licences to use the patent in suit included licences to use other patents not in suit but related to it and to other matters. Because of all of these matters it is impossible to isolate the commercial advantage, if any, of the licence of the patent in suit; and it is likewise impossible to infer that this commercial success is any proof of invention in this case.

In view of this decision on the question of invention, it is not necessary to deal with the defence of inutility.

It should, however, be mentioned that the submission of the defendant that this action is improperly constituted, in my opinion, is also sound in law.

The plaintiff, as stated earlier in these reasons, commenced this action on January 26, 1962, after having obtained an assignment of the patent in suit on December 21, 1961, from the United States company known as the Burns & Russell Company of Baltimore City, Baltimore, Maryland, U.S.A. It did so by two separate contracts of assignment. (See Exhibit 5 and Exhibit G, filed.) The plaintiff thereby purported to become the patentee as defined in section 2(*h*) of the *Patent Act* and entitled to the rights, privileges and liberties prescribed in section 46.

Both the contracts of assignment, Exhibit 5 and Exhibit G, were executed on December 21, 1961.

Exhibit 5 was registered in the Canadian Patent Office. (See section 53 of the *Patent Act*.) This assignment purports in its granting clause to be in absolute terms which granting clause reads in part as follows:

> ...by these presents hereby sells, assigns and transfers unto the said Burns & Russell of Canada Limited its successors and assigns its entire right, title and interest in and to Canadian Letters Patent No. 523,407 ... together with the right to claim and recover damages or profits with respect to past infringements.

This assignment, save and except for the clause "together with the right to claim and recover damages or profits with respect to past infringements" is clear and unequivocal and purports to confer absolute legal title on the plaintiff. I say all, except for this clause, which is meaningless, because this clause purports to assign the right to sue for past infringement which is a cause of action in tort. It is not legally possible at common law to assign a tort and there is no provision in the *Patent Act* which changes the common law in respect thereto.

Exhibit G, contract of assignment, however, is entirely different and it is the one that is relied upon between the plaintiff and the United States Company, Burns & Russell Company of Baltimore City, Maryland. The granting clause in this contract of assignment is "subject to the reservation by the Burns & Russell Company of Baltimore City of all rights and benefits, including the right..." On a true interpretation of the meaning of this contract of assignment the plaintiff has obtained no title or right whatsoever to the patent in suit.

Therefore, the plaintiff's action against the defendant is improperly constituted in that the plaintiff is not a patentee within the meaning of section 2(*h*) of the *Patent Act*, and, irrespective of the above finding of no invention, the plaintiff, therefore, for this reason, has no claim against the defendant.

In the result, the action is dismissed with costs and the counterclaim is allowed without costs; and there shall be a declaration that Canadian Patent No. 523,407 is void.

Toronto 1965 Nov. 17 Nov. 17

BETWEEN:

MONTECATINI SOCIETE GENERALE PER L'INDUSTRIA MINERARIA E CHIMICA .....PLAINTIFF;

AND

CHARLES W. McGARY JR. .....DEFENDANT.

Patents—Conflict proceedings—Patent Act, R.S.C. 1952, c. 203, s. 45(7) and (8)—Appeal from decision of Commissioner of Patents—Two claims declared not patentable—Whether action by way of appeal lies—Pleadings—Application for particulars.

On a conflict proceeding with respect to three identical claims in the patent applications of plaintiff and defendant the Commissioner of Patents awarded one claim to defendant as prior inventor and refused the other claims to both parties as not being patentable. Plaintiff thereupon brought action in this court under s. 45(8) of the *Patent Act*, R.S.C. 1952, c. 203 for a determination that it was entitled to a patent for all three claims. The defence was a general denial of plaintiff's allegations. Plaintiff applied to the court for an order for further and better particulars of the defence.

Held: (1) Particulars were not required of defendant's denial of plaintiff's allegation that plaintiff's assignors were the prior inventors.

(2) The Commissioner's decision that certain claims were not patentable was not a decision under s. 45(7) determining which of the applicants was the prior inventor, and in the absence of a decision under s. 45(7) no action lay under s. 45(8). (In any event if an action did lie, in the circumstances this was not a proper case to order particulars).

Plaintiff, an Italian corporation, claimed to be sole owner by assignment from the inventors of an invention described in an application for a patent, three claims in which were made the subject of conflict proceedings with the defendant under s. 45 of the *Patent Act*, R.S.C. 1952, c. 203.

The Commissioner of Patents, by his decision dated April 30th, 1965, refused claim 1 to both parties, awarded claim 2 to defendant as prior inventor and refused claim 3 to both plaintiff and defendant as being dependent on claim 1 but declared he would allow it to defendant if it were made dependent on claim 2.

Plaintiff brought action in this court for a determination that it was entitled to the claims in conflict. Defendant by his defence put plaintiff to the proof of certain allegations in the statement of claim and generally denied certain other material allegations therein. Plaintiff applied for an order that defendant furnish full particulars of all facts in support of his general denial of plaintiff's allegations of fact and of those allegations of which he did not admit the truth.

APPLICATION.

R. B. Tuer for plaintiff.

W. M. Thom for defendant.

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MONTECATINI SOCIETE GENERALE PER L'INDUSTRIA MINERARIA E CHIMICA v. CHARLES W. McGARY JR.

JACKETT P.:—An application was made at Toronto on November 17 for an order directing the defendant to give particulars of his defence in this action arising under conflict proceedings under section 45 of the *Patent Act*. This is a note of the reasons why I refused the application.

In so far as Claim 2 is concerned, this is an action under section 45(8) by the plaintiff for an adjudication under section 45(8)(*d*) that the plaintiff and not the defendant is the prior inventor. I cannot see that any plea by the defendant is called for other than a denial of the plaintiff's allegation that its assignors were the prior inventors. No specific particulars were sought.

In so far as Claims 1 and 3 are concerned, I came to the conclusion that the Commissioner did not make any decision under section 45(7). Having apparently originally decided under subsection (4) that the subject matter of Claims 1 and 3 was patentable, after examining the facts stated in the affidavits, he decided that it was not patentable and he, therefore, made no decision under subsection (7) as to which of the applicants is the "prior inventor". There being no decision under subsection (7) with reference to Claims 1 and 3, subsection (8) does not authorize a conflict action in respect of those proceedings.

In any event, even if subsection (8) does authorize an action by the plaintiff for an adjudication that the subject matter of Claims 1 and 3 are patentable, I do not think that it is a proper case in which to order particulars. Normally, the recourse of an unsuccessful applicant for a patent, where refusal is on the ground that the subject matter is not patentable, is by way of appeal and it is for the appellant to plead the facts necessary to show that the subject matter is patentable. The Commissioner would be the only respondent in such proceedings. Here, if the proceedings are properly constituted in respect of Claims 1 and 3, the defendant has not counterclaimed for a declaration that Claims 1 and 3 are patentable by it. I see no reason why it should be required to take a more detailed position on the pleadings in respect of the plaintiff's claim that Claims 1 and 3 are patentable by it even if such particulars would be ordered as against the Commissioner if he were a party opposing this part of the plaintiff's action (a matter in respect of which I express no opinion).

Victoria 1965

Nov. 15-18

Victoria Nov. 23

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

ERIK JOHNSON, FOREST JAMES FERGUSON, GILBERT GEORGE, JEROME BOND AND JAMES E. REILLY ..... PLAINTIFFS;

AND

THE SHIP *PACIFIC WIND* ..... DEFENDANT.

Shipping—Preliminary Act—Leave to amend refused—Special leave to adduce contrary evidence granted—Admission of fact in Preliminary Act made under mistake—Strength of admission.

In an action for damages resulting from a collision of ships plaintiffs applied to amend their Preliminary Act and for special leave to adduce evidence contrary to their Preliminary Act.

Held: (1) In accordance with the settled practice leave to amend the Preliminary Act was refused but leave to adduce evidence contrary to the Preliminary Act was granted. *Pallen v. the "Iroquois"* (1912) 17 B.C.R. 156; *The Canadian Lake & Ocean Navigation Co. v. The Ship "Dorothy"* (1906) 10 Ex. C.R. 163; *The "Seacombe". The "Devonshire"* [1912] P. 21; *Montreal Transportation Co. v. New Ontario Steamship Co.* (1908) 40 S.C.R. 160 at 172, referred to.

(2) Any statement of fact in a Preliminary Act is a formal admission binding on the party making it and special leave must be sought to adduce evidence contrary thereto. Where such leave is granted and it is shown that an admission of fact in the Preliminary Act was made under mistake the strength of such admission will vary according to the conditions under which the Preliminary Act was prepared.

ACTION for damages for loss sustained in a collision at sea.

David Brander Smith and *T. P. Cameron* for plaintiffs.

J. I. Bird, Q.C. and *W. Forbes* for defendant.

GIBSON J.:—In this action the plaintiff Johnson, as owner of the ship *Unimak*, her fishing gear and equipment, and part of her cargo of fish, and the plaintiffs Ferguson, Bond, George and Reilly, as owners of the rest of her cargo of fish, and for their respective personal belongings, claim against the ship *Pacific Wind* for the losses sustained by them when the said *Unimak* sank and became a total loss as a result of a collision between it and the said ship *Pacific*

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Wind on the 24th day of November, 1963, in Tolmie Channel at the juncture of Tolmie Channel and Graham Reach, being waters on the inside passage of the coastal waters of British Columbia lying between Princess Royal Island and the mainland.

At the trial of this action I had the advice of two assessors, namely, Captain R. E. S. Armstrong and Captain John Wigman.

The collision between these said vessels occurred about 5.15 A.M. that day, the visibility being good, the sky overcast and the sea smooth, with the tide flooding to the North with a force of about 1 knot, approximately two hours before high water.

Prior to the collision the M.V. *Unimak* (which is a fishing vessel of about 57.8 feet in length, beam 17.1 feet and powered by a 220 h.p. G.M. diesel single screw engine) was proceeding Southerly. Its crew consisted of the Master, Forest James Ferguson, and three other crew, namely, Gilbert George, Jerome Bond and James E. Reilly, being all fishermen, and all of this crew participated in some measure in the navigation of this vessel.

The other vessel, *Pacific Wind,* prior to the collision was proceeding Northerly. It was a coastal tanker 230 feet in length, 39 feet in beam, being of 1,561 tons gross, with two Fairbanks-Morse engines of 1400 h.p. driving a single shaft. At the time this ship was loaded to her marks. The crew consisted of 20 in number, namely, the Master, 3 Mates, the Chief Engineer, 3 engineers, 6 able bodied seamen, 3 oilers, the cook, the messman and the mess boy. The Master was Captain Ernest Leith, the First Mate was Vincent Thom, the Chief Engineer was Edward Hyde, the Second Engineer was Victor William Pituskin, and the helmsman at the material time was Cecil George Drover.

At the commencement of the trial and before any evidence was adduced, the plaintiffs made three motions, namely: Firstly—to amend their Preliminary Act; Secondly—to amend their pleadings to add a personal injury claim for the plaintiff Jerome Bond, to amend paragraph 4 thereof which concerned a statement of fact as to the location of the collision, and to add to paragraph 11 thereof by detailing further particulars of negligence; and Thirdly—to

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ask for special leave to adduce evidence contrary to their Preliminary Act.

In accordance with the settled practice, leave to amend their Preliminary Act was refused to the plaintiffs, see: *Pallen v. The Iroquois*[1]; *The Canadian Lake & Ocean Navigation Company Limited v. The Ship Dorothy*[2]; *The Seacombe. The Devonshire*[3]; *Montreal Transportation Company v. New Ontario Steamship Company*[4].

Leave to amend pleadings of the plaintiff to add the said personal injury claim was also refused because no particulars were given of the nature of this claim, no medical examination had been had at the time of trial, although the defendant required that such a medical examination be had, and because I was of opinion that the assessment of these damages for personal injury, for which it was proposed to claim only in the sum of $866.10, should be assessed by me and not referred to the Registrar for such purpose, and as a consequence this plaintiff was not ready to proceed with this claim at this trial. Leave to amend the pleadings otherwise was granted because there was no prejudice to the defendant caused by granting the same.

Leave to adduce evidence contrary to the Preliminary Act of the plaintiffs was also granted, it being noted at the time that, although any statement of fact in a Preliminary Act is a formal admission binding upon the party making it, the plaintiff must ask for such special leave to adduce evidence contrary thereto and, when such leave is granted, then any such admission of fact contained therein, as such, does not constitute an estoppel in that it may be shown the same was made under mistake, in which event the Court may be satisfied that such was the case while at the same time recognizing that it still is evidence against the party making it and its strength will vary according to the conditions under which the Preliminary Act was prepared.

The place of collision between these two vessels may be more particularly described in this way: It occurred at the junction of Tolmie Channel, Graham Reach and Hiekish Narrows as shown on the Canadian Hydrographic chart published by the Department of Mines and Technical

[1] (1912) 17 B.C.R. 156.
[2] (1906) 10 Ex.C.R. 163.
[3] [1912] P. 21.
[4] (1908) 40 S.C.R. 160 at 176.

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Surveys, Ottawa, being Chart No. 3738, entitled "Sarah Island to Swanson Bay".

Tolmie Channel lies between Sarah Island and Princess Royal Island, and is on the West side of Sarah Island. Hiekish Narrows is on the East side of Sarah Island. The North end of Sarah Island is in Latitude 52° 51′ N. and Longitude 120° 30.5′ W.

Tolmie Channel varies in width from 7 cables to 9 cables between the Southerly location referred to on the said chart as Ditmars Point and Sarah Head to the North. There are no salient indentations or points in this channel. The North end of this channel as Sarah Head is approached has a turn in it. This turn is about 5° to the East as it opens into Graham Reach to the North.

Graham Reach then runs North from Tolmie Channel and has a width of about 9 cables at its South end and it gradually narrows to 5 cables at a point Northerly referred to as Swanson Point. Swanson Point is 8 miles to the North of Sarah Head. The shorelines of Graham Reach are physically the same as those of Tolmie Channel, with the exception that to the East is an inlet running East which is called Green Inlet, which is approximately 2½ miles North of Sarah Head.

In both Tolmie Channel and Graham Reach there are numerous small streams flowing into them. Both these channels are deep channels with no off-lying dangers. In other words, both are clear channels with two steepto wooded shores.

In the critical area where this collision occurred there are two aids to navigation. Firstly, at Sarah Head, which again is at the point where Tolmie Channel runs into Graham Reach, there is a group flashing white light. Secondly, on Quarry Point, which is on the Western shore of Graham Reach and on the Eastern side of Princess Royal Island, and which is 11 cables, 340° true from Sarah Head, there is a flashing green light.

At any time there is only a weak tidal current in these channels running to the North with the flood and to the South with the ebb. As stated, at the time of this collision, namely about 5.15 A.M. on the 24th November, 1963, the tide was still flooding and it had about two hours before it reached high water.

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As also briefly referred to above, at the time of the collision there was very little wind, the sea was smooth, visibility was good and the sky was overcast.

By their Preliminary Act dated the 16th July, 1964, the plaintiffs with reference to Particular 3 (The place of the collision) answered: "Between Butedale, British Columbia, and Klemtu, British Columbia, in Tolmie Channel approximately 2 miles north of the entrance of Green Inlet and approximately one-eighth of a mile from the west shore of Tolmie Channel aforesaid"; to Particular 8 (The lights, if any, carried by her) answered: "Two white mast head lights, one each on the foremast and mainmast, red and green side lights, white stern light and various shaded lights apparently emanating from accommodation"; to Particular 9 (The distance and bearing of the other ship when first seen) answered: "Distance approximately five miles, bearing approximately S.S.E. magnetic"; to Particular 10 (The lights, if any, of the other ship which were first seen) answered: "The two white mast head lights referred to in Paragraph 8"; to Particular 11 (The lights, if any, of the other ship, other than those first seen, which came into view before the collision) answered: "The red and green side lights referred to in Paragraph 8"; to Particular 12 (The measures which were taken and when, to avoid the collision) answered: "At approximately 5:10 A.M. when the men on watch in the pilot house realized the vessels were on a collision course and that danger of collision existed, the M.V. *Unimak* altered course to starboard approximately half a point and steered approximately S x E$\frac{1}{2}$ E, and at approxiately 5:15 A.M. when it became apparent that collision was inevitable the main engine of the *Unimak* was stopped"; to Particular 13 (The parts of each ship which first came into contact) answered: "The bow of the *Pacific Wind* struck the *Unimak* on the starboard side approximately eight feet abaft the *Unimak's* bow"; to Particular 14 (What sound signals were given, if any, and when) answered: "No sound signals were given."; to Particular 15 (What sound signals, if any were heard from the other ship, and when) answered: "No sound signals were heard from the other ship."; to Particular 16 (What fault or default, if any, is attributed to the other ship) answered: "(a) No proper

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lookout kept on board the M.V. *Pacific Wind*. (b) Those on board the M.V. *Pacific Wind* improperly neglected to take in due time proper measures for avoiding a collision with the M.V. *Unimak*. (c) Those on board the M.V. *Pacific Wind* failed to observe the provisions of Rule 18, Paragraph (a), of the Regulations for Preventing Collisions at Sea. (d) Those on board the M.V. *Pacific Wind* failed to observe the provisions of Rule 25, Paragraph (a), of the Regulations for Preventing Collisions at Sea."

By their Statement of Claim dated the 22nd day of June, 1964, the plaintiffs alleged before the amendment granted to their pleading that the M.V. *Unimak* was approximately 4 miles North (of the entrance to Green Inlet) and after amendment they alleged that it was approximately "abeam" (of the entrance to Green Inlet) at about 5.00 A.M. on the day of this collision; (this would put this vessel before the amendment 5½ miles North of Quarry Point at this time, and after the amendment ½ mile North of Quarry Point;) that at about 5.10 A.M. the man on watch in the pilot house of the M.V. *Unimak* observed the 2 white masthead lights of the defendant ship *Pacific Wind* approaching from approximately 3 miles to the South and on a collision course with that of the M.V. *Unimak* which at the time was exhibiting the required lights; that the M.V. *Unimak* altered her course to starboard and steered approximately "S x E½ E" but after steering so for approximately 5 minutes it became apparent that both vessels were still on a collision course so that those on watch in the pilot house of the M.V. *Unimak* stopped the *Unimak's* main engine; that the *Unimak's* head swung to port and the *Pacific Wind* struck the *Unimak* on the starboard side approximately 8 feet abaft the *Unimak's* bow, thereupon the Master and crew abandoned the vessel and she sank shortly thereafter and became a total loss; that those on board the defendant ship *Pacific Wind* were negligent in: (a) There was no proper lookout kept on board the defendant ship, (b) Those on board the defendant ship improperly neglected to take in due time proper measures for avoiding a collision with the plaintiffs' ship, (c) Those on board the defendant ship failed to observe the provisions of Rule 18, Paragraph (a) of the Regulations for Preventing Collisions at Sea, and

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(d) Those on board the defendant ship failed to observe the provisions of Rule 25, Paragraph (a) of the Regulations for Preventing Collisions at Sea.

By its Preliminary Act dated the 3rd day of August, 1964, the answers of the defendant ship *Pacific Wind* with reference to Particular 7 (The course and speed of the ship when the other was first seen, or immediately before any measures were taken with reference to her presence, whichever was the earlier, and all subsequent alterations to the course or speed of the ship up to the time of the collision) answered: "342° magnetic; when the ships were less than one mile apart, M/V *Pacific Wind* altered course 10° to starboard and about one minute later, altered a further 15° to starboard and immediately thereafter, altered course hard to starboard. Speed: About 10½ knots."; to Particular 8 (The lights, if any, carried by the ship) answered: "M/V *Pacific Wind* was exhibiting one white foremast light, one white mainmast light, red and green sidelights and a white stern light."; to Particular 9 (The distance, bearing and approximate heading of the other ship when first seen) answered: "About six miles, bearing on the port bow and apparently heading on a southerly course."; to Particular 10 (The lights, if any, of the other ship which were first seen) answered: "White mast headlight and green sidelight."; to Particular 11 (The lights, if any, of the other ship, other than those first seen, which came into view before the collision) answered: "Shortly after the white mast headlight and the green sidelight were first seen, M/V *Unimak* showed her red light and continued so to do until the ships were slightly less than one mile apart, when she again showed her green light."; to Particular 12 (The measures which were taken, and when, to avoid the collision) answered: "When those on the M/V *Pacific Wind* observed the red light of the M/V *Unimak* bearing on the port bow, they maintained their course in the expectation that the two vessels would pass safely port to port. When the two vessels were slightly less than one mile apart, M/V *Unimak* altered her course to port and showed a green light. Those on the M/V *Pacific Wind* observed the said green light for a short interval and when it did not change, they altered course 10° to starboard so as to give M/V *Unimak* more room and they sounded one short blast on

their whistle. About one minute later, since the M/V *Unimak* was still showing a green light, those on the M/V *Pacific Wind* altered course a further 15° to starboard and blew one short blast on their whistle. Almost immediately thereafter, those on the *Pacific Wind* altered course hard to starboard and blew one short blast on the whistle and put their engines on standby."; to Particular 13 (The parts of each ship which first came into contact and the approximate angle between the two ships at the moment of contact) answered: "The stem of M/V *Unimak* struck the M/V *Pacific Wind* on the port side about twenty feet aft of the stem at an angle of slightly less than 90°."; to Particular 14 (What sound signals were given, if any, and when) answered: "One short blast was sounded on three distinct occasions to indicate three alterations of course to starboard as indicated in paragraph 12 hereof."; to Particular 15 (What sound signals, if any, were heard from the other ship, and when) answered: "None."; to Particular 16 (What fault or default, if, any, is attributed to the other ship) answered: "(a) Excessive speed; (b) Failing to keep a proper or any lookout; (c) Failing to keep to her own starboard side of mid-channel; (d) Failing to pass M/V *Pacific Wind* port to port as they could and ought to have done; (e) Failing to keep M/V *Unimak* under proper or any control whereby the said vessel was carried or allowed to proceed into the channel reserved for vessels proceeding northward in Graham Reach; (f) Having at the wheel or in control of the vessel an incompetent person or one with insufficient knowledge of navigation or the Regulations for Preventing Collisions at Sea; (g) Failing to ease, stop or reverse engines in time or at all; (h) Failing to signal any alteration of course; (i) Improperly and at an improper time altering course to port in an attempt to cross ahead of M/V *Pacific Wind*; (j) Failing to comply with Rules 25, 28 and 29 of the Regulations for Preventing Collisions at Sea."

By its Statement of Defence dated the 4th day of August, 1964, the owners of the vessel *Pacific Wind* alleged that shortly before 0500 hours on the 24th November, 1963, "those on the *Pacific Wind* observed at an estimated distance of six miles, bearing on the port bow, a white mast headlight and green sidelight of a vessel south-bound which

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later proved to be the motor vessel *Unimak*. Shortly thereafter, the M/V *Unimak* showed her red light and those on the *Pacific Wind* maintained their course in the expectation that the two vessels would pass safely port to port. At all material times, the *Pacific Wind* maintained a course well to her own starboard side of mid-channel"; that "shortly before the collision, the motor vessel *Unimak* altered her course to port and showed her green light whereupon those on the *Pacific Wind* altered their course to starboard and sounded one short blast on the whistle. Very shortly thereafter when the M/V *Unimak* continued to show a green light and was apparently attempting to cross the bow of the *Pacific Wind*, those on the *Pacific Wind* again altered course to starboard and blew one short blast on the whistle and immediately thereafter altered course hard to starboard and blew one short blast on the whistle"; that "notwithstanding the efforts of M/V *Pacific Wind* to avoid the oncoming vessel *Unimak*, the said vessel came on and with her stem struck the port side of the *Pacific Wind* at an angle of slightly less than ninety degrees. The M/V *Unimak* later sank and her master and crew were rescued by those on the *Pacific Wind*."; that "the negligence of the plaintiffs, their servants or agents, in the navigation or management of the *Unimak*" consisted of: "(a) excessive speed; (b) failing to keep a proper or any lookout; (c) failing to keep to her own starboard side of mid-channel; (d) failing to pass M/V *Pacific Wind* port to port as they could and ought to have done; (e) failing to keep M/V *Unimak* under proper or any control whereby the said vessel was carried or allowed to proceed into the channel reserved for vessels proceeding northward in Graham Reach; (f) having at the wheel or in control of the vessel an incompetent person or one with insufficient knowledge of navigation or the Regulations for Preventing Collisions at Sea; (g) failing to ease, stop or reverse engines in time or at all; (h) failure to signal any alteration of course; (i) improperly and at an improper time altering course to port in an attempt to cross ahead of M/V *Pacific Wind*; (j) failing to comply with Rules 25, 28 and 29 of the Regulations for Preventing Collisions at Sea."

On this hearing all of the plaintiffs gave evidence except the owner, Erik Johnson, namely, the Master, Forest James

Ferguson, and the other members aboard, Gilbert George, Jerome Bond and James E. Reilly. According to them in the vessel *Unimak* they had left their fishing area North and West of the place of collision on the previous afternoon and were proceeding Southerly with their cargo of fish to deliver it. The Master had handed over the helm of the *Unimak* to Bond at about 4.30 a.m. on the 24th November, 1963, and he had gone down into the engine room and was there at the time of the collision. Bond was at the helm at the time of the collision and with him in the wheelhouse was George. Reilly was asleep below deck at the time of the collision.

It is clear from the evidence that both Bond and George had only a most elementary knowledge of navigation, that Bond had no knowledge of the Rules of the Road, and that George, in so far as is relevant in this action, only knew in so far as these Rules are concerned that ships should pass port to port. Although the vessel *Unimak* was radar-equipped, neither Bond nor George knew much about how to operate it, and in any event they did not use it as an aid at any material time. Bond and George really jointly, prior to and at the material time, were navigating the vessel *Unimak*. Bond was steering this ship along the West shore of Graham Reach, aided from time to time by remarks made to him by George, as George made observations of the channel, and Bond in effect at all times was merely following the shoreline. He was not following any compass course. He had received no instructions as to what course to navigate (and I so find notwithstanding evidence from Ferguson to the contrary) and he had no real knowledge of the channel. Both Bond and George were guided in their navigation of the *Unimak* following the shoreline by the snow on the shoreline and by the trees. In effect, at all material times, they were navigating in a fashion which has been referred to irreverently as "beachcombing".

At some point in Graham Reach channel I find that both Bond and George saw the two mast lights of the ship *Pacific Wind* and immediately prior to the collision George saw the red running light of the ship, but on their evidence I am unable to make any finding as to the location of the point of collision between these two vessels, in so far as it would prove where such point was on a North-South

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axis. In so far, however, as determining where the point of collision was on an East-West axis, I am of the opinion that their evidence is of substantial assistance in determining the same.

The evidence of the defendant that is of assistance in the adjudication of this matter was given by the Master, Ernest Leith, the First Mate, Vincent Thom, and to a lesser extent by the Engineer, Edward Hyde, and Cecil George Drover (the helmsman prior to and at the time of the collision). It is clear that Thom was an experienced and competent ship's officer and that the ship was well equipped with navigation aids to assist him on the morning of this collision. Among other things it had radar which he employed at all material times. Prior to the collision Thom was on duty in the wheelhouse and Drover was the helmsman.

Thom at the trial marked the chart of Tolmie Channel and Graham Reach which was filed as Exhibit 10. This chart is the same chart as was filed as Exhibit 1, and is merely another copy. On this chart he marked the respective positions of the vessel *Pacific Wind* and the vessel *Unimak* when he said they were approximately six miles apart. Thom said he knows these positions so marked are reasonably accurate because he plotted them on the night of the collision by using radar.

The collision took place following what manoeuvres these two vessels made within this six-mile area.

The Northerly position marked on Exhibit 10 by Thom indicates the position of the vessel *Unimak* at that time. It is marked "Al" and is a position in Graham Reach approximately three miles North of Sarah Head and about 3 cables from the West shore of Graham Reach and about 4 cables from the East shore.

The Southerly position marked as "A" on Exhibit 10 is the position of the vessel *Pacific Wind,* and is a point about three miles South of Sarah Head in Tolmie Channel and about mid-channel.

Thom says the ship *Pacific Wind* was then following a course of 342° magnetic. This is the course which is marked on Exhibit 9, which is another copy of the same chart as Exhibit 10, which chart came from the wheelhouse of the *Pacific Wind* and was the chart used in that ship on the day of this collision. Although some evidence was given that

this 342° course was the course followed by the vessel *Pacific Wind* while South-bound only, on cross-examination of Thom it was clear, and I so find, that this course was a reciprocal course.

(At this juncture it is significant to observe, from looking at this course marked on Exhibit 9, that the vessel *Pacific Wind*, in following such a course, as according to the evidence was its normal practice, in proceeding Northerly passing through Tolmie Channel and Graham Reach, would not be at all times on its own starboard side of the channel. While this might be an acceptable practice during daylight hours, at night time a more prudent practice to follow would be not to follow so long a straight track, but instead to vary the direction of the course from time to time to conform with the direction of the channel. For instance, to illustrate what will result in following such a long straight track Northerly as plotted on the chart, Exhibit 9, this course, as it runs past the Quarry Point light, is well over West of mid-channel.)

In brief, what transpired as these two vessels approached each other within this said six-mile North-South axis I find was as follows:

Bond on the *Unimak* having been told by George that he was too close to the West shore hauled his vessel to port, and according to George ran for about five minutes on whatever course that was taken as a result by the *Unimak*. Then Bond, seeing the white mast lights of the *Pacific Wind* said to George that he thought this vessel was going to pass on the starboard side of the *Unimak*. George told him not to let it pass on their starboard side and to haul the *Unimak* to starboard, which Bond did. George said that then he saw the lower mast light of the two mast lights of the *Pacific Wind* to his right of the upper mast light. From this it is a reasonable inference, and I so make such an inference on advice from the Assessors, that *Pacific Wind* at that juncture was shaping a course to port of mid-channel close to Quarry Point.

Bond then caused the *Unimak* to run along on this new course and at some point of time shortly after, in observing the vessel *Pacific Wind*, said he thought it was about a quarter mile away. George said that he thought it was about 400 to 500 feet away. George then stepped out of the

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wheelhouse of the *Unimak* by opening the starboard door and looked ahead and observed that the *Pacific Wind* was then only about 100 to 200 feet away. At this point both Bond and George became alarmed and Bond stopped or stalled the engine of the *Unimak* and after that the *Unimak* moved to port. Precisely why she moved to port on the evidence it is impossible to say, except to find that it did in fact so move for some short distance, and that the collision between these two vessels happened within a very short time after the engine of the *Unimak* stopped. From the evidence of both Bond and George as to their observations subsequently, it is clear that the point of impact on the *Unimak* was on its starboard side immediately forward of its wheelhouse, at approximately its anchor windlass, and that the point of impact on the ship *Pacific Wind* was on its port side about 20 feet from its bow.

Bond, George and Ferguson then gave evidence of getting into a lifeboat and being subsequently picked up by the crew of the *Pacific Wind* and while aboard the latter, observing the sinking of the *Unimak*.

The First Mate Thom of the *Pacific Wind* said that when his ship was at said point marked "A" on Exhibit 10, that he observed from the wheelhouse the green running light of the *Unimak* when the latter vessel was at the position he marked "A1" on Exhibit 10 six miles away. He caused the ship *Pacific Wind* to continue on a course 342° magnetic and at some later point saw that the *Unimak* was showing its red running light. Then at some time later he observed that the *Unimak* again was showing its green running light, and after waiting a short time he gave an order to the helmsman to haul 10° to starboard. He said he identified his position in the channel then as being on course 342° a little South of Sarah Head. He did not cause the speed of the *Pacific Wind* to be reduced then, or at any time before the collision. He says his ship altered to this 10° change of course and about a minute later he gave an order to haul 15° to starboard. His ship was then at some point North of Sarah Head. He said the *Unimak* was still showing its green running light. He said almost immediately thereafter he gave the order full astarboard and that almost immediately there was a collision between the *Pacific Wind* and the *Unimak*. He said that just before the impact he put the engines on "stand-by". At the time of

the collision he put the engines on "stop". He then gave an order to haul to port and then he put the engines "full astern". At this latter time Captain Leith came to the wheelhouse and took over.

Then according to Captain Leith, he caused the *Pacific Wind* to go "half ahead" at which time the bow of his ship was swinging to starboard and the stern to port, and shortly after the *Pacific Wind* turned in clockwise fashion and came back and picked up the crew of the *Unimak*. Then aboard the *Pacific Wind* he and the said crew observed the *Unimak* sinking.

According to Thom, also, there were whistle signals made by the *Pacific Wind* at the time he gave each said order of change of course to starboard above referred to.

On all the evidence it is clear from the time the ship *Pacific Wind* was at point "A" marked by Thom on Exhibit 10, to the point of collision, that *Pacific Wind* was proceeding at from 10 to 11 knots (the defendant by its Preliminary Act admits the speed to be 10½ knots); and that the *Unimak* from the position marked by Thom "A1" on Exhibit 10 until very shortly before the collision was proceeding at about 8 knots.

It follows that predicated on the ship *Pacific Wind* proceeding from the North from said point "A" at 10 knots and the ship *Unimak* proceeding South from said point "A1" at 8 knots, these ships come together in Graham Reach somewhere at a point in an East-West line about 4 cables North of Sarah Head. Where precisely in such East-West line these ships did come together (on such premises) is dependent firstly on precisely at what positions the *Pacific Wind* made its said manoeuvres to starboard and how far off the 342° course such manoeuvres took that ship before the collision, and also on how close to the West shore of Graham Reach *Unimak* was at all material times during the said manoeuvres it made, as it proceeded along that shoreline. A reasonable inference, however, as to the point of collision can be made from the evidence of Captain Leith who said that, immediately after the collision, the bow of his ship was about 2 cables from the East shore of the channel of Graham Reach, as he was about to turn around the ship after putting it "half ahead" and that he succeeded in so turning around the *Pacific*

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Wind without running into the shore. Of necessity, therefore, the point of collision, if it occurred on this East-West line, must have been practically in the centre of the channel.

It follows also that predicated on the ship *Pacific Wind* proceeding Northerly from said point "A" on Exhibit 10 at 11 knots to the point of collision and the *Unimak* proceeding Southerly from said point "A1" on Exhibit 10 at 8 knots to the point of collision, the point of collision is somewhere at a point on an East-West line about 3 cables South of Quarry Point in Graham Reach. Inferring again in the same fashion from the same evidence of Captain Leith, this would put the point of collision still about mid-channel.

In both these premises no allowance has been made for current. However, from all the evidence it is a reasonable inference, and I so find, that the current was not more than 1 knot. Allowing for this tide would merely move the East-West axis of these two results further North.

All of the evidence on the point of the sinking of the *Unimak* I find is inconclusive and is not of assistance in determining the cause or contributing cause of this collision. I find it strange, however, that those in charge of the *Pacific Wind* did not make precise and accurate measurements of this place of sinking when they were in such an excellent position to do so, but I make no finding in respect to such failure on their part.

The Preliminary Act of the plaintiffs obviously was improperly prepared. About the only thing that is at all precise and correct in it is the statement that the mast lights and the red running light of the *Pacific Wind* were seen prior to collision. Because such statements were in the Preliminary Act I am reinforced in my belief that Bond and George were truthful witnesses, and their evidence as a result was of substantial assistance in determining where the point of collision was on an East-West axis (but not on a North-South axis). The other statements in the Preliminary Act, fortunately for the plaintiffs, because of the evidence generally, were not material in deciding what was the cause or any contributing cause of this collision.

The Preliminary Act of the defendant was in accordance with the evidence given at this trial in all material respects.

In particular this is true of the speed and tract of the *Pacific Wind*. Such statements were of substantial assistance in this adjudication.

From a consideration of the above, and making inferences therefrom, and from a consideration of all of the evidence, in the result I find that this collision between the vessel *Unimak* and the vessel *Pacific Wind* occurred about mid-channel in Graham Reach at a point on an East-West line, which line is probably about 3 cables South of Quarry Point.

I find also that both those in charge of the vessel *Unimak* and those in charge of the vessel *Pacific Wind* were to blame for this collision.

The negligence of those in charge of the vessel *Unimak* I find consisted in (1) permitting an incompetent crew to be in charge of it at all material times, (2) keeping an inadequate lookout, having regard to the conditions of this channel at this material time, (3) failing to take reasonable precautions when a collision was imminent, as prudent seamen should, and (4) navigating the *Unimak* just prior to and at the time of the collision in about the centre of the channel.

I find that the negligence on the part of those in charge of the *Pacific Wind* consisted in (1) pursuing the course referred to above, of 342° magnetic, at a point in Tolmie Channel which would not keep the vessel on the starboard side of the channel at all times, thereby breaching Rule 25 of the Rules of the Road, (2) in not reducing the speed of the *Pacific Wind* when it should have been obvious to any prudent seaman that a risk of collision existed at the time, when proper remedial action might have avoided a collision or reduced its consequences, and (3) in navigating the *Pacific Wind* just prior to and at the time of the collision in about the centre of the channel.

The decision of First Mate Thom not to reduce the speed of the *Pacific Wind* but instead to maintain its speed and manoeuvre to starboard may have initiated in a substantial way the sequence of events which led to this collision between these two vessels. If the time such decision was made could be accurately determined, those in charge of the

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Pacific Wind could be substantially to blame for this collision in my opinion. Because, however, of the inconclusiveness of the evidence as to precisely when the first order was given to manoeuvre the vessel *Pacific Wind* to starboard, I find it is not possible to establish the degrees of fault respectively of those in charge of the *Unimak* and those in charge of *Pacific Wind* and liability is therefore apportioned equally.

The plaintiffs therefore shall have judgment accordingly against the defendant and there shall be a reference to the Registrar to assess the damages.

The plaintiffs shall be entitled to costs against the defendant.

St. John 1965 July 23 1966 Jan. 17

NEW BRUNSWICK ADMIRALTY DISTRICT

BETWEEN:

STE. NOUVELLE D'AFFRÈTEMENT ET DE COURTAGE S.A.R.L. ....PLAINTIFF;

AND

M. V. *BROWIND*, HER TACKLE AND APPAREL ....DEFENDANT.

Admiralty—Affidavit to lead warrant—Admiralty Rule 45—Based on "instructions"—Sufficiency of.

Defendant moved to vacate a warrant issued under Admiralty Rule 45 on the grounds that the affidavit to lead warrant sworn by plaintiff's solicitor was defective in that deponent merely stated that he was "instructed" as to the facts to which he deposed and that this was insufficient under Exchequer Court Rule 168 which provides that an affidavit based on belief shall state the grounds of belief.

Held, defendant's objections to the affidavit were not of substance and the motion to vacate the warrant must be dismissed.

Letson v. The Tuladi (1912) 17 B.C.R. 170, 15 Ex. C.R. 134, 4 D.L.R. 157; *Victoria Machinery Depot Co. v. The Canada and The Triumph* (1913) 18 B.C.R. 511, 15 Ex. C.R. 136, 17 D.L.R. 27; *Rouleau v. The S.S. Aledo* (1923) Ex. C.R. 10 distinguished. Admiralty Rules 45, 46, 47, 49, 88, 215; Exchequer Court Rule 168 considered.

E. Neil McKelvey, Q.C. for defendant.

Frederic S. Taylor for plaintiff.

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Anglin D.J.A.

ANGLIN D.J.A.:—This is an application heard in Chambers on July 23, 1965, at Saint John, Province of New Brunswick, Canada, to vacate the warrant issued by the Registrar for the arrest of the defendant vessel. Briefs were submitted and judgment reserved. The delay in delivering it has been due to matters having priority and recently to my acting as Chairman of the Electoral Boundaries Readjustment Commission for the Province, the final report of which to Parliament was completed on January 5, 1966.

The defendant's notice of motion states that the application is made

on the ground that the affidavit to lead the said warrant sworn herein the 25th day of June, 1965 by Frederic S. Taylor is defective and inadmissible, and that paragraphs 2, 3, 4 and 5 thereof should be struck out, and that no affidavit as prescribed by the Rule has been filed to lead the said warrant.

Mr. Taylor is solicitor of record for the plaintiff, and the paragraphs under reference are contained in his affidavit to lead warrant, which in full is as follows:

(1) That I am the duly authorized agent and solicitor of the above named plaintiff and I am specially instructed by the said plaintiff to make this affidavit.

(2) That I am instructed that the plaintiff is an incorporated company duly incorporated under the laws of the Republic of France with head office at Dinard in said Republic.

(3) That the plaintiff entered into a contract with the owners of the defendant to charter said ship. The owners of the defendant wrongfully repudiated said contract resulting in damages to the plaintiff in the sum of £30,400 Sterling, being the difference between the hire payable under said contract and the market rate as I am instructed.

(4) That I am further instructed that the plaintiff's claim for said sum of £30,400 Sterling has not been satisfied and that the aid of this Honourable Court is required to enforce it.

(5) That I am also instructed that the said defendant Motor Ship is a Greek vessel registered at Piraeus.

(6) That there is no Consular Officer of the Kingdom of Greece in the New Brunswick Admiralty District.

(7) That to the best of your deponent's belief there is no owner nor part owner of the ship domiciled in Canada.

Counsel for the defendant says in his brief:

Mr. Taylor's affidavit is objectionable on two basic grounds:

1. The affidavit is not made on the basis of information and belief in that it simply states that he is instructed as to the facts of which he clearly does not have personal knowledge, and there is no statement as to the deponent's belief in the facts deposed to.

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2. The source of his instructions, which certainly can be no better than information, is not identified.

The relevant Rules of the Exchequer Court of Canada on its Admiralty side are:

45. In an action in rem a warrant for the arrest of property may be issued by the Registrar at the time of, or at any time after, the issue of the writ of summons, on an affidavit being filed, as prescribed by the following rules. A form of affidavit to lead warrant will be found in the Appendix hereto, No. 15.

No. 15

Affidavit To Lead Warrant—Rule 45
(Title of Court and action)

I, A.B. (state name and address) make oath and say that I have a claim against the Ship *Mary* for (state nature of claim).

And I further make oath and say that the said claim has not been satisfied, and that the aid of this Court is required to enforce it.

---

46. The affidavit shall state the nature of the claim, and that the aid of the Court is required.

47. The affidavit shall also state—

. . . .

(d) In an action in rem on any claim—

(1) Arising out of an agreement relating to the use or hire of a ship . . . the national character of the ship and that to the best of the deponent's belief at the time of the institution of the action no owner or part owner of the ship is domiciled in Canada.

49. The Registrar, if he thinks fit, may issue a warrant, although the affidavit does not contain all the prescribed particulars, . . . or he may refuse to issue a warrant without the order of the Judge.

88 When the application (to the Court or to a Judge) comes on for hearing, . . . the Judge, after hearing the parties . . . may make such order as to him shall seem fit.

215. In all cases not provided for by these Rules the general practice for the time being in force in respect to proceedings in the Exchequer Court of Canada shall be followed.

Rules 99 to 104 respecting "Affidavits" contain nothing relevant to the issue on the present application.

Counsel for the defendant submits that the said Rule 215 brings into effect in Admiralty matters the following rule of the Exchequer Court with respect to other than proceedings in Admiralty:

168. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which

statements as to his belief with the grounds thereof may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies or extracts from documents shall be paid by the party filing the same.

Counsel also cites the following passage in McGuffie on British Shipping Laws Vol. 1, Admiralty Practice, 1964, at p. 478:

Although in practice the grounds of a witness's information and belief are frequently not stated, nevertheless the party against whom such an affidavit is made is entitled to take the objection and if the objection is one of substance, the Court is bound to pay regard to it. The Court of Appeal has commented strongly on the irregularity of an affidavit founded upon information and belief merely, without giving the source of such information and belief.

I note in passing that the above passage is in a chapter headed "Preparations for Trial", and that the cases mentioned in the footnote by the learned author, who is Registrar of the Admiralty Court in London, England, include none dealing with affidavits in Admiralty matters.

As Counsel for the defendant further submits there are decisions of the common law courts in Canada with the same ruling as those mentioned in the above footnote in respect of affidavits based on information and belief.

In the brief of Counsel for the plaintiff, *contra,* he submits, *inter alia,* that "in any event the affidavit to lead warrant does sufficiently disclose the grounds for the deponent's belief, namely the plaintiff's instructions". He also refers to a rule of the Exchequer Court:

300. The Court or a Judge may, under special circumstances, depart from any limitation in these rules upon the inherent right or power of the Court or a Judge and, furthermore, may excuse any party from complying with any of the provisions of these rules.

It appears that the sufficiency of an affidavit to lead warrant for arrest has been considered in only three cases in Canadian Admiralty jurisprudence. In *Letson v. The Tuladi,*[1] there was a motion in an action *in rem* for necessaries to vacate the warrant for the arrest of the defendant ship. The learned District Judge in Admiralty for British Columbia said:

The affidavit here does not state the national character of the ship, or that the aid of the Court is required. The first omission is of importance, the latter is almost a matter of inference; in other respects I think

[1] (1912) 17 B.C.R. 170; 15 Ex. C.R. 134; 4 D.L.R. 157.

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the affidavit sufficient. Were it not for rule 39 (now 49), I should have thought that as a whole there had not been a susbtantial compliance with the rules, but I see no escape from the fact that the registrar has, for reasons which must be assumed to be valid, and which are not required to be disclosed on the record, "thought fit" to dispense with some of the prescribed particulars, and in such circumstances I cannot perceive in what respect I am entitled to review the exercise of that discretion any more than I should be under the English rule . . . . The motion must be dismissed.

In *Victoria Machinery Depot Co., Ltd. v. The Canada and The Triumph*[1], the headnote is as follows:

> Upon an application to vacate warrants issued against a ship under arrest in an action in rem for necessaries, although it appeared that on the facts disclosed in the affidavits filed before the registrar, the Court would not have jurisdiction to issue the warrant for arrest, the plaintiffs were allowed to file supplementary affidavits to shew that there was jurisdiction to issue the warrants and that the case was one in which the discretion of the registrar could be properly exercised.

In *Rouleau v. The S. S. Aledo*[2], there was an action *in rem* by a seaman for wages against an American ship arrested at Montreal. The affidavit to lead warrant did not contain the particulars with respect to stating the national character of the ship and that notice of the action had been served on the American consul. The latter filed a protest against the prosecution of the action. The Court said:

> The American consul had power to deal with the dispute between the plaintiff and the American ship and for the reasons stated in the consul's protest, the court is entitled to exercise its discretion to decline to proceed with the present suit, and for these reasons as well as for the defective affidavit already referred to plaintiff's action is dismissed with costs, and there will be judgment accordingly.

It might be for consideration that in the present matter the defendant does not challenge the substantive matters under reference in the affidavit in question, that upon security being arranged by the parties with respect to the alleged claim the defendant's solicitor endorsed his consent on the release from arrest issued by the Registrar, that such substantive matters, if denied in the pleadings, will be explored at the trial, and that the costs of arrest might be ordered paid in any event by the plaintiff. But, nevertheless, the question remains whether there was such a failure to comply with the prescribed process of the Court that there was no jurisdiction to issue the warrant for arrest.

[1] (1913) 18 B.C.R. 511; 15 Ex. C.R. 136, 17 D.L.R. 27.
[2] [1923] Ex. C.R. 10.

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To my mind the defendant's objections to the affidavit to lead warrant are not "of substance". In the English and Canadian cases cited it is patent that the objections to the affidavits based on information and belief were of substance. In addition it may be noted that in the Admiralty Rules dealing with the particulars to be covered in an affidavit to lead warrant it is specified in the said Rule 47 that with respect to the particular of no owner being domiciled in Canada it is "to the best of the deponent's belief". It might be inferred from this that the said Exchequer Court Rule 168 is to be deemed modified with respect to "statements as to his belief with the grounds thereof" in connection with other particulars. In any event, to give the Court jurisdiction to issue a warrant for arrest it is the nature of the particulars and not the wording in which they are presented to the Registrar which is of the essence. Although I think it preferable for practitioners to employ conventional wording, it appears to me that in context the use of "instructed" connotes "belief and the grounds thereof". The source of the instructions is identified in the first paragraph of the affidavit in question.

The application is dismissed with costs in the cause.

Ottawa 1966

Feb. 1

Feb. 4

BETWEEN:

HOFFMANN-LA ROCHE LIMITED .....APPELLANT;

AND

DELMAR CHEMICALS LIMITED .....RESPONDENT.

Patents—Compulsory licence—Decision of Commissioner of Patents—Appeal from—Rejection of request to make further submission—Grant of licence on terms to be agreed—Whether appealable "decision"—Patent Act R.S.C. 1952, s. 41(3)(4).

On April 17th 1964 respondent applied to the Commissioner of Patents under section 41 of the *Patent Act* for a licence under appellant's patent. Appellant filed a counterstatement opposing the application and subsequently requested leave to make further submissions but the Commissioner rejected the request and decided to grant a licence on terms to be agreed upon by the parties within one month or, if the parties failed so to agree, upon terms that he would then settle. Appellant appealed from the Commissioner's decision rejecting the request to make further submissions and from the Commissioner's

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decision to grant respondent a licence on terms to be agreed or subsequently settled.

Held, the appeal was a nullity and must be quashed. Section 41(4) contemplates one appeal only in respect of an application for a licence and the appeal must be from the decision to grant the licence as ultimately settled. *J. K. Smit & Sons International Ltd. v. Packsack Diamond Drills Ltd.* [1964] Ex. C.R. 226, referred to.

APPLICATION.

R. G. McClenahan for appellant.

Donald J. Wright for respondent.

JACKETT P.:—This is an application for an order dismissing the appellant's appeal and all proceedings therein on the ground that the same are premature and, in the alternative, for an order staying the appeal and all proceedings therein until the Commissioner of Patents has settled the terms of a licence under subsection (3) of section 41 of the *Patent Act*.

On April 17, 1964 the respondent applied to the Commissioner of Patents under section 41(3) of the *Patent Act* for the grant of a licence under Canadian patent No. 671,044 dated September 24, 1963, of which the appellant is the patentee. On May 7, 1965, the Commissioner wrote a letter to the appellant's solicitors referring to a request by the appellant for an opportunity to amend a "counterstatement" that it had filed "with a view to submitting further evidence and submissions" and saying that he had come to the conclusion that no good purpose could be served by the submission of additional material.

On May 14, 1965, the Commissioner signed a document in relation to the matter, the last four paragraphs of which read as follows:

> Upon reading the counterstatement of the patentee in the present case I find very much the same objections and there are no new ones of any significance which would lead me to the finding of good reasons to refuse the application.
>
> I am here dealing with the same type of chemicals, the same arguments; the applicant that I have judged capable of operating processes of this type is the same.
>
> I have concluded that an oral hearing is not necessary and that the application should be granted and the grant of a licence ordered.
>
> The parties will have one month to settle between themselves the conditions of the licence including the royalty. Upon failure to do so I shall finalize the licence on my own terms or set a short period of time within which the parties will have the opportunity to make submissions.

On the same date, the Commissioner sent a copy of the document to the appellant's solicitors under cover of a letter in which he referred to it as his "decision" in respect of the respondent's application.

On May 20, 1965, the appellant filed in this Court a "Notice on Appeal" by which it purports to appeal

(*a*) from the "decision" of the Commissioner made on May 7, 1965, refusing the appellant the opportunity of submitting further evidence and submissions, and

(*b*) from the "decision" of the Commissioner made on May 14, 1965 "ordering the grant of a licence to the Respondent".

The respondent's application to the Commissioner was made under subsection (3) of section 41 of the *Patent Act*, which reads as follows:

> 41 (3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

The only provision upon which the appellant relies for authority for its appeal is subsection (4) of section 41, which reads as follows:

> 41. (4) Any decision of the Commissioner under this section is subject to appeal to the Exchequer Court.

Having regard to section 17 of the *Patent Act*, which provides that whenever an appeal to this Court from "the decision" of the Commissioner is permitted under that Act, notice of his decision shall be mailed by registered letter and "the appeal shall be taken within three months from the date of mailing", and to the characterization by the Commissioner of the document that he issued on May 14, 1965 as a "decision", it is not surprising that the appellant concluded that it was necessary to appeal from the "decision" contained in that document to avoid the risk of losing its right to appeal from that "decision". This risk is appar-

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Jackett P.

ently enhanced by the fact that the practice under section 41(3) has been, in some cases at least, for the Commissioner to purport to grant the licence, when its terms are ultimately settled, with effect retroactive to the date when he announced that he had concluded that the grant of a licence should be ordered. Nevertheless, I have come to the conclusion that there is no "decision" in this case from which there can be an appeal under subsection (4) of section 41.

Subsection (4) of section 41 provides for an appeal from a "decision of the Commissioner under this section". The only authority conferred on the Commissioner by section 41 to make a decision is that impliedly conferred by that part of subsection (3) thereof which requires him "unless he sees good reason to the contrary" to "grant" a "licence" to any person applying for one. The balance of this subsection makes it clear that he will ordinarily include various terms in a licence including a provision for royalty or other consideration. What is contemplated by that subsection, therefore, is

(*a*) an application by an applicant for licence, and

(*b*) a decision by the Commissioner

(i) refusing the application, or

(ii) granting a licence containing appropriate terms and providing for royalty or other consideration.

In my view, it is that "decision" that is subject to an appeal to this Court. It is of course true that, before the Commissioner reaches the point of making a decision disposing of an application by refusing it or granting a licence, the application will have given rise to the necessity of his making many decisions, which are impliedly authorized by subsection (3) of section 41. He must decide on the procedure to be followed in processing the application; he must decide whether there will be an oral hearing; he must decide the disposition of applications to hear further evidence or argument; and, indeed, he must decide each of the preliminary questions that arise in the course of formulating his decision as to the disposition of the application[1].

[1] Compare *J. K. Smit & Sons International Limited v. Packsack Diamond Drills Ltd.* [1964] Ex. C.R. 226, per Thurlow J. at pages 230-1, where he discusses a similar problem as to the meaning of "decision" in section 56(2) of the *Trade Marks Act*, chapter 49 of 1952-3.

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In my view, however, Parliament did not contemplate a whole series of appeals in the course of the hearing of the rather simple application contemplated by subsection (3) of section 41. Parliament did not, therefore, contemplate that there should be an appeal either from the Commissioner's refusal to hear further evidence and submissions or from his conclusion on the question whether a licence should be granted. (The formulation of such conclusion is, of course, only a part of the process of deciding what disposition to make of the appeal.) Both these matters can be brought under review in an appeal from the ultimate decision disposing of the application.

It follows, therefore, that, in my view, the appeal is a nullity and should be quashed.

The application is allowed with costs and the appeal to this Court from the Commissioner's decisions of May 7, 1965 and May 14, 1965 is ordered to be struck out.

Vancouver 1966

Jan. 26-28

Feb. 8

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

CHEMAINUS TOWING CO. LTD. .....PLAINTIFF;

AND

THE SHIP *CAPETAN YIANNIS* FIANZA COMP. NAV. S.A., and NORTH PACIFIC SHIPPING CO. LTD. ..... DEFENDANTS.

Shipping—Writ in rem against ship not served within limitation period—Power of court to renew—Whether plaintiff had reasonable opportunity to arrest vessel within jurisdiction—Admiralty R. 200—Canada Shipping Act R.S.C. 1952, c. 29, s. 655(1) and (2).

On November 18th 1963 the defendant ship allegedly damaged plaintiff's scow and on August 27th 1964 a writ was issued against defendant owners *in personam* and against defendant ship *in rem*, and was served on defendant owners but not on defendant ship. On January 5th 1966 on an *ex parte* application plaintiff obtained an order under Admiralty R. 200 renewing the writ and extending the time for service on the ground that the ship was then in Vancouver and had not been within the jurisdiction previously. Application was made to set aside the order on the ground that the ship had been in Vancouver from May 24th to June 2nd 1964, though plaintiff was ignorant of this because the ship had been omitted from the Shipping Guide.

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CHEMAINUS TOWING CO. LTD. v. THE SHIP *Capetan Yiannis* FIANZA COMP. NAV. S.A., AND NORTH PACIFIC SHIPPING CO. LTD.

Held, the order for renewal of the writ should be set aside. While Admiralty R. 200 and s. 655(2) of the *Canada Shipping Act*, R.S.C. 1952, c. 29 permit a writ to be renewed after its expiry even though the time limited by s. 655(1) for bringing the action has elapsed, plaintiff had, within the language of s. 655(2), a "reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court" before the expiration of the limitation period provided by s. 655(1), *viz* during the time she was in Vancouver from May 24th to June 2nd 1964. *Battersby v. Anglo-American Oil Co.*, [1945] K.B. 23, per Lord Goddard at p. 28; *The Espanoleto* [1920] P. 223, per Hill J. at p. 226; *A/S Motor Tramp v. Ironco Products Ltd.* [1959] Ex. C.R. 299 per Kearney J.; *Clark v. Thomas J. Gaytee Studios Inc.* [1930] 3 W.W.R. 489; *The Arraiz* [1924] 132 L.T. 715, per Pollock M.R. at p. 716; *The Kashmir* [1923] P. 85, per Hill J. at p. 90; *The James Westoll* [1923] P. 94, per Lord Parker of Waddington at p. 95; *H.M.S Archer* [1919] P. 1, per Hill J. at p. 6, considered.

D. B. Smith and *G. Donegan* for plaintiff.

J. R. Cunningham for defendant.

SHEPPARD D.J.:—This application is by the defendant owners of the ship *Capetan Yiannis* to set aside an order made *ex parte* on the 5th January, 1966, extending the time of the service of the writ *in rem* upon the ship. The facts follow.

On the 17th November, 1963, the ship allegedly damaged the plaintiff's scow through negligence. On the 27th August, 1964, a writ was issued against co-defendants *in personam* and against the defendant ship *in rem*. The writ was served upon the co-defendants but was not served upon the defendant ship, hence under Rule 17[1] the writ ceased to be in force after twelve months, including the date thereof, and under Sec. 655(1) of the *Canada Shipping Act* (R.S.C. 1952, Chap. 29) the statutory limitation of two years applied to bar further action.

On the 17th January, 1965, the plaintiff applied *ex parte*

[1] Rule 17 (enacted 19th September, 1963):—

No writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Judge for leave to renew the writ; and the Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the writ of summons be renewed for twelve months from the date of such renewal inclusive, and so from time to time during the currency of the renewal writ. The writ of summons shall, after service, be filed with an affidavit of such service.

under Rule 200[1] for an order to renew the writ and to extend the time for service on the ground that the ship was then in Vancouver and had not been within the jurisdiction previously. Accordingly the order was made. This application is to set aside that order on the ground that the ship had been in Vancouver for the period of 24th May, 1964, to 2nd June, 1964. The plaintiff was ignorant of that fact because the ship had been omitted from the Shipping Guide and hence the plaintiff's solicitors being ignorant that the ship had called, applied in good faith.

The applicants contend:

(1) That the application to extend the time for service must be made before the writ expires as provided in Rule 17, and not later, and

(2) That there are no special circumstances to permit the granting of the extension.

First, this defendant contends that the express provisions of Rule 17 for renewal before expiry impliedly excludes any renewal otherwise than as provided for in Rule 17 and therefore excludes any renewal after expiry under Rule 200 which authorizes a Judge to enlarge the time prescribed by the Rules on application before or after expiry. That contention should not succeed.

The former English Rules, Order 8, Rule 1 (M.R. 45) and Order 64, Rule 7 (M.R. 967): see Annual Practice 1961, pp. 3, 1813; were the equivalent of Canadian Admiralty Rules 17 and 200 and the express provision of Order 8, Rule 1 for renewal before expiry did not exclude an application under Order 64, Rule 7 to renew after expiry.

An application to renew after expiry was considered under Order 64, Rule 7 in *Doyle v. Kaufman*[2] and in *Hewett v. Barr*[3]. In *Battersby v. Anglo-American Oil Company, Ltd.*[4], Lord Goddard stated at p. 28:

> The plaintiffs, however, contend, and in this have the support of the decision in *Holman v. George Elliot & Co., Ltd.* ([1944] K.B. 591) that the

[1] Rule 200:—

The judge may enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding, upon such terms as to him shall seem fit, and any such enlargement may be ordered after the expiration of the time prescribed.

[2] (1877) 3 Q.B.D. 7 and 340. [3][1891] 1 Q.B. 98.

[4] [1945] K.B. 23.

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court has a discretion under Or. 64, r. 7, to enlarge the time for renewing the writ, and that it was, accordingly, open to Stable J. to renew the writ notwithstanding that the application was made more than twelve months after the date of issue. That the widest discretion is given to the court under that rule none will deny, but there is a line of authority, unbroken till the recent decision in *Holman's* case, that the court will not exercise that discretion in favour of renewal, nor allow an amendment of pleadings to be made, if the effect of so doing be to deprive a defendant of the benefit of a limitation which has already accrued.

Order 64, Rule 7 was applied to renew after expiry in the Admiralty Division in *The Espanoleto*[1], where Hill J. at p. 226 stated:

> That brings me to the real point in the case: was the plaintiff entitled to a renewal of the writ, the twelve months having expired and expired some time? The original writ was issued within two years, but it was not renewed within the proper time. The Court has power to extend the time and to give leave to renew. That is quite clear from the decision in *In re Jones* ((1877) 25 W.R. 303) and the cases I am about to mention. Whether the leave should be granted after the time has expired must depend, like every other question of granting an extension of time, upon the circumstances of the particular case.

Such judgments preclude the application of Canadian Admiralty Rule 17 as the exclusive authority for renewal and as impliedly excluding an application to renew after expiry under Canadian Admiralty Rule 200. Further, Kearney J. in *A/S Motor Tramp v. Ironco Products Ltd.*[2] held that Rule 200 did permit renewal of a writ after expiry. Moreover, Rule 200, in purporting to enlarge the jurisdiction of the Court to permit an action to proceed to trial on the merits, should receive the widest interpretation of which the words are reasonably capable. The need for such jurisdiction is evident in cases such as *Clark v. Thomas J. Gaytee Studios Inc.*[3], where the Court in the circumstances should properly take away the legal defence of statutory limitation. In the result an application in Admiralty before expiry of the writ comes within Rule 17 and after expiry within Rule 200.

Secondly, the defendants contend that the claim became barred by Sec. 655(1) of the *Canada Shipping Act* upon the expiry of the writ under Rule 17, and that the Court should thereafter not renew it so as to take away the statutory limitation at all as in *Doyle v. Kaufman, supra,* in *Hewett v. Barr, supra,* and in *Battersby v. Anglo-*

[1] [1920] P. 223.
[2] [1959] Ex. C.R. 299.
[3] [1930] 3 W.W.R. 489.

American Oil Company Ltd., supra, or at least not without special circumstances, here absent. Whatever may be the effect elsewhere of such Rules, namely 17 and 200, as for example in the Queen's Bench Division according to *Battersby v. Anglo-American Oil Company Ltd.,* on the other hand, in Admiralty the effect of such Rules is subject to certain peculiar statutory provisions: in Canada subject to Sec. 655 of the *Canada Shipping Act,* and in England subject to Sec. 8 of the *Maritime Conventions Act*[1], an equivalent section. Section 655(1) of the *Canada Shipping Act* provides a statutory limitation of two years, and Sec. 655(2) empowers the Court to grant extensions of time, notwithstanding Section 655(1).

In *The Espanoleto,* Hill J. at p. 226 states the effect of the equivalent section as follows:

> In general, leave will not be granted if, but for the enlargement of time, the plaintiff's claim would be barred by a statute of limitations. That is to say, it will not be granted to revive a barred cause of action: see *Doyle v. Kaufman* ((1877) 3 Q.B.D. 7, 340); and with reference to that case *Smallpage v. Tonge* ((1886) 17 Q.B.D. 644, 648) and especially *Hewett v Barr* ([1891] 1 Q.B. 98) In general the Court must not by renewal deprive a defendant of an existing right to the benefit of a statute of limitations But s 8 of the Maritime Conventions Act is a limitation section of a very peculiar kind, for it contains a proviso unknown to any other statute of limitations; in one event—namely, if there has not been any reasonable opportunity of arresting the defendant vessel within the period—it directs

[1] Section 8, *Maritime Conventions Act, 1911*:—

No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:

Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

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the extension of the limited period of two years, and further gives the Court power to extend it on any other sufficient grounds.

In my judgment, when an application to extend the time for the renewal of a writ in an action which comes within s. 8 is made, the matter is not to be disposed of merely by saying that the two years have elapsed and the claim is statute barred and no renewal can be granted. The application to renew must be considered on its merits, and the Court must inquire whether the circumstances are such that the Court would give leave to issue a writ, notwithstanding that the time had expired.

and in *The Arraiz*[1] Pollock M.R. at p. 716:

All that is quite true: but to the section there is a proviso. It is in two parts; and the first says that the court may extend the period to such an extent and on such conditions as it thinks fit. Now it seems to me that those words give the widest possible discretion to the court.

The second part of the proviso says that the court shall if satisfied in a particular way extend the period to an extent sufficient to give a reasonable opportunity to arrest the ship.

It is clear, therefore, that Sec. 655(2) is divided into two parts. The first is prefaced by the words, "to such extent and on such conditions as it thinks fit", and that is deemed to require special circumstances described in *The Kashmir*[2], by Hill J. at p. 90 as follows:

The only reason alleged in the present case for interfering is that the plaintiff, though she knew of the loss of her son, did not know that the loss gave her any cause of action. It seems to me that that is a wholly insufficient ground for depriving the defendants of a right which they had otherwise acquired, especially after so long an interval.

and in *The James Westoll*[3], by Lord Parker of Waddington at p. 95 as follows:

It appears to me that what the Court has to do is to consider the special circumstances of the case and see whether there is any real reason why the statutory limitation should not take effect. I have carefully read the affidavit which has been filed and really it only amounts to this, that it was not until a comparatively recent date, namely, April, 1913, that the amount of the claim could be ascertained. I think that is not a sufficient reason.

Those do not here apply.

The second part of Sec. 655(2) is prefaced by the words, "and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court", etc. This part is

[1] (1924) 132 L.T. 715. [2] [1923] P. 85.
[3] [1923] P. 94.

explained in *The Espanoleto, supra,* by Hill J. at p. 227 as follows:

> The question, to my mind, is whether, in these circumstances, first, the case comes within the obligatory part of the proviso, ...

The word "shall" is regarded by that learned Judge as making the extension "obligatory" provided the facts come within this part of the subsection. Hence, the decisive question is whether there has been "during such period" a reasonable opportunity of arresting the defendant ship. "Such period" is referred to in Sec. 655(1) as "within two years from the date when the damage or loss or injury was caused", and therefore does not commence with the date on which the writ was issued. The fact that the ship was in Vancouver within such period, that is, within two years from the date when the damage was caused, did provide the plaintiff with a reasonable opportunity for service of the writ. The ship was in Vancouver before the writ was issued. This fact does not exclude the possibility of that having been a reasonable opportunity to the plaintiff to have issued the writ in sufficient time to have served it. It may be argued that the plaintiff did not know that it had such opportunity because the ship was omitted from the Shipping Guide. However knowledge that the ship was in Vancouver is not the test. The section does not require that the plaintiff know it has a reasonable opportunity, but rather that the plaintiff have such reasonable opportunity. In other words, that an alert plaintiff could have issued and served the writ is apparent from the fact that the ship was in Vancouver for some days and the opportunity was not affected by any conduct of the defendants. In *The Kashmir, supra,* the plaintiff did not know that she had a cause of action. This fact was held not to be a sufficient reason for interfering with the operation of the statutory limitation.

For these reasons, to determine this aplication, I adopt the words Hill J. in *H.M.S. Archer*[1] at p. 6 which follow:

> Now that I have had the matter fully argued by counsel on both sides, and having considered the affidavit before me, I am satisfied that the discretion ought not to have been exercised and the order made.

The application will be allowed and the order made *ex parte* on the 5th January, 1966, will be set aside.

[1] [1919] P. 1

Vancouver 1966
Jan. 17-21
Feb 8

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

QUEEN CHARLOTTE FISHERIES LIMITED ..... PLAINTIFF;

AND

THE SHIP *TYEE SHELL* . . . . . DEFENDANT.

Shipping—Collision of ships—Narrow channel—Practice of seamen to pass port to port—Apportionment of fault.

Defendant ship, a coastal tanker of 1,600 gross tons, was proceeding east through the eastern portion of Johnstone Strait in the early morning of August 5th 1964 and altered course to port to overtake a fishing vessel about 2 miles ahead, thus bringing her to her port (or north) side of mid-channel. There her mate observed by radar the fishing packer *Norking* of 135 gross tons at a distance of 2½ miles proceeding west through dense fog on the north side of mid-channel. *Norking's* master observed defendant ship's course on his radar. Thereafter both ships continued to alter course to the north, *Norking* continuing at full speed throughout and defendant ship proceeding at full speed until just before it collided with *Norking*. The practice of seamen was to keep to the starboard side of the eastern portion of the strait so as to pass port to port.

Held, defendant ship was principally at fault for the collision. She created the position of difficulty in failing to continue her course to her starboard side of mid-channel. *Norking* was, however, at fault in proceeding throughout at full speed and in not navigating with caution. Fault apportioned 72% to defendant ship and 28% to *Norking*.

D. B. Smith and *L. Morris* for plaintiff.

J. I. Bird, Q.C. and *J. S. Clyne* for defendant.

SHEPPARD D.J.:—This action arises out of a collision in the eastern portion of Johnstone Strait on the 5th August, 1964, at 0325 between the *Tyee Shell*, the defendant vessel, and the *Norking* owned by the plaintiff. The *Tyee Shell*, a coastal tanker of 249 feet overall in length, 1,599 tons gross and 838 tons registered, with a cargo of 1,500 tons of oil, was inbound on a passage from Namu, B.C. to Vancouver, B.C. and proceeding east of Vansittart Point in the eastern portion of Johnstone Strait, there overtaking a fishing vessel about two miles ahead, altered course to port to overtake and pass that vessel. This carried her to her port side (or north) of mid-channel. There Oselg, the mate of the *Tyee Shell* on watch, observed by radar a vessel, later

proved to be the *Norking*, on the starboard bow at a distance of about two and one-half miles, which was going west on the north side of mid-channel. The mate of the *Tyee Shell* then decided that having crossed to the north side of mid-channel, he would remain there and continue north until the *Norking* had passed and thereafter would overtake and pass the fishing vessel.

The *Norking*, a fish packer of approximately 107 feet in length, of gross tonnage of 134.87 and registered tonnage of 91.71, her cargo 30 tons of ice, was on a voyage from Vancouver, B.C. to Namu, B.C. She was proceeding west through this eastern portion of Johnstone Strait. On watch, on the bridge were the Master at the radar, the mate as lookout at an open window of the wheelhouse and the helmsman. At Chatham Point and thereafter she ran into dense fog which continued until the time of collision with the visibility varying from time to time from 100 feet up to 100 or 150 yards. The vessel came abeam of Ripple Point on course 282° mag., at a distance under one-half mile, ran past to Point C (on Chart, Ex. 3), and proceeded west on 244° mag. which brought her on to her starboard side of the channel. The Master at the radar observed at a distance of about four and one-half miles off his port bow an echo which he first took to be a tug and tow but later saw that there were two vessels, one of which proved to be the *Tyee Shell*; the other was a fishing vessel. The *Tyee Shell* altered course to port to overtake and pass the other vessel and thereby crossed to the north side of mid-channel. The *Norking* was at that time in dense fog which was drifting to the west, but the *Tyee Shell* could see the fishing vessel being overtaken and that there was ahead a dense fog into which the *Tyee Shell* entered at 0321 some seven minutes before the collision.

The sequence of changes in course is as follows: 0314, the *Tyee Shell* altered course to port 10°, that is, to 081° true, to overtake and pass the fishing vessel. The *Norking* at a distance of four and one-half miles, by radar saw the *Tyee Shell* ahead, and altered course $\frac{1}{4}$ point ($2\frac{1}{2}$° to 3°) to starboard. The *Tyee Shell* saw by radar the *Norking* when distant about two and one-half miles and thereupon at 0320 altered course to 070° true. The *Norking* again altered course to starboard $\frac{1}{4}$ point. At 0321 the *Tyee*

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Shell rang standby engines on account of fog. At 0322 the *Tyee Shell* again altered course to port to 065° true. At 0323 she reduced speed to slow, at 0324 changed to full astern, at 0326 to slow astern and at 0328 collided with the *Norking*.

In the collision the stem of the *Tyee Shell* cut into the port bow of the *Norking* aft of the stem and forward of the bridge almost to midships. The question is the fault which has contributed to that collision.

The evidence does not prove this eastern portion of Johnstone Strait to be a narrow channel within Rule 25, nor does it disprove it, but it is established that those on watch of the *Tyee Shell* did neglect the precautions required by the ordinary practice of seamen, contrary to Rule 29. In *The Jaroslaw Dabrowski*[1], Langton J. at p. 27, in citing *The Varmdo*[2], held that the test of a narrow channel "within the rule is that which by the practice of seamen is treated, and necessarily treated, as a narrow channel". This eastern portion of the Strait, that is from Camp Point to Ripple Point, is approximately eight miles in length from east to west, and the navigable channel, that between lines drawn on each side between the headlands, is about three-quarters of a mile wide. On the west side of this eastern portion of the Strait there is Race Passage and on the east the passage between Pender Island and Ripple Point. These passages to the west and to the east are narrow channels within Rule 25 and have been so held in *Union Steamships Limited v. Alaska Steamship Company*[3]. *New England Fish Company of Oregon v. Britamerican Ltd*[4]. Hence each vessel entering into or emerging from either narrow channel must keep to her starboard side of the narrow channel so as to permit therein a port to port passing (Rule 25), and it would obviously add a difficulty to navigation in clear weather and a menace in restricted visibility to permit vessels to proceed on either side of this portion of the Strait in any direction. On the weight of the evidence, the common practice of seamen is to keep to the starboard side of this eastern portion of the Strait so as to pass port to port. That is proven by the evidence of

[1] [1952] 2 Ll. L.R. 20.
[2] [1940] P. 15.
[3] (1952) 15 W.W.W.R. 121 (*Re* Race Passage)
[4] [1959] Ex. C.R. 256.

Captain Horne, a B.C. Pilot, Captain McIntosh, Master of the *Norking*, Steel, the mate of that vessel, who testified that the practice is for vessels to keep to starboard of mid-channel, westbound to the north shore, and that the vessels pass port to port. According to Captain Horne, the exception is rare, to the effect that if you have a vessel giving you a broad green and you watch for some minutes, it is better to take green to green. Such evidence is to be preferred to that of Captain Belotti, who said that vessels pass green to green and red to red in the proportion of 50 to 50, although he himself prefers red to red if the circumstances permit.

The *Tyee Shell* when abeam the Vansittart Point was on a course of 091° true which course would have taken her over towards the starboard side of the channel. Moreover, the *Tyee Shell* had been overtaking a fishing vessel of which the stern light could be seen and which fishing vessel was on a course which permitted her to pass the *Norking* port to port without incident. Nevertheless the second mate of the *Tyee Shell* decided to alter course 10° to port and then continued to hold over along the north shore by altering course a total of 26° to port onto 065° true, and all of this in spite of the fact that the mate of the *Tyee Shell* could see by radar that the *Norking* was holding along the north shore.

The *Tyee Shell* was at fault under Rule 29 in not following the ordinary practice of seamen in failing to keep to her starboard side of the channel so as to pass the *Norking* port to port. There was nothing to have prevented the *Tyee Shell*, from slowing down and following the fishing vessel until she had passed the *Norking*, or to have prevented the *Tyee Shell*, after having altered course to port, to have returned to her starboard side of the channel. The mate on watch stated that having got to the north he decided to keep on to the north, and hence he intended passing the *Norking* starboard to starboard somewhere to the north of mid-channel. So far as those on the *Tyee Shell* could know at a distance of two and one-half miles, the meeting vessel, which proved to be the *Norking*, might have had no radar and therefore would be obliged to follow her starboard shore in fog to know where she was. The *Tyee Shell* was therefore at fault in failing to keep to her starboard side of mid-channel, as required by the ordinary

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practice of seamen, and in failing to keep to her starboard side she has committed the additional faults:

(1) She failed to slacken speed and remain behind the fishing vessel and thereby pass the *Norking* to port as did the fishing vessel.

(2) Having altered course to 081° true from 0314 to 0320 and thereby proceeding to the north side of the channel, she failed to return to her starboard side but made further changes to port by altering to 070° and 065° true.

(3) She failed to see by radar whether or not the way was clear before turnimg to port 10° to overtake and pass the fishing vessel. Captain McIntosh testified that he first saw by radar the vessels to port. After the *Tyee Shell* had altered to 081° true she had the *Norking* to starboard.

In contrast thereto the *Norking* followed a proper course. She came abeam of Ripple Point on 280° mag. at a distance of approximately one-half mile, then ran past to point C (on Chart, Ex. 3) and there altered course to 244° mag. That is a proper course and would bring her in good position to clear Vansittart Point on the north, to permit her to keep to her starboard of Race Passage and to pass on her port any vessels met in the meantime. Further, the tide did not set at 3 knots through the Strait. Captain McIntosh stated that at such rate there would be a turbulence at Knox Bay, which was not the case, and further, the helmsman stated that the tide was not sufficiently strong to have any appreciable effect in keeping the course. It appears rather that the effect of the tide after Vansittart Point throughout this eastern portion of the Strait at that stage, namely on the ebb for one hour and twenty minutes, would be at the most one knot, thereby reducing the speed of the *Tyee Shell* from 12 knots to 11 knots at full speed; that would have permitted her to reach the point of collision at 0328 as shown on Chart (Ex. 3) which she would not have reached against a 3-knot tide.

The initial fault was that of the *Tyee Shell* exclusively. It was urged by counsel that there were subsequent faults

that had contributed to the collision. The subsequent faults raised are as follows:

(1) It was contended that the *Norking* had a defective lookout both visually and by radar. Captain McIntosh, her Master, has stated that to the west of Chatham Point there was dense fog which continued to the point of collision and in which the visibility was 100 feet, or from 100 to 150 yards. Evidently there were pockets in which the visibility varied but the fog would generally be described as dense. Oselg, the mate of the *Tyee Shell* admits that his vessel was in dense fog for seven minutes before the collision. The *Norking* had on the bridge at material times from Chatham Point westward, the Master at the radar, the mate at an open window to the starboard side of the bridge, and the helmsman, and in the engine room the second engineer. There is no evidence that the mate was not in a proper place for a lookout as this was a small vessel and he was within 40 to 50 feet of the stem. The mate was alert, as he heard the first fog signal of the *Tyee Shell* and reported it to the Master, and heard the *Tyee Shell* when coming close immediately before the collision, which he also reported. He was there to listen and to see. There was a dense fog but he did see the green light of the *Tyee Shell* as the ships collided.

As to the radar, the fault alleged is that the Master, Captain McIntosh, had had only one-half hour of instruction and did not use the cursor. There is no evidence that there was absence of competency in the use of the radar. The *Norking* saw the *Tyee Shell* at a distance of four and one-half miles but the *Tyee Shell* did not see the *Norking* ahead until she was within two and one-half miles. It was admitted that the course and speed of the *Tyee Shell* was not plotted by the Master of the *Norking* but neither was that of the *Norking* plotted by the *Tyee Shell*. The real contention was that the radar of the *Norking* was defective by reason of having a blind spot, but the evidence is that the radar was operating effectively.

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In contrast thereto the *Tyee Shell* had a defective lookout both visually and by radar. The second mate and helmsman only were on the bridge. There the mate had to set the course, check the course maintained, operate the engine changes as the throttle was in the wheelhouse, operate the radar and the whistle, keep the wheelhouse log, and maintain a lookout visually and by radar. Amongst those duties the mate had not sufficient time to maintain a proper lookout and in any event the bridge was 150 feet from the stem where the lookout should have been placed. There was a deckhand on watch who was available to be called as a lookout but he was allowed to clean out the after portion of the vessel. The Master in such dense fog should have been on the bridge where he could take charge and relieve the mate of some of the duties. However, the Master was not called, although fog was seen ahead and the vessel was in dense fog for seven minutes before the collision. Standing orders required the Master to be called.

The *Norking* kept a proper lookout but the *Tyee Shell* did not and hence was at fault under Rule 29.

(2) It is further contended that the *Norking* was at fault in failing to stop the engines, and as she proceeded throughout at full speed (10 knots) she also failed to navigate with caution as required by Rule 16(*b*). The *Norking* did commit those faults.

The *Tyee Shell* did not navigate at altered speed near or on entering or in the fog as laid down in Marsden's Work, The Law of Collisions at Sea, 11th ed., p. 770, cited in *Imperial Oil Limited v. M/S Willowbranch*[1] as follows:

> Apart from the regulations, the law requires a ship to be navigated in or near a fog at a moderate speed; the regulations make no alteration in the law in this respect.
>
> Vessels approaching a bank of fog or snow, which they are about to enter, should, as a matter of seamanship, go at a moderate speed. Failure to comply with this duty does not, however, amount to a breach of rule 16; but if, in the result, her speed when she enters the fog is not moderate she may then be in breach...

[1] [1964] S.C.R. 402 at 407.

The mate on watch sighted fog ahead and knew that the *Norking*, visible on radar, was ahead two and one-half miles but hidden by the fog. Nevertheless the *Tyee Shell* later, at 0321, entered the fog at full speed, at 0322 altered course to port to 065°. The mate on watch admits that the changes in course had not materially changed the bearing of the *Norking*.

The mate of the *Tyee Shell* testified that he stopped the engines for one minute but the wheel-house log, the engine room log and the preliminary act contain no such entry. The engines were not stopped before the collision. At the time of the collision the *Tyee Shell* had sufficient way on to penetrate the bow of the *Norking* up to amidships.

(3) It is contended that the *Norking* altered course in fog without knowing the course of the other vessel. Neither vessel plotted the course and speed of the other.

(4) It is contended that the *Norking* took no avoiding action. That is not tenable. Throughout, the *Norking* changed to starboard believing that the *Tyee Shell* would return to her proper side to pass port to port, and further that the *Tyee Shell* would not follow so closely to the north shore as could the *Norking*, a small vessel. The collision occurred about $2\frac{1}{2}$ cables from the north shore.

The faults which caused the collision may be summarized as follows bearing in mind the rule that only those faults that did contribute are relevant: *Thompson v. Ontario Sewer Pipe Company*[1].

The *Tyee Shell* committed the initial fault in failing to keep to her starboard side of the channel so as to pass the *Norking* port to port, therefore was at fault under Rule 29 and that fault continued until the collision. In *Imperial Oil Limited v. M/S "Willowbranch"*, *supra*, Ritchie J. in stating the judgment of the Court said at p. 410:

In my opinion, however, the fault of these two ships is not to be assessed only in terms of their respective actions at close quarters, and I

[1] (1908) 40 S.C.R. 396.

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adopt the language used by Wilmer J. in *The Billings Victory* ((1949) Lloyds Rep. 877 at 883), where he said:

> "It appears to me that the most important thing to give effect to in considering degrees of blame is the question which of the two vessels created the position of difficulty."

In this instance the *Tyee Shell* created "the position of difficulty" in failing to continue her course to her starboard side of mid-channel and further not only continued that fault to collision but also added additional faults.

The *Tyee Shell* did not keep a proper lookout as required by Rule 29. The *Tyee Shell* did not navigate with caution.

The *Norking* was at fault in proceeding throughout at full speed, therefore she did not navigate with caution until the danger of collision was over as required by Rule 16(*b*). It was urged in mitigation that such fault was not an originating cause but rather occurred in taking avoiding action which was required by the initial fault of the *Tyee Shell* and that the Master of the *Norking* kept going to starboard thinking that the *Norking* could go so close to the north shore that the other and larger vessel, the *Tyee Shell* could not follow. However, the *Norking* did not navigate with caution, and the Rule requires that it do so. Here the faults appear to be essentially questions of fact: *The Heranger*[1], per Lord Wright at p. 101.

Under the circumstances of this case the fault of the *Tyee Shell* is the greater, not only in having committed the initial fault, but also in adding thereto by subsequent faults of navigation. The *Norking* was at fault within Rule 16 (*b*). I assess the degrees of respective fault as follows: against the *Tyee Shell* 72%, and against the *Norking* 28%.

There will be a reference to the Registrar to determine the amount of the damages. The costs and interest may be spoken to.

I wish to express my appreciation for the able and competent assistance of the Assessors, Captain R. W. Draney and Captain E. B. Caldwell.

[1] [1939] A.C. 94.

BETWEEN:

WATSON & McLEOD LTD. ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .. . . RESPONDENT.

Calgary 1966 Jan. 26-28

Ottawa Feb. 14

Income tax—Income or capital—Company in gravel business—Purchase of land in hope of finding sand—Subsequent sale of land—Whether realization of capital asset—Grant of exclusive contract to remove gravel—Whether payment therefor of revenue nature.

Appellant company, which had three equal shareholders, carried on business in Calgary of selling gravel from land which it held under a lease expiring on June 30th 1965.

In January 1958 W, one of appellant's shareholders, made a deal to buy for appellant a 38 4 acre farm near Calgary for $40,000 in the belief (based on an excavation he had made on adjoining property in 1945) that it might contain sand, which appellant's shareholders had been seeking with a view to setting up a concrete operation. The farm was then under lease at $30 a month. The terms of sale provided for payment of $20,000 down and $20,000 on March 1st 1960 with interest at 6% per annum, and that the vendor should retain possession until September 30th 1958 There was no suburban development nor any municipal services near the land, but it was close to rapidly developing Calgary and near a proposed site for a university. Tests conducted shortly afterwards showed that the sand on the land was not commercially useful for mixing concrete, and appellant did nothing with the land until December 1960 when it sold it for $115,200, i.e at a profit of $75,200.

On February 28th 1959 appellant contracted to sell gravel to S Co for the duration of its lease at a fixed price per yard and, in addition, a payment of $60,000 (payable in 6 annual instalments of $10,000) for the exclusive access to the property (subject to appellant's right to remove gravel for development purposes conducted by itself or by another specified company) It was a condition of the contract that appellant should obtain and maintain all necessary permits for S Co, and in connection therewith appellant was obliged to make an engineering survey of the land and undertook to level and seed worked out areas.

Held, appellant was assessable to income tax in respect of both matters

(1) The highly speculative value of the farm and the fact that appellant dealt with it as a speculative dealer would have dealt with it pointed to the conclusion that the $75,200 profit made on the sale of the farm arose from a venture in the nature of trade rather than from the realization of an investment *Irrigation Industries Ltd. v M.N.R.* [1962] S C R 346 at 360, *M N R v Taylor* [1956] C T C. 189, applied.

(2) The contract by which S Co obtained an exclusive right with respect to the removal of gravel was simply a commercial contract made by appellant in the course of carrying on its trade of selling gravel and the $10,000 instalment received therefor in the taxation year was accordingly a revenue and not a capital receipt *Van Den Berghs Ltd.*

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v. Clark [1935] A C 431 per Lord Macmillan at p. 440 distinguished and applied.

APPEAL from a decision of the Tax Appeal Board.

R. A. F. Montgomery for appellant.

T. E. Jackson and *S. A. Hynes* for respondent.

THURLOW J.:—This is an appeal from a judgment of the Tax Appeal Board[1] which dismissed the appellant's appeal from a reassessment of income tax for the year 1961. There are two matters in issue. The first is whether a profit of $75,200 which the appellant realized on the sale of a parcel of land is income within the meaning of the statute. The other, which was not raised in the appeal before the Board, is whether an instalment of $10,000 received by the appellant on account of a larger amount of $60,000 payable to it by Standard Gravel and Surfacing of Canada Limited for an exclusive right to remove gravel from certain premises is income within the meaning of the statute. The Minister added to the income declared by the appellant both the $75,200 and the $10,000 and, after allowing a reserve pursuant to s. 85B(1)(*d*) of the Act in respect of the unpaid portion of the $75,200, assessed tax accordingly.

The appellant was incorporated in June 1955 and since then has been owned and controlled by three shareholders each holding a one-third interest. The first of these, Victor Watson, is a farmer and contractor who engages in contracts for road and irrigation work. The second is John C. McLeod, the secretary and a twenty-five per cent shareholder of Spyhill Development and Holding Co. Ltd., a company engaged in land development in the City of Calgary and particularly in the north-western portion thereof where an area known as Spyhill is located. The third is Frank Reid, a farmer, who was one of three owners of a half section of land, known as the Frey property situated near the northern boundary of the City of Calgary not far from the Calgary International Airport. Early in 1955 Watson made a verbal deal with Reid under which Watson obtained the exclusive right for ten years to take gravel and sand from this property at a set price per yard with a minimum payment of $600 per year for the ten year period. Having made the deal Watson invited McLeod to take an

[1] (1963-64) 34 Tax A.B.C 426.

interest in the contract and the appellant company was then formed with broadly expressed objects including investing in, developing and improving land, and constructing buildings thereon, buying, selling and dealing in, *inter alia*, gravel and sand and acquiring, holding or otherwise dealing in real and personal property and rights. The three persons mentioned became the shareholders and directors of the company and the company proceeded to engage in and work up a business of supplying gravel to the public in general but more particularly to persons engaged in land development including the Spyhill Development & Holding Co. Ltd. As the digging, crushing, loading and hauling were done either by the purchasers or by a contractor the appellant required no employees and maintained no business office.

In January 1956 the agreement with the owners of the land was reduced to writing by a letter addressed by them to the appellant and acknowledged by the latter. It provided for payment for gravel at the rate of $7\frac{1}{2}¢$ per yard and for sand at the rate of $20¢$ per yard with, as previously mentioned, a minimum annual payment of $600 and fixed June 30th, 1965 as the date of termination of the right thereby granted. The property contained an estimated $2\frac{1}{4}$ million yards of gravel but little or no sand in commercial quantity.

In the following year the three shareholders of the appellant company began looking for a practical and economical source of sand for the purpose of supplying materials for a pre-mix concrete operation which several small contractors had suggested could be set up and operated from the Frey property if a supply of suitable sand could be obtained. For this purpose tests were made on a number of prospective sites during the summer of 1957 but these either were not available or the sand was not of satisfactory quality.

On or about February 12th, 1958 Mr. Watson contacted a man named Johnson and on behalf of the appellant offered him $800 an acre for a property consisting of some 38.4 acres of agricultural land with a small house and some other buildings thereon. Johnson was interested but required a week to think the matter over at the end of which time he put a firm price of $40,000 on his property. Watson agreed to buy at that price and thereupon paid a deposit of

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$5,000 to bind the bargain. Subsequently on February 28th, 1958 an agreement of sale of the property was executed by Johnson and the appellant providing for payment of $40,000 for the property by payment of $20,000 on execution and a further payment of $20,000 on March 1st, 1960 with interest at six per cent thereon payable yearly. The property was at that time let to a tenant who paid some $30 a month rent and the agreement provided that the vendor should retain all benefits under the lease until September 30th, 1958 from which date the appellant should have the right to possession and should be responsible for the outgoings.

At the time of the purchase there was no suburban development of the city within half a mile of the property, most of the property was higher than the existing water supply installation could serve and there were no sewers or other municipal services immediately available or likely to be available to serve a development of the property for several years. On the other hand the land was in a highly speculative area. The development of the City of Calgary was proceeding at a fast pace, and there had been publicity respecting proposed development of land half a mile to the southward as a site for a university. The land also adjoined the western boundary of land belonging to and held by the Spyhill Development & Holding Co. Ltd. for the purpose of developing it. The speculative character of the property also appears both from comparison of the price paid with the rental revenue obtainable, and from the conduct of the parties in negotiating the price.

According to Mr. Watson his purpose in buying the Johnson property was to acquire a sand pit and he had no other purpose. In 1945 in the course of making an excavation on an adjoining property he had cut through twelve to fifteen feet of sand which suggested to him that there would be sand on this property as well. He did not want the vendor to know that he hoped to find usable sand on the property and he therefore bought it for the appellant and paid the deposit without making tests to ascertain the quantity or the quality of sand that might be present in the property. He did so as well without consulting either of his associates with respect either to their knowledge of the presence of sand on the property or their views as to the price to be paid.

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In April or May of the same year tests were conducted on the property and it was found that while sand was present it was not useful for making concrete without processing to remove clay therefrom. As this would not have been economical the appellant had no use for the property in its business and but for some small amounts of rental received from a tenant, who seems to have been put in possession by the appellant largely as a caretaker, derived no revenue therefrom during the time it was held. According to Mr. Watson most of the time land in the area was selling for $500 an acre and the shareholders were hoping to get their $1,000 or thereabout an acre back. Just when the purchase was ultimately completed does not appear but presumably it was completed on or about March 1st, 1960.

In the meantime on February 28th, 1959 the appellant had entered into an agreement with Standard Gravel and Surfacing of Canada Limited with respect to the gravel on the Frey property. Standard was a customer who had bought gravel from the appellant and at that time was interested in bidding for two contracts for works at the airport which would require a large quantity of gravel. That company accordingly bargained with the appellant both for a set price for gravel which they might require and for a right which would enable it to deny its competitors the opportunity to count on purchasing gravel from the property. The agreement, after reciting the exclusive right of the appellant to remove sand and gravel from the land until June 30th, 1965, provided that Standard might take gravel from the property during the remainder of the appellant's term at ten cents per ton, and sand at twenty cents per ton, and that Standard might set up such plant and other installations as its operation might require. In turn it undertook to remove the same upon termination of the agreement and to leave the parts of the property on which it had worked clear of debris and in a neat and tidy condition. The agreement further provided that Standard should have "the exclusive right of access and egress to and from and of occupation of the land for the purpose of any and all of its operations" in respect to removing gravel from the land, provided however, that the appellant should have the right to remove gravel required for subdivision development work conducted by the appellant itself or by

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Spyhill Development and Holding Co. Ltd. The appellant's existing stockpile of crushed gravel was also excepted from the terms of the agreement. In consideration of the exclusive rights so granted to it Standard agreed to pay, in addition to the price already mentioned for sand or gravel removed by it, the sum of $60,000 in six annual payments of $10,000 each commencing on March 1st, 1959. The appellant undertook to make efforts at its own expense to obtain and maintain such permits as might be necessary to entitle Standard to carry on its activities on the land and it was provided that if the permit for Standard to commence its activities was not obtained the initial $10,000 payment should be returned and that if any permit expiring during the term should not be renewed immediately the agreement should become void and a proportionate part of the $10,000 paid in respect of the year in which the agreement terminated should be repaid to Standard. The obtaining of these permits involved the making of an engineering study as to the contours of the land before and after the operation and an undertaking by the appellant to level and seed worked out areas.

Standard obtained the airport construction contracts in which it was interested and in the years 1960 to 1964 inclusive paid the appellant sums totaling $123,415.76 for gravel removed from the property. That these sums were revenue receipts in the appellant's hands is not in dispute. But in the 1961 taxation year to which this appeal relates the appellant also received one of the $10,000 payments under the contract which, as previously mentioned, the Minister included in his computation of the appellant's income for the year.

In the latter part of 1960 the appellant accepted an offer from the Spyhill Development and Holding Co. Ltd. for the Johnson property and by an agreement dated December 1st, 1960 sold it for $115,200. By that time, water service had become available to part of the property, contracts had been let for the construction of buildings on the university property half a mile to the southward and the city had revised its plans for providing services in the area and in particular had advanced its plans for a water system to supply the area. A water supply in fact became available for the whole of the property in the following year. The appellant thus realized a profit of $75,200 on the sale of the

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property and the nature of this profit for the purposes of the *Income Tax Act* is the other matter in issue in the appeal.

It will be convenient to deal with this issue first. The question to be determined is whether the $75,200 profit realized on the sale of the property was profit from a business within the meaning of that term which, as defined in s. 139(1)(*e*) of the *Income Tax Act*, includes a "venture or concern in the nature of trade". The Minister's position is that the profit in question was profit realized by the appellant in the course of carrying on its business or alternatively was profit from a venture in the nature of trade. The appellant's position is that the profit arose neither from its business nor from a venture in the nature of trade but from a mere realization of a capital asset.

The case is perhaps a close one, with some features tending to support the appellant's submission and others pointing to the opposite result but on balance I have come to the conclusion that the profit in question arose from a venture in the nature of trade. I observed nothing in the demeanour of Mr. Watson which would cause me to discredit his evidence that his purpose in purchasing the property was to acquire a source of sand but the determination of cases of this kind depends on the particular facts[1] and there are features of the present situation which appear to me to stand out above the others and to point to the conclusion which I have reached.

First the property at and from the time of its purchase by the appellant was a highly speculative one. Land may, of course, be useful for a great variety of purposes and have value accordingly depending on its location and other characteristics. But at the price of $40,000, which Mr. Johnson put upon it, this property plainly had value in excess of what it was worth for the agricultural purposes for which it was let at $360 or thereabouts per year. It might also have had value to the appellant for the sand on it, had there been any there, but that was undetermined and the possibility was not made known to the vendor. Yet he held out for $40,000. He did so in my opinion because he knew the property had value arising from its location not far from

[1] *Vide* Cartwright J. in *Irrigation Industries Ltd. v. M.N.R.* [1962] S.C.R. 346 at 360 where the principles expounded by Thorson P. in *M.N.R. v. Taylor* [1956] C.T.C. 189 are summarized.

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the suburban residential development of a rapidly growing city. The property was also no mere building lot but a substantial area of land which could be expected to become ripe for subdivision and development within the space of a few years. The nature and quantity of this land, the subject matter of this venture, thus, while not necessarily such as to "exclude the possibility that its subsequent sale by the appellant was the realization of an investment, or otherwise of a capital nature, or that it could have been disposed of otherwise than as a trade transaction"[1] is, I think, at least strongly suggestive that its sale was not the realization of an investment but a disposal as a trade transaction.

Secondly, the property appears to me to have been dealt with as a speculative dealer in land might have been expected to deal with it. It was bought for $40,000 with a down payment of half the amount and with completion of the transaction deferred for two years. Despite the interest which would accrue from the time of the making of the agreement possession was not to be assumed for seven months. These were spring and summer months. Yet so far as appears the appellant obtained no right to remove sand from the property in the meantime, and apart from the making of some tests for sand, the property from the time of its purchase was simply held until it was ripe for disposal to a development company at a substantial profit and thereupon disposed of accordingly. And this occurred within a year after the final payment fell due.

On both of the two positive tests propounded by Thorson P. in *M.N.R. v. Taylor*[2] the balance thus favours the conclusion that this was a venture in the nature of trade.

Nor do I see in the evidence, when read as a whole, anything which outweighs these considerations. The evidence of Mr. Watson's intention indicates that he hoped and thought, perhaps optimistically, that usable sand would be found on the property and that had usable sand been found it would have been turned to account by using the sand in the appellant's business. This, however, was only a possibility. Apart from it he had no intention or

[1] *Vide Irrigation Industries Limited v. M.N.R.* [1962] S.C.R. 346 where at 352 Martland J. treated the land involved in *Regal Heights Ltd. v. M.N.R.* [1960] S.C.R. 902 as a subject matter to which this principle applied.

[2] [1956] C.T.C. 189.

purpose for the property and in the circumstances disclosed by the evidence I do not think it can be said either that his intention was exclusively to acquire the property as an item of capital or that the purchase itself was exclusively an acquisition of the property for use as a capital asset in the business or to hold as an income yielding investment.

Accordingly I am of the opinion that the profit in question was properly taken into account in computing the appellant's income for tax purposes and the appeal on this issue therefore fails.

This brings me to the other issue in the appeal, that is to say, whether the payment of $10,000 received from Standard on account of the $60,000 payable in respect of the exclusive right granted to it was of a revenue nature and thus properly included in the computation of the appellant's income.

In considering this problem the distinction to be applied in my opinion is that stated in *Van Den Berghs, Limited v. Clark*[1] where after referring to *British Insulated and Helsby Cables, Ltd. v. Atherton*[2] and citing the principle there stated by Viscount Cave, Lord Macmillan said at page 440:

> My Lords, if the numerous decisions are examined and classified, they will be found to exhibit a satisfactory measure of consistency with Lord Cave's principle of discrimination. Certain of them relate to excess profits duty and not to income tax, but for the present purpose this distinction is immaterial. A sum provided to establish a pension fund for employees, as has already been seen, is a capital disbursement: *British Insulated and Helsby Cables, Ld. v Atherton* [1926] A C 205; so is a sum paid by a coal merchant for the acquisition of the right to a number of current contracts to supply coal: *John Smith & Son v. Moore* [1921] 2 A C 13; so is a payment by a colliery company as the price of being allowed to surrender unprofitable seams included in its leasehold: *Mallett v. Staveley Coal & Iron Co.* [1928] 2 K B 405 Similarly a sum received by a fireclay company as compensation for leaving unworked the fireclay under a railway was held to be a capital receipt: *Glenboig Union Fireclay Co. v. Commissioners of Inland Revenue* [1922] S C (H L) 112
>
> On the other hand, a sum awarded by the War Compensation Court to a company carrying on the business of brewers and wine and spirit merchants in respect of the compulsory taking over of its stock of rum by the Admiralty was held to be a trade or income receipt: *Commissioners of Inland Revenue v Newcastle Breweries, Ld.* (1927) 12 Tax Cas. 927: so was a sum paid to a shipbuilding company for the cancellation of a contract to build a ship: *Short Brothers, Ld. v. Commissioners of Inland Revenue* (1927) 12 Tax Cas 955; so was a lump sum payment received by a quarry company in lieu of four

[1] [1935] A C. 431 [2] [1926] A.C. 205.

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annual payments in consideration of which the company had relieved a customer of his contract to purchase a quantity of chalk yearly for ten years and build a wharf at which it could be loaded: *Commissioners of Inland Revenue v. Northfleet Coal and Ballast Co.* (1927) 12 Tax Cas. 1102; so was a sum recovered from insurers by a timber company in respect of the destruction by fire of their stock of timber: *J. Gluksten & Son v. Green* [1929] A.C 381. Conversely, where a company paid a sum as the price of getting rid of a life director, whose presence on the board was regarded as detrimental to the profitable conduct of the company's business, the payment was held to be an income disbursement: *Mitchell v. R. W. Noble, Ld.* [1927] 1 K.B. 719; so was the payment made in the case of the *Anglo-Persian Oil Co. v. Dale* [1932] 1 K B. 124 in order to disembarrass the company of an onerous agency agreement. There are further instances in the reports, but I have quoted enough for the purposes of illustration.

Lord Macmillan then discussed the facts of the case before the House and in doing so said at page 441:

> It is important to bear in mind at the outset that the trade of the appellants is to manufacture and deal in margarine, for the nature of a receipt may vary according to the nature of the trade in connection with which it arises. The price of the sale of a factory is ordinarily a capital receipt, but it may be an income receipt in the case of a person whose business it is to buy and sell factories.

and at page 442:

> The three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products, or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary the cancelled agreements related to the whole structure of the appellants' profit-making apparatus. They regulated the appellants' activities, defined what they might and what they might not do, and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of, so fundamental an organization of a trader's activities can be regarded as an income disbursement or an income receipt. Mr. Hills very properly warned your Lordships against being misled as to the legal character of the payment by its magnitude, for magnitude is a relative term and we are dealing with companies which think in millions. But the magnitude of a transaction is not an entirely irrelevant consideration. The legal distinction between a repair and a renewal may be influenced by the expense involved. In the present case however, it is not the largeness of the sum that is important but the nature of the asset that was surrendered. In my opinion that asset, the congeries of rights which the appellants enjoyed under the agreements and which for a price they surrendered, was a capital asset.

In the present case the trade or business of the appellant was to deal in gravel, of which a large quantity, consisting

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of the whole of the gravel on the Frey property, was available to it at a fixed price per yard. Standard was not a competitor but was the appellant's customer and was interested in obtaining a set price for the gravel it might require and a right to acquire the bulk of the gravel which the appellant had the right to sell. Standard and the appellant accordingly for commercial reasons concluded what appears to me to be simply a commercial contract made by the appellant in the course of carrying on its trade, a contract respecting the disposal to Standard of gravel which the appellant had for sale. In these respects therefore the situation was the opposite of that in the *Van Den Berghs* case. Moreover while the $60,000 was a single amount payable in respect of the whole of the remainder of the appellant's term it was payable only in proportion to such part of the term as the municipal permits to be obtained by the appellant might cover and there was thus something to be done by the appellant in the course of its business activities from time to time during the term to perfect its right to the amount. Since the digging, crushing, loading and removing of gravel from the property in the course of the appellant's operation was normally done by others, including customers, one of whom was Standard itself, there was nothing unusual to the appellant's mode of operation in the appellant giving Standard the right to enter the property and to dig, crush, load and remove gravel and in the circumstances, despite the fact that the appellant, by giving Standard (subject to some exceptions) an exclusive right to do so, restricted and committed itself to dealing with a single customer in respect of a large portion of its business the transaction appears to me to have been entered into in the course of its trading activities and to have been but a particular mode of earning profit from the right which the appellant had to purchase gravel from the owners of the property at a favourable price. In my opinion the amount was accordingly part of the revenue of the appellant's business and was properly taken into the computation of its income for tax purposes.

The appeal will be dismissed with costs.

Vancouver 1966
Feb. 14, 15
Feb 22

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

RALPH PERRIGOUE .....PLAINTIFF;

AND

BRITISH COLUMBIA FERRY AUTHORITY .....DEFENDANT.

Shipping—Ship causing excessive wash—Personal injury to fisherman—Excessive speed of ship—Fault—No contributory negligence.

On the morning of May 5th 1963 plaintiff tied his fishing vessel alongside another fishing vessel anchored in the Gulf of Georgia in the lee of Newcastle Island Defendant ferry came by inbound at low speed creating some wash which the fishing vessels countered by releasing the spring line joining them. Soon afterwards the ferry returned outbound at greater speed (15 knots) creating an excessive swell. The spring line was released again and in addition plaintiff attempted to hold apart the bows of the two vessels. He suffered severe injuries when the swell caused by the ferry hurled his vessel with great force against the other fishing vessel.

Held, the ferry was at fault in travelling at excessive speed within confined waters, and plaintiff was not guilty of contributory negligence (1) in tying his vessel to the other, this being a common practice amongst fishermen and the anchorage being clear of other traffic; (2) in not keeping a lookout, it being daylight and the weather clear; (3) in attempting to hold the vessels apart in the circumstances. *The Batavier* (1854) 9 Moo. P C. 286; *Luxford v Large* (1833) 5 C & P 421; *Nance v. The B.C. Elec. Ry. Co.* [1951] 2 W W.R. 665; *The Solace* (1936) 54 L1 L R 229 referred to.

J. I. Bird, Q.C. for plaintiff.

J. R. Cunningham for defendant.

SHEPPARD D.J.:—This action is for personal injuries of the plaintiff alleged to have been received aboard the *Tacora* through the negligent operation of the *Queen of Sidney*.

On the 4th May, 1963, the plaintiff and his wife, aboard the plaintiff's fishing vessel, the *Susie M*, length 39.5 feet, gross tonnage 18.60, with Harold R. Jones, aboard his fishing vessel, the *Tacora*, length 34.7 feet, gross tonnage 16.84, left Everett on a voyage to Alaska to engage in fishing. For the night they hove to at Provost Harbour, Stuart Island, Washington, and at 4:30 a.m. on the 5th May, 1963, continued the voyage. In the Gulf of Georgia they found the wind has freshened from the southeast to

30 m.p.h. with a quartering sea. At 11:15 A.M. they sought shelter in the lee of Newcastle Island, there intending to have lunch, to lower their trolling poles and to put out their stabilizers. There the *Tacora,* perhaps more fully equipped, though both vessels had fathometers, anchored just south of Tyne Point fairly close to the shore in 8 to 10 fathoms of water, and the *Susie M* tied alongside with a line from the bow, another from the stern and a spring line, and with two sets of fenders of rubber tires over the side of each vessel. Shortly thereafter the *Queen of Sidney* owned by the defendant, passed at a distance of about 600 feet in the channel north of Newcastle Island inbound from Horseshoe Bay to the terminal in Departure Bay. This vessel was travelling slowly, there was some wash but this raised no problem as Jones then cast off the spring line which permitted the vessels to drift apart and to be held by the fore and aft lines.

Shortly after 12:00 noon the *Queen of Sidney* proceeded outbound. The plaintiff and Jones were in the wheelhouse of the *Tacora* working out the courses to Alaska, and the plaintiff's wife, seeing the swell raised by the *Queen of Sidney,* shouted. The plaintiff and Jones rushed on deck to release the spring line as formerly. Jones went aft and attempted to hold the vessels apart at the stern by holding the rail of each vessel. The plaintiff went forward between the wheelhouse and the rail and attempted to hold the vessels apart with his left hand on the shroud of the *Susie M* and his right hand on the rail of the *Tacora.* The swell of the *Queen of Sidney* struck the *Susie M* amidships, raised her to the level of the top of the wheelhouse of the *Tacora,* and that threw Jones back against the skiff on the poop deck of the *Tacora.* The *Susie M* came down on the plaintiff, breaking his hip and also injuring his left knee. The plaintiff became faint, fell to the deck of the *Tacora* alongside the wheelhouse and came to on a stretcher when being carried to the ambulance. He was then taken to hospital in Nanaimo, B.C., put in a cast for seven weeks then allowed to go home where he remained in the cast for a further two weeks, and in August, 1963, was able to return to fishing.

The plaintiff's case is that the *Queen of Sidney* injured the plaintiff by excessive wash raised by her excessive

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speed, and therefore she was liable within the principles of *The Batavier*[1] and *Luxford v. Large*[2].

On the evidence the *Queen of Sidney* was at fault in travelling at excessive speed within the confined waters of Departure Bay which resulted in the excessive wash which caused the injuries complained of by the plaintiff. Jones estimated the speed of the *Queen of Sidney* when outbound at 15 knots and that estimate is borne out by that vessel's log (Ex. 9) and her chart (Ex. 8). The speed of the *Queen of Sidney* should have been kept slow in the early part of this trip until she had passed the fishing vessels. This was not done. According to the log (Ex. 9) she left the terminal at 12:00, at 12:04 was abeam Nares Point, at 12:07 was abeam Horswell Buoy. The distances made by the vessel according to the chart (Ex. 8) at the times in the log, indicate the following speeds: to F (chart, Ex. 8) at slow from the terminal would take 2½ minutes, hence she made from F to abeam Nares Point, 3,150 feet, in 1½ minutes, and even if her time be taken at 2 minutes, she was travelling at 15 knots; that speed is confirmed by her speed from abeam Nares Point to abeam Horswell Buoy, a distance of 4,700 feet, which she made in 3 minutes, which is 15 knots. Further, inbound from Horswell Buoy to the terminal she averaged 8.6 knots and outward bound over the same distance she averaged 13.6 knots, therefore during the crucial part of this trip from F to Nares Point she was making 15 knots. That speed was not required. Inbound she had reduced speed and outbound she could have proceeded in the same manner, whereas 15 knots was excessive within those confined waters as bound to produce an excessive wash beyond that which could reasonably have been anticipated by those aboard the *Susie M* and the *Tacora*. That the wash was excessive is indicated by the fact that the first wave raised the *Susie M* to the level of the top of the wheelhouse of the *Tacora* by the fact that the paint from the *Susie M* was found on the trolling pole of the *Tacora* above her rail, and by the further fact that the cross-trees were broken and her trolling pole snapped through a diameter of 4 inches. Under these circumstances the defendant was at fault in travelling at an excessive speed.

[1] (1854) Moo. P C. 286.

[2] (1833) 5 C. & P. 421.

The defendant contends that the plaintiff was guilty of contributory negligence in tying the *Susie M* alongside the *Tacora* rather than in anchoring her at a distance to prevent the vessels coming into contact. Whether the plaintiff was guilty of contributory negligence depends upon whether he used reasonable care for his own safety: *Nance v. The British Columbia Electric Railway Company*[1]. That is essentially a question of fact depending upon all the circumstances of the case. For example, the upsetting of a stove has been held to have been caused by excessive wash: *The Solace*[2] and has been held not so caused: *Perry v. Car Barge and Towing Co. Ltd.*, an unreported judgment of Ruttan J. (B.C. Supreme Court).

The *Susie M* in tying alongside the *Tacora* was following a quite common practice of fishing vessels and also of yachts being secured to one at anchor. The vessels were anchored in the lee of Tyne Point well clear of other traffic, and a considerable number of small vessels do from time to time use that area as a shelter for tying up or anchoring. Under the circumstances there was no contributory negligence in mooring at that place or in that manner.

It was also contended that the plaintiff was guilty of contributory negligence in not having a lookout. On the other hand, good seamanship did not require a lookout beyond that being maintained. It was daylight in clear weather and there was good visibility. Moreover the vessels so anchored were seen by those on watch on the *Queen of Sidney*.

It is also contended that the plaintiff was, by his conduct, guilty of contributory negligence in attempting to use his physical strength to hold the vessels apart. That contention should not succeed. It was reasonable for the plaintiff and Jones to have released the spring line and to have attempted to hold their vessels apart. That method had been successful when the *Queen of Sidney* was inbound and they had no other choice than to attempt to hold the vessels apart as they had previously succeeded in doing.

In any event, they could not have anticipated that the violence of the wash would raise the *Susie M.* as subsequently occurred.

[1] (1951) 2 W.W.R. 665.

[2] (1936) 54 Ll. L.R. 229.

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It was also contended that the plaintiff was guilty of negligence in being outside the rail of the *Tacora* whereby he received his injuries. That is not the evidence. The plaintiff has testified that he was standing on the deck of the *Tacora* between the wheelhouse and the rail when he received his broken hip. He then attempted to hold himself up by holding on to the wheelhouse when he received the blow which injured his left knee. Then presumably he fell to the deck of the *Tacora* because he was there found by Jones.

It follows, therefore, that the excessive wash was produced by the excessive speed of the *Queen of Sidney* and that caused the injuries complained of by the plaintiff.

These findings are concurred in by the Assessors, Captain E. B. Caldwell, and Captain W. A. Dobie, for whose competent advice and assistance I am greatly indebted.

The findings in these reasons involve no criticism of Captain Shives, the Master of the *Queen of Sidney*. The difficulty is that the engine changes are ordered from the bridge by telegraph and the engine room kept no bell book of the engine changes, hence the Master could know he ordered slow or full ahead but could not know the number of revolutions that the engineer had turned on, or that the orders for slow or full ahead were correctly carried out.

There will be judgment for the plaintiff accordingly with a reference to the Registrar to determine the amount of the damages. The costs will follow the event.

Toronto 1966 Mar. 15, 16

Ottawa Apr. 7

BETWEEN:

MINISTER OF NATIONAL REVENUE ...APPELLANT;

AND

BELMONT HEIGHTS LIMITED .....RESPONDENT.

Income tax—Purchase of lands in trust for proposed company—Deposit received from subsequent purchaser—Whether trust created—Construction of contract—Income Tax Act, s. 63(6) and (7).

In April 1956 Mrs. A contracted to purchase from I P Ltd a large parcel of land in Ontario in trust for a company to be incorporated. In August Mrs. A made an agreement (not purporting to do so as a

trustee) to sell part of the land to L Co and received a deposit of $25,650 which was returnable if a plan of subdivision was not registered by December 15th 1956. On September 5th 1956 Mrs. A. assigned her interest in the contract with I P Ltd to respondent (which had been incorporated in May to acquire the lands) and covenanted that she had done nothing to encumber the lands. On September 20th 1956 she sold half her interest in respondent to E and H, and as a term of her contract with them agreed to pay respondent on or before November 10th 1956 the $25,650 which she had earlier received as a deposit from L Co, but she did not in fact do so.

On December 17th 1956 L Co demanded repayment of its deposit because a plan of subdivision had not been filed. In October 1957 respondent assigned its interest in the lands to R Co, one of the terms of the arrangement being that R Co indemnified respondent and Mrs. A with respect to their liabilities under the contract with L Co, and Mrs. A, in agreement with respondent, simultaneously acknowledged her debt of $25,650 to respondent and declared that it would be satisfied when the deposit of $25,650 was repaid to L Co. The deposit was paid by R Co to L Co late in December.

The Minister contended that the deposit was received by Mrs. A. as trustee for respondent and that it became chargeable to income tax in respondent's hands in its 1958 tax year (which ended on May 31st) under s. 63(6) and (7) of the *Income Tax Act* either when R Co as a term of its contract with respondent agreed to return the deposit or at a later date when it did return the deposit (both dates being in respondent's 1958 taxation year).

Held: (1) Respondent was not beneficiary of a trust of the $25,650 received by Mrs. A either on the date when the deposit was returned by R Co or at any later date in respondent's 1958 tax year. If Mrs. A received the deposit in trust for respondent (which was doubted) the trust came to an end on September 20th 1956 when the respondent's rights against Mrs. A merged in the rights which accrued to respondent under its contract of that date with Mrs. A, which (by reason of her covenant that she had done nothing to encumber the lands) impliedly included an obligation by her to indemnify respondent against claims on the land by L Co and for repayment of the deposit if the transaction with L Co was completed.

(2) Moreover, the effect of the transactions subsequent to September 20th 1956 was that Mrs. A was not at any time thereafter bound as between herself and respondent to pay respondent the amount of the deposit.

(3) Even if Mrs. A was liable to pay respondent $25,650 by November 10th 1956 by virtue of her contract of September 5th 1956 with E and H (that contract having been incorporated in her contract of September 20th with respondent), such liability was not upon any trust but was a simple contractual liability and was incurred in respondent's 1957 taxation year, and the $25,650 was therefore not assessable as income of respondent's 1958 taxation year.

Income tax—"Amount Receivable"—Meaning of—Sale of land—Price payable as land re-sold—When purchase-price to be brought into computation—Onus of proof—Income Tax Act, s. 85B(1)(b).

In its 1958 taxation year respondent sold certain lands for $125,000, to be paid at the rate of $5,000 an acre as the lands were sold by the

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purchaser. Respondent included the whole $125,000 in computing its income for 1958 but claimed an over-all operating loss for that year. Respondent's computation was upheld on an appeal to the Tax Appeal Board. On an appeal by the Minister to this court, respondent asserted that the $125,000 should not have been brought into computation at its full amount but at a valuation of $73,399, and produced its books which showed that the $125,000 was received between March 30th 1959 and July 1st 1964.

Held, rejecting respondent's contention, the onus was on respondent to prove, if it could, that the sales made by the purchaser upon which the $125,000 was to become due, were not made in its 1958 taxation year, and evidence that the amount was received by the respondent in later years would not serve to establish the relevant fact. Had it been established that the sales by the purchaser were made after the respondent's 1958 taxation year, *semble* the $125,000 would not have been an "amount receivable" in that taxation year within the meaning of s. 85B(1)(*b*).

APPEAL from a decision of the Tax Appeal Board.

T. Z. Boles for appellant.

S. H. Starkman for respondent.

THURLOW J.:—This is an appeal from a judgment of the Tax Appeal Board[1] which allowed an appeal by the respondent from a re-assessment of income tax for the year 1958.

In its income tax return for its fiscal period which ended on May 31st of that year the appellant showed an operating loss for the year of $218,26. In making the re-assessment the Minister added to the revenue declared in the return an amount of $25,650 in respect of what was referred to as "additional consideration on sale to Ridge Realty Limited not recorded" and assessed tax accordingly. Later by his notification pursuant to s. 58 of the Act[2] following notice of objection by the respondent the Minister agreed to amend the assessment to allow an amount of $19,775 as a deduction from income under s. 85B(1)(*d*) but otherwise confirmed the reassessment as made. The respondent thereupon appealed to the Tax Appeal Board which held that the respondent was not liable for tax in respect of the $25,650 and allowed the appeal and referred the matter back to the Minister for reconsideration and re-assessment. On the present appeal the first issue to be determined is whether the Minister was correct in adding the $25,650 in computing the respondent's income. If not his appeal must

[1] (1963) 33 TAX A B C 114. [2] R.S C. 1952, c. 148

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fail. But a further issue has also been raised by the respondent and will require determination if the Minister was right in adding the $25,650. This issue is whether an amount of $125,000 which was included by the respondent in computing its income was properly brought into the computation at its full amount rather than at $73,399.71 which the respondent now asserts was its value in the 1958 taxation year. Since the net amount to be added in the computation of the respondent's income following the Minister's undertaking is but $5,875 the appeal must also fail if the respondent is right to that extent on this issue.

The facts are somewhat confusing but for the most part they are not in dispute. By an agreement dated April 30, 1956 Islington Park Limited agreed to sell to "Juliana Allonsius (as trustee for a company to be incorporated)" a parcel of land in Etobicoke Township consisting of 70.377 acres for $703,770 payable in stated payments extending over a period ending on August 20, 1961. Thereafter on May 29, 1956 Juliana Allonsius caused the respondent to be incorporated and this company is admittedly the "company to be incorporated" referred to in the Islington Park agreement. Its business, as described by one of the witnesses was the development of the Belmont Heights subdivision which seems to have consisted of the property comprised in the agreement.

By an indenture dated September 20, 1956, in which it is recited that the respondent is the company referred to as the "company to be incorporated" in the agreement between Islington Park Limited and "Juliana Allonsius (Trustee for a company to be incorporated)", the latter, as assignor, "in consideration of the premises" and of $5.00 assigned to the respondent all her interest in the lands described in the agreement to hold the same subject to the terms of the agreement and the covenants and conditions therein. The respondent covenanted to assume and pay all moneys due and to become due under the agreement and to save the assignor harmless and indemnify her against the payment thereof and on her part the assignor covenanted that she had performed all the covenants, provisos and conditions contained in the agreement and that she had done no act to encumber the lands.

By the time this indenture was executed Mrs. Allonsius had made payments totalling $75,000 on account of the

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purchase price of the property, and two other persons, Harry Evans and Irving Howard, neither of whom had been interested in the agreement at the time when it was made, had entered into a contract with her dated September 5, 1956, under which they acquired certain rights as against her including a right to shares in the respondent company. By a further agreement, also dated September 20, 1956, it was agreed between Mrs. Allonsius and the respondent that she should sell to the respondent and that the respondent should purchase from her the Islington Park agreement and the lands comprised therein and all her interest therein for $75,000 payable, as to $1,000, by the issue to her of 1,000 shares of the respondent, as to a further $20,000, by the assumption of an indebtedness of that amount which she then owed to Evans and Howard, and as to the remaining $54,000, on demand, but subject to what was set out in her agreement with Evans and Howard which, it was stated, was attached and formed a part of the agreement between her and the respondent.

The contract of September 5, 1956 between Mrs. Allonsius, Evans and Howard contained corresponding provisions by which she undertook to assign the Islington Park agreement and the lands described therein to the respondent for $75,000 payable in the same manner as described in her agreement of September 20 with the respondent but went on to say:

> 4. Allonsius agrees to account and pay to the Company forthwith, *subject to what is hereinafter set out with respect to the sale to Lempicki* for all monies received by Allonsius whether by way of deposit, part or full payment or otherwise with respect to any lots or lands sold by Allonsius whether conditionally or otherwise out of (whether partially or otherwise) the lands described in agreement for sale No. 167633 (hereinafter referred to as the "Company Lands"); it being understood and agreed that any such transactions were entered into by Allonsius as Trustee for the Company and are for the Company's benefit. *Allonsius acknowledges that she has sold 38 lots on a proposed plan of subdivision to T. Lempicki Construction Company Limited under an agreement of purchase and sale registered as instrument No. 173,022 and has received the deposit of $25,650.00 therein set out. Allonsius shall forthwith pay to the Company the sum of $5000.00 out of such deposit and shall pay the balance of such deposit to the company on or before the 10th day of November, 1956.* Allonsius shall furnish satisfactory proof as to the existence or non-existence of any other such transactions before any payments are made by Howard and Evans hereunder.
>
> 5. Upon such accounting and payment being made by Allonsius as set out in paragraph 4 (which accounting and payment shall be made forthwith) Howard and Evans agree to purchase from Allonsius and

Allonsius agrees to sell to Howard and Evans in such shares, as they agree, 500 common shares of the Company for the sum of $500.00. Howard and Evans further agree to then lend the Company the sum of $295,500.00 and to then assign and discharge mortgage No. 172962 for $20,000.00 which shall be owed by the Company to them so that the Company shall then owe Howard and Evans a total of $49,500.00 in such proportions as Howard and Evans agree. The Company shall then repay Allonsius the sum of $4500.00 so that the total indebtedness of the Company to Allonsius shall be $49,500.00. Howard and Evans agree to lend such monies to the Company on or before the 21st day of September, 1956, notwithstanding that Allonsius shall be indebted to the Company in the sum of $20,560.00, with respect to the Lempicki deposit, provided, however, that if at the time of such loan by Howard and Evans, Allonsius is still indebted to the Company with respect to any portion of the said Lempicki deposit, then Allonsius shall convey 25% of the issued common stock of the Company owned by her to Howard and Evans as pledge and security for the repayment by her to the Company of the balance of the Lempicki deposit on or before November 10th, 1956.

(Italics added).

The references to the Lempicki sale arose from the fact that on August 7, 1956 Mrs. Allonsius had agreed to sell a portion of the land to T. Lempicki Construction Company Limited for $171,000 and had received $25,650 on account of this price as a deposit. The contract did not purport to be made by Mrs. Allonsius as a trustee and it was expressly made subject to the registration of a plan of subdivision of the property. It went on to provide that if the plan was not registered on or before December 15, 1956 the purchaser might terminate the contract and in that event would be entitled to repayment of the deposit within one month. By September 20, when the Islington Park agreement was assigned to the respondent, it had already become apparent that the plan would not be registered by December 15, 1956 and that the Lempicki company would become entitled to cancel its contract and demand repayment of the deposit. A notice exercising the purchaser's rights and demanding repayment of the deposit was in fact given by the Lempicki company on or about December 17, 1956, but the money was not repaid either by Mrs. Allonsius or by the respondent nor was any part of the deposit ever paid by Mrs. Allonsius to the respondent as contemplated by the contract between her and Evans and Howard.

On March 29, 1957 the respondent accepted an offer from Aluminum Company of Canada Limited for the purchase of another portion of the land for about $110,000 and received $5,000 as a deposit.

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The respondent, however, ran into difficulties and delays in carrying out its proposed development of the property and in finding purchasers for portions of it and therefore endeavoured to find a purchaser who would take the whole project off its hands. In this as well it did not succeed at first but ultimately, by an indenture dated October 7, 1957 and made between the respondent of the first part, Ridge Realty Limited of the second part and Evans and Howard of the third part, the respondent assigned to Ridge Realty Limited all its interest in the lands described in the Islington Park agreement together with all its interest in or under the agreement, in consideration of $125,000 to be paid by Ridge Realty Limited to Evans and Howard at the rate of $5,000 an acre on the sale, transfer or conveyance by Ridge Realty Limited of any of a certain portion of the lands, such payment to be secured in the meantime by a vendor's lien on that portion of the property in favour of the respondent and in favour of Evans and Howard.

It was a condition of the assignment that Ridge Realty Limited should also pay the installments then due and thereafter to become due to Islington Park Limited and Ridge Realty Limited further agreed to assume the agreements for sale with T. Lempicki Construction Company Limited and with Aluminum Company of Canada Limited which agreements the respondent convenanted to assign to it. The indenture then went on to say:

> In this connection T. Lempicki Construction Company Limited has paid to one, Juliana Allonsius the sum of $25,650.00 and the said Aluminum Company of Canada Limited has paid to the Assignor the sum of $5000.00. Neither the said Juliana Allonsius or the Assignor shall be required to account to the Assignee for the said money so received and as against the said Assignee shall be deemed entitled to retain the said monies so received. The Assignee covenants and agrees to assume the said agreements and to indemnify and save harmless the Assignor and the said Juliana Allonsius of and from all actions, manner of actions, debts, liabilities and demands whatsoever with respect to the said agreements and either of them

On the same day Juliana Allonsius executed an acknowledgement under seal with respect to her interest in the $125,000 to which was appended a covenant by Evans and Howard to hold the $125,000 when received upon certain trusts for her and them. The acknowledgement by Mrs. Allonsius, which was admitted to have been made "in

agreement with" the respondent contained the following with respect to the Lempicki deposit:

I, JULIANA ALLONSIUS, hereby acknowledge that attached hereto are unsigned copies of assignments of agreements from Belmont Heights Limited to Ridge Realty Limited and of an agreement between Murray Gruson and myself, together with Harry Evans and Irving Howard, all of which are dated October 7th, 1957.

...

And I, the said Juliana Allonsius, further acknowledge that I still owe Belmont Heights Limited the monies received by me from T. Lempicki Construction Company Limited in the sum of $25,650.00 notwithstanding anything contained in the assignment of agreement from Belmont Heights Limited to Ridge Realty Limited, a copy of which is attached hereto, *provided however that when the debt to Lempicki is satisfied then the said debt to Belmont Heights Limited is also satisfied.*

And I, the said Juliana Allonsius, further covenant, acknowledge and agree that I will indemnify and save harmless Harry Evans, Irving Howard and Belmont Heights Limited of and from all actions, causes of actions, claims and demands whatsoever with respect to any monies paid to me by T. Lempicki Construction Company Limited or anyone else on behalf of any of the lands referred to in the Islington Park Limited agreement registered as instrument No. 167633.

(Italics added).

The transaction with Ridge Realty Limited was completed and at some time prior to May 31, 1958 that company repaid the Lempicki deposit. Later, by several payments, the first of which was made on March 30, 1959 and the last on July 1, 1964, it also paid the $125,000.

The Minister's case for adding the amount of the deposit in computing the respondent's income for 1958 is that though the $25,650 was never in fact paid over to it, Mrs. Allonsius was a trustee for the respondent of the puchaser's rights under the Islington Park agreement when on August 8, 1956, she made the agreement with the Lempicki company and that she received the deposit as trustee for the respondent, that at that time the $25,650, being a mere returnable deposit, was not income in anyone's hands but that on October 7, 1957 when the transaction between the respondent and Ridge Realty Limited was entered into or subsequently when Ridge Realty Limited repaid an equivalent amount to the Lempicki company the deposit made earlier became income in the hands of Mrs. Allonsius and that since she was trustee of the deposit for the respondent the latter then became entitled to enforce payment thereof and the amount was therefore income of the respondent by virtue of s-ss. 63(6) and (7) of the Act.

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These subsections read as follows:

(6) Such part of the amount that would be the income of a trust or estate for a taxation year if no deduction were made under subsection (4) or under regulations made under paragraph (*a*) of subsection (1) of section 11 as was payable in the year to a beneficiary or other person beneficially interested therein shall be included in computing the income of the person to whom it so became payable whether or not it was paid to him in that year and shall not be included in computing his income for a subsequent year in which it was paid.

(7) For the purposes of subsections (4), (4a) and (6), an amount shall not be considered to have been payable in a taxation year unless it was paid in that year to the person to whom it was payable or he was entitled in that year to enforce payment thereof.

On the facts which I have outlined I do not think the Minister's contention can prevail. It depends, as I understand it, (among other things) on the respondent having been, at the time when Ridge Realty Limited paid $25,650 to the Lempicki company, that is to say, either on October 7, 1957 or on some later date prior to May 31, 1958, the beneficiary of a trust of the $25,650 which Mrs. Allonsius received from the Lempicki company on August 8, 1956. On the facts this in turn depends on whether the respondent had on August 8, 1956 rights as beneficiary of a trust in the $25,650 received by Mrs. Allonsius and continued to have such rights up to the time when Ridge Realty Limited repaid an equivalent amount to the Lempicki company. This, in my view, is negatived by the evidence. Though I doubt that the respondent was ever in the position of beneficiary of a trust of the purchaser's rights under the agreement, even if it be assumed that this was the situation when on August 8, 1956 Mrs. Allonsius, not purporting to act as a trustee, agreed to sell a portion of the property to the Lempicki company and received the deposit, and that despite her personal liability to return it to the Lempicki company in events which later occurred the respondent was entitled to the benefit of whatever rights she acquired in it, the rights of the respondent as against her in my opinion become merged in the rights which accrued to the respondent as a result of the transaction of September 20, 1956 between her and the respondent. The result of this transaction, consisting of the agreement of that date together with the indenture of the same date, appears to me to have been that as between Mrs. Allonsius and the respondent the latter became entitled (i) to the rights of the purchaser

under the Islington Park agreement, subject to the respondent assuming the burden of making the remaining payments under that agreement; (ii) to a right to be indemnified by Mrs. Allonsius against any claim against the land by the Lempicki company for repayment of the deposit; and (iii) to payment of the deposit in the event of the Lempicki transaction being completed. The two last mentioned rights in my opinion flow from her covenant that she had done nothing to encumber the lands. As between Mrs. Allonsius and Evans and Howard, Mrs. Allonsius was also bound to pay the deposit over to the respondent by November 10th but I do not think that anything in the agreements rendered her liable to the respondent to do so except on the indemnity basis already mentioned in events which never arose. Had Mrs. Allonsius repaid the money to the Lempicki company her liability to all concerned would plainly have been discharged. On the other hand had she paid the money to the respondent it would I think be clear that the respondent would have come under an obligation to indemnify her against any claim by the Lempicki company for return of the deposit based on her personal liability to that company to repay it. Accordingly, it appears to me that even if the respondent had rights in the Lempicki deposit as beneficiary of a trust prior to September 20, 1956, (which, as already stated, I doubt) the trust came to an end with the transaction of that date and from that time onward did not exist[1].

Moreover, in my view, in the events which later transpired the respondent never did have a right to recover the amount of the Lempicki deposit from Mrs. Allonsius or from anyone else. It is, of course, plain that if Mrs. Allonsius had paid the amount to the respondent and the same agreement had thereafter been made between the respondent and Ridge Realty Limited the respondent might have realized $25,650 more than it in fact realized. But this did not happen. Instead with no right upon which it could recover the deposit from Mrs. Allonsius the respondent made a contract with Ridge Realty Limited which provided *inter alia* that both the respondent and Mrs. Allonsius should be saved harmless from any claim by the Lempicki

[1] There is a further question as to which, in view of my conclusion on the facts, no expression of opinion is necessary, whether s. 63(6) has any application to trading income.

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company. At the same time a declaration executed by Mrs. Allonsius "in agreement with" the respondent acknowledged that she owed the deposit to the respondent provided, however, that when the Lempicki claim was satisfied her obligation to the respondent should be at an end as well and by the same document she went on to covenant to save Evans, Howard and the respondent harmless from any claim by the Lempicki company for the deposit. In my view, as already mentioned, in the events which transpired Mrs. Allonsius was not at any time after September 20, 1956, bound as between herself and the respondent to pay over the deposit and the effect of the declaration, which I think plainly amounts to a contract between her and Evans and Howard if not between her and the respondent as well, is to relieve her, in the event mentioned in the proviso, from her earlier undertaking to Evans and Howard to pay the deposit to the respondent and at the same time to state what was already implicit in the situation that when the Lempicki company was repaid and her contracts to indemnify the respondent were thus at an end there would be no right in the respondent to recover the amount from her. Neither Evans nor Howard were trustees of their rights for the respondent and their right under the agreement of September 5, 1956 to require Mrs. Allonsius to pay the deposit to the respondent was, in my view, subjected to and modified by the terms of the declaration so that when the Lempicki claim was satisfied they too were no longer in a position to require Mrs. Allonsius to pay the amount to the respondent.

Moreover, even if the legal result of the wording by which the contract of September 5, 1956 between Mrs. Allonsius and Evans and Howard was incorporated into the transaction of September 20, 1956 between Mrs. Allonsius and the respondent can be regarded as having been that Mrs. Allonsius became liable to the respondent for the $25,650 it is I think plain that such liability was not upon any trust but at most a simple contractual liability to pay by November 10, 1956. The amount, as previously mentioned, was not income in anyone's hands at that time but neither can it be regarded as income of the respondent in 1958 since the effect of the transaction which took place in that year between the respondent and Ridge Realty Limited, in my view, was not to give the respondent any

further right against Mrs. Allonsius but simply to relieve her and the respondent from any claim by the Lempicki company for the deposit. At the same time the declaration of Mrs. Allonsius, which is the only indication of a contract between her and the respondent at that time negatived her liability to the respondent in events which transpired. If, therefore, Mrs. Allonsius ever did become indebted to the respondent for the deposit the liability must have been incurred in the 1957 and not in the 1958 taxation year.

I am accordingly of the opinion that there is no basis upon which the Minister could properly include the $25,650 in the computation of the respondent's income for 1958 and that his appeal therefore fails.

In view of this conclusion it is not strictly necessary for me to deal with the alternative issue whether the $125,000 to be paid at some indefinite future time when parts of the property might be sold by Ridge Realty Limited should have been brought into the computation of the respondent's 1958 income at its full amount but as the issue is raised and in certain events could conceivably bear on the computation of the respondent's income for later years. I shall express my view on it.

It will be recalled that the $125,000 was voluntarily brought into the computation by the respondent in its return for 1958 at its full amount. It was suggested by counsel that this might have been done because even so the computation showed a loss so that there was no tax to pay in any event but that when the Minister brought the $25,650 into the computation the respondent became entitled on its part to show that the $125,000 brought into its computation was more than should have been accounted for. It is of course not difficult to understand that $125,000 payable without interest at some uncertain future time could scarcely be regarded as having a present value of $125,000.

The Minister's position on this issue was that the $125,000 was required to be brought in at the full amount by s. 85B (1)(*b*) which provides that:

85B (1) In computing the income of a taxpayer for a taxation year,

...

(*b*) every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year

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unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year;

It is, I think, plain that if the $125,000 was an "amount receivable" within the meaning of this subsection at any time in the respondent's 1958 taxation year it was properly included at its full face amount. On the other hand the terms upon which it was to be paid were such that no right to any part of the amount would arise until at some indefinite time the purchaser sold certain portions of the property and as this might never occur I should not have thought that the amount or any part of it would fall within the meaning of "amount receivable" until the event upon which the amount would become payable occurred. In my view it was therefore open to the respondent to show if it could, and the onus was upon it to do so if it was to succeed on this issue, that the event or events upon which the $125,000 was to become payable did not occur prior to May 31, 1958. As I see it, however, no evidence was given to establish when the event or events occurred. All that was put in evidence was a copy of a ledger sheet showing the amounts and dates of the payments by which the $125,000 was said to have been received commencing with a payment on March 30, 1959 and ending with a final one on July 1, 1964. In my view this does not establish when the sales upon which the $125,000 was to become due were made by Ridge Realty Limited and in particular it does not establish that they were not made prior to May 31, 1958.

A submission was also made that the wording of s. 85B (1)(*b*) would not apply because the contract made between the respondent and Ridge Realty Limited was not a sale of the property "in the course of the [respondent's] business" but on the facts I do not regard this submission as tenable. There is accordingly, in my view, no basis upon which it may be held that the $125,000 was not properly included in the computation.

As already indicated, however, the Minister's appeal fails on the issue as to the $25,650 and it will therefore be dismissed with costs.

BETWEEN:

DIMENSIONAL INVESTMENTS LIMITED ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Toronto 1965 Nov. 22-26 Ottawa 1966 Feb 25

Crown—Constitutional law—Indian lands—Contract for sale of surrendered Indian lands—Default in payment of price—Provision for termination of contract and retention of money paid—Whether a penalty or pre-estimate of damages—Petition of right—Right to repayment of money in excess of value of land acquired under contract—Equitable jurisdiction to relieve against penalty—"Penalty", meaning of—Exchequer Court Act s. 48—Construction of—Whether limited to public works—Unconscionability of retaining both land and payments.

By a contract dated March 14th 1959 the Crown agreed to sell suppliant some 3,100 acres of Indian lands at Sarnia, Ontario, which had been surrendered for sale. The price was $6,521,000 (approx.) of which $323,000 (approx.) was payable to individual Indians and $750,000 to the Crown on execution of the contract, $600,000 to the Crown in instalments within the following year and the balance on March 15th 1961. Interest was payable on the unpaid balance at 5% per annum. The contract entitled suppliant to obtain grants of portions of the land on making additional pre-payments calculated on the area and location of the land to be granted but suppliant was not otherwise entitled to possession of any land until the price was paid in full. The contract provided that on failure by the purchaser to remedy any default in payment after 30 days' notice the vendor might terminate the contract and retain any moneys paid thereon as liquidated damages and not as a penalty, and time was declared to be of the essence. Suppliant paid $2,323,000 (approx.) under the contract, of which $973,000 (approx.) was attributable to land actually taken up, but suppliant failed to make the final payment of $4,300,000 (approx.) due on March 15th 1961 or to remedy the default within 30 days of notice, and the Crown terminated the agreement on April 17th 1961. Suppliant had paid the Crown $1,350,000 more than the amount required for the lands granted, but $375,000 of that sum was paid by the Crown to individual Indians as required by the surrender and the Crown retained only $975,000 at the time suppliant presented this petition of right for repayment of the $1,350,000. Suppliant was not in a position to make any further payments on the contract.

Held, the petition must be rejected.

(1) While the provision of the contract that on default the Crown might retain sums paid as liquidated damages and not as a penalty was a penal provision rather than a genuine pre-estimate of damages, s. 48 of the *Exchequer Court Act* required that it be construed as importing an assessment of damages by mutual consent, thereby excluding the equitable jurisdiction to relieve against penalties. The word "penalty" in s. 48 means a pecuniary amount. *In re Dagenham (Thames) Dock Co., Ex. parte Hulse* (1873) L.R., 8 Ch. App. 1022 per Mellish L.J. at

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p. 125; *Kilmer v. B.C. Orchard Lands Ltd.* [1913] A.C. 319 per Lord Moulton at p. 325 referred to; *Dussault et al v. The King* (1917) 16 Ex. C.R. 288, distinguished.

(2) Section 48 of the *Exchequer Court Act* is *intra vires* Parliament so far at least as it purports to apply to the legal effect of contracts entered into by or on behalf of the Crown in right of Canada (*Att'y Gen. Can v. Jackson* [1946] S.C.R. 489 per Kellock J. at p. 496), at any rate where the contracts relate to land reserved for Indians, a subject within the exclusive legislative competence of Parliament under s. 91(24) of the *B.N.A. Act.*

(3) Having regard to its plain and unambiguous language s. 48 of the *Exchequer Court Act* cannot be construed as restricted to contracts for the construction of public works and is broad enough to include the contract under review.

Semble, if the equitable jurisdiction to relieve against penalties were not excluded by s. 48 of the *Exchequer Court Act,* suppliant would be entitled to the relief sought on proper terms, which would include an opportunity for the Crown to set off any loss sustained from suppliant's failure to make payments when due and limit the amount to be repaid suppliant in any event to the $975,000 in the Crown's hands at the time the petition of right was presented.

There is equitable jurisdiction to grant relief if it would be unconscionable for the vendor to retain both the land and the money paid therefor, notwithstanding that there was no sharp practice by the vendor and although the purchaser is unable to complete the contract. *Stockloser v. Johnson* [1954] 1 Q.B. 476; *Walsh v. Willaughan* (1918) 42 D.L.R. 581, discussed; *Galbraith v. Mitchenall Estates Ltd.* [1964] 3 W.L.R. 454; *Campbell Discount v. Bridge* [1961] 1 Q.B. 445; *Steedman v. Drinkle* [1916] 1 A.C. 275; *Snell v. Brickles* (1914) 49 S.C.R. 260 per Duff J. at p. 371; *Boericke v. Sinclair* [1929] 1 D.L.R. 561, referred to.

PETITION OF RIGHT.

R. N. Starr, Q.C. for suppliant.

N. A. Chalmers and *A. M. Garneau* for respondent.

THURLOW J: This is a petition of right claiming the return of moneys paid by the suppliant under the terms of a contract for the sale to it by the Crown, represented by the Minister of Citizenship and Immigration, of a tract of some 3,100 acres of land at Sarnia, Ontario, being part of an Indian reserve surrendered to the Crown by the Indian band for the purpose of such sale. The suppliant having failed to make the final payment when it fell due the Crown terminated the contract pursuant to one of its provisions and in these proceedings takes the position that the suppliant's rights in the land (other than that conveyed pursuant to the contract) are at an end and that the Crown is entitled to retain the moneys paid by the suppliant on account of the purchase price. That the contract in terms so

provides is not in doubt but the suppliant asserts that it is unconscionable for the Crown to retain the moneys and that relief from their forfeiture should be granted. The petition also includes several claims for damages for alleged breaches of the contract by the Crown but these were abandoned in the course of the trial.

The contract, which was dated March 14th, 1959, called for payment of a total purchase price of $6,521,946. Of this $323,763.63 was payable to individual Indians on execution of the agreement. The remainder was payable to the Receiver General of Canada over a two year period. Of the amount payable to the Receiver General $750,000 was to be paid on execution, a further $500,000 was to be paid in ten monthly instalments of $50,000 each, a further $100,000 in four quarterly instalments of $25,000 each, all within the space of one year or thereabouts after the execution of the contract and the balance on or before March 15th, 1961. In addition, the suppliant agreed to pay interest at the rate of 5 per cent. per annum on the unpaid balance "both before and after default and both before and after maturity" half yearly on the 15th days of March and September in each year but was entitled to pay any further amounts or the whole balance owing at any time without notice or bonus. Under further provisions the suppliant was to be entitled to a grant of the lands sold only on payment in full of the purchase price but in the meantime, when not in default, was entitled to obtain grants of portions of the land on making certain additional prepayments calculated on the area and location of the land to be conveyed. The suppliant was, however, not entitled to possession of any of the lands agreed to be sold until the same were granted or until the suppliant became entitled to a grant thereof and then only after sixty days' notice to the individual Indian occupying the same or in the case of land upon which an Indian was residing only after six months' notice. Paragraph 10 read as follows:

The Purchaser convenants and agrees that if default be made in payment of the said purchase price and interest, and any part thereof, upon the days and times herein before provided, or if default be made in the performance or observation of any of the covenants, agreements and stipulations to be performed and observed by the Purchaser, the Minister shall be entitled to give the Purchaser thirty days' notice in writing requiring it to remedy such default, and upon such notice having been given and such default not having been remedied, this agreement shall, at

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the option of the Minister, be terminated and all rights and interest hereby created or then existing in favour of the Purchaser or derived by it under this agreement with respect to the lands not already granted to the Purchaser shall cease and determine, and the Minister shall be entitled to retain any moneys paid under this agreement as liquidated damages and not as a penalty.

By paragraph 13 it was agreed that time should be of the essence of the agreement and that no extension of time for any payment by the suppliant or for rectification of any breach should operate as a waiver of the provision as to time being of the essence with respect to any other payment or rectification or extension of time except as specifically granted in writing by the Minister.

The suppliant paid the sums payable on execution of the contract and, though it initially defaulted in paying several of the monthly and quarterly instalments of purchase price and several interest payments when due, it succeeded in making each of such payments in full prior to the termination of the thirty-day period provided for in paragraph 10 and on March 14th, 1961 was not in default. In the meantime following the making of the agreement the suppliant had paid for and obtained grants to its nominees of certain portions of the land and on March 15th, 1961 the balance of the total purchase price remaining unpaid stood at $4,198,549.15. That amount together with $107,408.28 for interest fell due on March 15th, 1961 and was not paid. On that or the following day the Minister pursuant to paragraph 10 gave the suppliant thirty days' notice to remedy the default and on April 17th, 1961, the money not having been paid, the Minister terminated the agreement.

From its inception the principal promoter of the suppliant company had been a Mr. S. Ray, a man of experience in the real estate business. He had invested a large part of his means in the venture but had become incapacitated in February 1960 by an illness from which he subsequently died. From the time when he took ill his son, Howard Ray, a pharmacist, assumed and thereafter conducted the affairs of the suppliant company. Having committed the remainder of his father's means in making an interest payment of more than $100,000 Howard Ray endeavoured to interest persons of means in backing the venture and as the time for payment of the final instalment of the price approached he succeeded in interesting at least two financially capable

prospects to the extent given the time to look thoroughly into the situation either might have been prepared to put up funds in the vicinity of $1,000,000 to be paid on account on the granting of further time in the order of three years to pay the balance. Overtures were therefore made to the Minister with a view to obtaining an extension of the time for payment but came to nought.

The total amount which had been paid by the suppliant on account of the purchase price was $2,323,396.85 which amount, it is agreed was $1,350,000 in excess of what was required under the terms of the contract to pay for land granted to the suppliant or its nominees. Of the $1,350,000, however, $375,000 had been paid out to individual members of the Indian band in accordance with one of the provisions of the surrender requiring the Crown to disburse at once to members of the band one-half of certain moneys received in respect of the band interest in the land. The surrender itself is referred to in all three recitals of the contract for the sale of the land and distribution by the Crown in accordance with the terms of the surrender of moneys paid by the suppliant must, I think, be treated as having been within the contemplation of the parties to the contract. At the time of the commencement of these proceedings, however, at least $975,000 of the amount paid by the suppliant had not been disbursed but remained in the hands of the Crown as trustee for the Indian band.

The suppliant's case is that the provision of paragraph 10, that on termination of the contract the Crown might retain any moneys paid under the agreement "as liquidated damages and not as a penalty", was not a genuine pre-estimate or assessment by the parties of damage likely to result from breach but was in the nature of a penalty, that in the circumstances of the case it is unconscionable for the Crown to terminate the suppliant's rights in the land and retain the $1,350,000 as well, that the evidence shows that the Crown, having retaken the land, suffered no damage as a result of the suppliant's failure to pay the balance of the purchase money and that on the equitable principles expounded by the majority of the Court of Appeal in *Stockloser v. Johnson*[1] the $1,350,000 should be repaid.

[1] [1954] 1 Q.B. 476.

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The Crown answers this case at three points. It submits, first, that on ordinary principles of interpretation the provision in question was not of a penal nature but a genuine pre-estimate of damage, secondly, that in any event s. 48 of the *Exchequer Court Act*[1] requires that the provision be so interpreted and that when so interpreted the suppliant must fail, and, thirdly, that even on the principles of the *Stockloser* case upon which the suppliant relies, it is not unconscionable in the circumstances of this case for the Crown to forfeit the suppliant's rights in the land and to retain the money in question as well and that no case for equitable relief has been established. Several further points of a more technical nature were also raised in defence but though they were not abandoned neither were they pressed and in view of the conclusion I have reached it is not necessary to state or deal with them.

The first question to be determined is accordingly whether the provision of clause 10 of the contract authorizing the Crown to retain the money paid on account of the purchase price should be interpreted as being a genuine pre-estimate by the parties of the damages expected to result from breach of the contract by the suppliant. It was conceded that the suppliant must fail if the provision is to be interpreted as a genuine pre-estimate of such damage but the question is not resolved merely by referring to the assertion to that effect in the provision itself and cases are not hard to find wherein sums have been held to be liquidated damages though called penalties in the contracts and *vice versa*.[2] Here despite the fact that the contract provides for the retention of the money "as liquidated damages and not as a penalty" in my opinion the whole of paragraph 10 is a penal provision and the provision for retention of the money is a penalty in the sense in which that term is commonly used to refer to a pecuniary amount to be paid or forfeited as a punishment in a particular situation.

The principle which, in my view, leads to this conclusion was stated by Mellish L.J. in *In re Dagenham (Thames)*

[1] R.S.C. 1952, c. 98.

[2] *Vide Clydebank Engineering and Shipbuilding Co. Ltd. v. Castaneda* [1905] A.C. 6 and *Kemble v. Farren* (1829) 6 Bing. 141; 130 E.R. 1234.

Dock Company, Ex. Parte Hulse[1], and was later approved and followed by the Privy Council in *Kilmer v. British Columbia Orchard Lands Limited*[2] and *Steedman v. Drinkle*[3]. In the *Dagenham* case Mellish L.J. put the point as follows at page 1025:

> I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty. Here, when you look at the last agreement, it provides that if the whole £2000 with interest, or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase-money which they have paid. It appears to me that this is clearly in the nature of a penalty, from which the Court will relieve.

Here paragraph 10 provides for the same consequences if default is made "In payment of the purchase price and interest, or any part thereof" upon the days and times thereinbefore provided—in which case the real damage might be very large or very trifling—and this appears to me to be precisely the kind of provision to which Mellish L.J. was referring. Moreover, the total money from time to time paid on account was to increase by payments during the first year and in this respect the case resembles the *Kilmer*[4] case where Lord Moulton said at page 325:

> The circumstances of this case seem to bring it entirely within the ruling of the *Dagenham Dock Case* L.R. 8 Ch. 1022. It seems to be even a stronger case, for the penalty, if enforced according to the letter of the agreement, becomes more and more severe as the agreement approaches completion, and the money liable to confiscation becomes larger.

Paragraph 10 therefore appears to me to be clearly of a penal nature and to constitute a mere security for the performance of the contract.

It was submitted on behalf of the Crown that the practical danger of loss to the Crown inherent in the making of this contract lay in the chance that the purchaser might abandon the contract after paying for and obtaining conveyances of the best of the land during the two year period leaving the Crown with unsaleable and perhaps landlocked portions, that this was the possibility against which paragraph 10 was intended to provide and that since the land

[1] (1873) L.R., 8 Ch. App. 1022.
[2] [1913] A.C. 319.
[3] [1916] 1 A.C. 275.
[4] [1913] A.C. 319.

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would have been tied up during the two year period and might in the meantime have fallen in value there might be great difficulty experienced in making an accurate assessment of the Crown's loss in the event of the purchaser abandoning the contract and that in these circumstances the provisions for retention of the money by the Crown was in fact a genuine pre-estimate of anticipated damage. While this submission is not unattractive I do not think it can prevail. The suggested inference as to the purpose of the paragraph is, I think, considerably weakened by the fact that the contract itself provides different prices to be paid by the purchaser to obtain conveyances of different parts of the land. But apart from this the fact is that the provisions of paragraph 10 apply in many possible situations other than that suggested and the fallacy in the submission becomes I think apparent when one considers that the same amount would be retained as "liquidated damages" even if what had been taken up had been the least saleable portions of the land. Accordingly I reject this submission and but for s. 48 of the *Exchequer Court Act* I would hold that paragraph 10 was a penal provision.

I turn therefore to the Crown's alternative submission that s. 48 of the *Exchequer Court Act* applies and requires the Court to interpret paragraph 10 as importing "an assessment by mutual consent of the damages caused by" the suppliant's default even though on ordinary principles of construction the paragraph might be interpreted otherwise. Since the construction of s. 48 depends on the preceding section I quote it as well.

> 47. In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow
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> (a) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein, or,
>
> (b) interest on any sum of money that the court considers to be due to the claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown.
>
> 48. No clause in any such contract in which a drawback or penalty is stipulated for on account of the non-performance of any condition thereof, or on account of any neglect to complete any public work or to fulfil any covenant in the contract, shall be considered as commina-

tory, but it shall be construed as importing an assessment by mutual consent of the damages caused by such non-performance or neglect.

Before considering the question of the applicability of s. 48 it will be convenient to deal with a submission put forward on behalf of the suppliant that the provision interferes with property and civil rights in the province and is *ultra vires*. Sections 47 and 48 have been in the *Exchequer Court Act* with but immaterial alteration since their enactment by c. 16 of S. of C. 1887. By s. 15 of the same statute the jurisdiction of this Court was redefined so as to make it clear that the Court had jurisdiction in respect of claims arising upon contracts entered into by or on behalf of the Crown in right of Canada, and it is worthy of note that in *The King v. Paradis & Farley*[1] Taschereau J. (as he then was) in considering s. 47 first referred to the provision by which the jurisdiction in respect of claims on contracts was conferred. As the subject matter with which s. 47 deals is what this Court may do "in adjudicating upon any claim arising out of any contract in writing" it seems clear that what is being referred to is the kind of contract upon which claims may arise in respect to which the jurisdiction of the Court may be exercisable. From this it appears to me that s. 47 refers, at least for the most part, if not exclusively, to claims arising on contracts entered into by or on behalf of the Crown in right of Canada. Since the contracts to which s. 48 applies are defined by the words "any such contract" the same comment appears to me to apply to the scope of that section as well. Though I am not aware of any case in which the precise point has been determined, I am of the opinion that it lies within the legislative competence of Parliament with respect to "matters not coming within the classes of subjects by this Act[2] assigned exclusively to the legislatures of the Provinces" to prescribe the legal effect of contracts to be entered into by or on behalf of the Crown in right of Canada, whether such effect is to be decided in this or any other court,[3] and to the extent that s. 48 purports to apply to such contracts (which is sufficient for the present case) if not to any further extent, it is, I think, *intra*

[1] [1942] S.C.R. 10 at p. 18.

[2] *B.N.A. Act*, 1867, s. 91.

[3] See Kellock J. in *Attorney General of Canada v. Jackson* [1946] S.C.R. 489 at 496.

See also the analysis of the subject of the rights and responsibilities of the Crown in *The Queen v. Murray et al.*, [1965] 2 Ex. C.R. 663.

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vires. Moreover even if, contrary to this view, the prescribing of the legal effect of contracts to be entered into by or on behalf of the Crown in right of Canada is not in all cases within the legislative competence of Parliament, the prescribing of the legal effect of such contracts where the same relate to "lands reserved for the Indians" seems to me to fall within the legislative competence of Parliament under s. 91 (24) of the *British North America Act*, 1867 and this alone appears to me to furnish a sufficient basis to support the provision in its application to the present case. I therefore reject the suppliant's submission.

To what contracts of the Crown then do these sections apply? On this question counsel for the suppliant made two submissions, first that s. 48 must be read along with ss. 46, 47 and 49 and that when so read it becomes clear that s. 48 is intended to apply only to the types of contracts for the construction of public works referred to in s. 47, and secondly that since s. 48, when applicable, abrogates what would otherwise be the rights of parties to contracts it should be construed strictly and applied only to contracts falling clearly within its terms, that when read strictly the section is ambiguous and that it should not be allowed to apply to a contract of the kind here in question which is not clearly one of the kind contemplated.

I am unable to accept either of these submissions. Sections 46 and 49 do not deal with claims arising upon contracts but with principles to be applied by the court in determining compensation for injury to property or for property taken for or injuriously affected by a public work. While their proximity to ss. 47 and 48 as well as their inclusion in the group of sections headed *"Rules for Adjudicating Upon Claims"* may suggest that the draftsman's attention may have been principally occupied with situations in which public works would be involved I do not think that anything in the heading or in ss. 46 and 49 can be allowed to restrict the plain meaning of the language used in ss. 47 and 48. There does not appear to me to be any limitation by reference to subject matter on the kinds of contracts to which s. 47 refers and indeed there seems to be no limitation of the meaning of the word "contract" in the section beyond (1) that implicit in the reference to adjudication by the court which, as I have indicated, appears to me to limit the kind of contracts referred to to

those upon which claims in respect of which this court has jurisdiction may arise and (2) that found in the words "in writing". This, I think, is the scope of the kinds of contracts referred to in the first clause of s. 47, which is a positive provision, and as I read the section nothing in the two specific prohibitory clauses which follow serves to narrow or restrict that scope. It is contracts of the same kind to which the expression "any such contract" in s. 48 in my opinion refers and while I do not quarrel with the submission that the section should be applied only to cases falling clearly within the meaning of the expressions used I think that the expression used in s. 48 is not ambiguous and is broad enough to include the contract in question in these proceedings.

A further point as to the application of s. 48 is whether the provision in paragraph 10 of the contract authorizing the Crown to retain the money was one stipulating for a "penalty" within the meaning of that term in s. 48. The meaning of the word "penalty", when used as a noun, can vary depending on the context in which it is found. In s. 48 the context by referring to a "drawback" and to "an assessment by mutual consent of damages" suggests to me that "penalty" is used in the sense of a pecuniary amount rather than in the broader sense in which it may refer to other types of punishment as well. Subject to this, however, in its context the expression "in which a drawback or penalty is stipulated for" appears to me to be concerned with the substance or character of what is stipulated for rather than with its form or the manner of its enforcement and to contain no limitation by reference to the form or the manner of enforcement of the stipulation.

In the present case what paragraph 10 provided was that upon the suppliant's default continuing beyond the thirty-day period, the Crown might terminate the suppliant's rights in the land and retain the money paid on account as well. But for the latter provision, on termination of the contract, a right to the return of the money paid on account would have arisen in favour of the suppliant[1] and the provision for the abortion of this right appears to me to

[1] *Mayson v. Cluett* [1924] A C 980, *Dies v British and International Arms Co* [1939] 1 K B 724, *Cronholm v Cole* [1928] 3 D L R 321, *York v Krause* [1930] S C R 376

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have in itself all the attributes of and to be a pecuniary penalty.

The only reported case on the interpretation of s. 48 of which I am aware is *Dussault et al v. The King*[1] where Audette J. after posing a series of questions with respect to its application seems to have held, though not without hesitation, that the section would not apply where no damage arises from the breach for which the penalty is stipulated. In the Supreme Court,[2] however, the judgment turned on other provisions of the contract to which s. 48 did not apply.

As what s. 48 prescribes is a rule of construction, which it seems to me must be applicable at and from the time when the contract is made, I have some difficulty in understanding how that construction can be affected by a subsequent event, that is to say, that the Crown happens to suffer no damage from the breach, but in any case I do not think the *Dussault* case applies in the present instance since I do not think it has been shown that the Crown suffered no damage to which that expression in the section could apply. There were answers given on discovery as to prospective and actual damage which were read at the trial and some answers were given as well in the course of the evidence of David Vogt but all that appears to me to have been established by them is that on the assumption that the Crown would be in a position to terminate the suppliant's rights in the land and keep the money paid on account of the price as well no loss was expected to result or did result from breach or default on the part of the suppliant and that there may or may not have been damage through decline in value of the land during the two year period when the contract was in force. In the *Dussault* case the fact that the Crown had suffered no loss from the suppliant's breach of contract clearly appeared. The situation in the present case is thus distinguishable on the facts from that considered by Audette J. and I am unable to see any other means of escape for the suppliant from s. 48. As the effect of that section is that the provision for retention by the Crown of the money must not be considered as punitive but on the contrary must be construed as importing an assessment by mutual

[1] (1917) 16 Ex. C.R. 228 at 236 *et seq.*
[2] (1917) 58 S.C.R. 1.

consent of the damage caused by the breach, there appears to me to be no basis on which the suppliant can be afforded any of the relief claimed.

As this conclusion disposes of the case it is not strictly necessary to express any view on the complex and rather contentious question whether the suppliant would be entitled to relief even if s. 48 did not apply but since this judgment is based on s. 48 alone it may be desirable that I should express my view briefly in case it should be of some importance in the event of an appeal.

On this question it should first be noted that what the suppliant seeks by its petition of right is neither specific performance of the contract nor specific performance and, failing that, repayment of moneys paid on account. The suppliant is not in a position to pay the balance of the purchase price and interest, or to offer to perform the contract, so as to put the court in a position to decree that the money heretofore paid ought to be returned unless the Crown elects to waive the provisions of paragraphs 10 and 11 and to complete its part of the contract on the usual terms as to payment of the balance of the price and interest. In the course of an examination for discovery held in September 1963 counsel for the suppliant stated that if given two years to do so the suppliant would raise the necessary funds and complete payment for the property but notwithstanding the size of the amount required I do not think an offer to pay requiring so long an extension can be regarded as a reasonable offer to carry out a contract which stipulated that time was to be of the essence and that payment in full should be made in two years ending in March 1961.

There is a body of judicial opinion which holds that in the absence of fraud, sharp practice or other unconscionable conduct on the part of a vendor equitable jurisdiction to order repayment of purchase money paid on account in a situation of this kind, that is to say, where the purchaser has defaulted and the contract provides for retention of the money by the vendor on termination by him of the contract, depends on the readiness and willingness of the purchaser to complete the contract and can be exercised only as an alternative remedy where, though the purchaser is ready and willing to complete the contract, the court is not

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in a position to give the defaulting purchaser further time and to decree specific performance.

This appears to have been the opinion of Farwell J. in *Mussen v. Van Deimen's Land Co.*[1] and of Romer L.J. in *Stockloser v. Johnson*[2] and the basis of the judgment of the Appellate Division of the Supreme Court of Ontario in *Walsh v. Willaughan*[3].

Thus in *Stockloser v. Johnson* Romer L.J. said at p. 501:

> There is, in my judgment, nothing inequitable per se in a vendor, whose conduct is not open to criticism in other respects, insisting upon his contractual right to retain instalments of purchase-money already paid In my judgment, there is no sufficient ground for interfering with the contractual rights of a vendor under forfeiture clauses of the nature which are now under consideration, while the contract is still subsisting, beyond giving a purchaser who is in default, but who is able and willing to proceed with the contract, a further opportunity of doing so, and no relief of any other nature can properly be given, in the absence of some special circumstances such as fraud, sharp practice or other unconscionable conduct of the vendor, to a purchaser after the vendor has rescinded the contract
>
> My brother Denning in his judgment has referred to the hypothetical case which was suggested during the argument of a purchaser who buys a pearl necklace on terms that the purchase price is to be payable by instalments and that the vendor is to be entitled to get the necklace back and retain all previous payments if the purchaser makes default in the punctual payment of any instalment, even the final one It would certainly seem hard that the purchaser should lose both the necklace and all previous instalments owing to his inability to pay the last one But that is the bargain into which the purchaser freely entered and the risk which he voluntarily accepted The court would doubtless, as I have already indicated, give him further time to find the money if he could establish some probability of his being able to do so, but I do not know why it should interfere further, nor would it be easy to determine at what point in his failure to pay the agreed instalments the suggested equity would arise

This opinion was also adopted and followed in *Galbraith v. Mitchenall Estates Limited*[4], where Sachs J. preferred it to the opinions of Somervell and Denning L.JJ. in the *Stockloser* case and drew support for his preference from the opinions of several members of the Court of Appeal in *Campbell Discount v. Bridge*[5].

[1] [1938] Ch 253
[2] [1954] 1 Q B 476
[3] (1918) 42 D L R 581
[4] (1964) 3 W L R 454
[5] [1961] 1 Q B 445 Reversed on another point [1962] A C 600

In *Walsh v. Willaughan*[1] the rule was stated by Mulock C.J. Ex., who spoke for the majority of the Court, as follows at page 585:

It is not the law that in all cases, upon the rescission of a contract by the vendor, the purchaser is entitled to a return of moneys paid on account of the contract The conduct of a purchaser, as in this case, may fully justify rescission by the vendor and entitle to retain moneys paid on account of the contract

Further, the conduct of the parties, after rescission, may be considered in determining whether a purchaser is entitled to relief from forfeiture of payments made on account In support of his proposition Mr Beck relies on *Boyd v Richards*, 29 O L R 119, 13 D L R 865, and *Steedman v Drinkle*, [1916] 1 A C 275, 25 D L R 420 *Those cases do not decide that, under all circumstances, where a vendor rescinds a contract for sale of land, the purchaser is entitled to return of moneys paid on account of the purchase-money, but merely that, where a purchaser is ready and willing to carry out his contract and seeks specific performance, and where the circumstances are such that it would be inequitable to allow the vendor to retain the land and the money, then relief from forfeiture may properly be given*

Riddell J. also said at page 590:

Very many cases were cited to us not unlike the present in some particulars, in which such a provision as we have in this case, has been called a penalty and has been relieved against at the instance of a purchaser, but it has been relieved against in order to allow the purchaser who was willing and able to carry out his contract (except in the matter of time) to do so on proper terms It is unnecessary to enumerate these cases—the most important and authoritative is *Kilmer v British Columbia Orchard Lands Limited*, [1913] A C 319, 10 D L R 172 I add to those cited in the argument only *In re Dagenham (Thames) Dock Co* [1873], L R 8 Ch 1022

The part payments might be recovered back (on proper terms) if specific performance were refused the latest case of this kind in the Judicial Committee is *Steedman v Drinkle*, [1916] 1 A C 275, 25 D L R 420, and that this is the law is indicated in *Brickles v Snell*, [1916] 2 A C 599, at p 604, 30 D L R 31 The case of *Labelle v O'Connor*, 15 O L R 519, is to the same effect

But there is no case in which one who is unable to carry out his contract has been allowed to abandon his purchase and claim the return of his part payments, when the vendor has given formal notice of cancellation In the language of Kekewich J, "that would be to enable him to do the very thing that Lord Justice Bowen said he ought not to be allowed to do, namely, taken advantage of his own wrong—I mean wrong, not in the moral sense, but in the sense that he could not perform his contract." *Soper v Arnold* [1887], 35 Ch D 384, at p 390

If the scope of equitable jurisdiction, in the absence of fraud, sharp practice or unconscionable conduct on the part of the vendor, is so limited, it is plain that on the facts

[1] (1918) 42 D L R 581.

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which I have summarized the suppliant is not in a position to obtain the relief claimed for the suppliant does not ask for specific performance and is not in a position to offer to complete the purchase. An attempt was made to establish sharp practice on the part of officials of the department in three incidents occurring while the contract was in effect and in one further incident occurring during the course of these proceedings but I am of the opinion that the incidents relied on do not constitute sharp practice in any relevant sense and that no equity of such a nature has been established.

On the other hand if the jurisdiction of equity, as exercised in *Steedman v. Drinkle*[1], to decree return of purchase money notwithstanding the provision of the contract for its retention by the vendor, is not a mere adjunct of procedure for specific performance to be called into operation only when the vendor is insisting on his contractual right to keep the property and the money too, despite the purchaser's readiness to complete, but is part of the jurisdiction of a court of equity to relieve from penalties and forfeitures, (and this was the legal basis on which the arguments of counsel were mainly developed), other principles apply and the readiness and willingness of the purchaser to complete, though important, is not critical and becomes but a circumstance, to be taken into account as part of the whole situation in determining whether the case is one in which relief should be granted. This was the view held by Somervell and Denning L.JJ. in *Stockloser v. Johnson*[2].

Somervell L.J. put the matter as follows at page 484 to page 487:

> Various arguments were developed before us. I am clear that the plaintiff could only recover if he could satisfy the court that it was unconscionable in the defendant to retain the money. I agree with the judge that he fails to do this and the analysis which I have made of the instalments and the sums which might have been anticipated reinforces the conclusion. Where instalments are to be paid over a period in which the plaintiff has the use or the benefit of the subject-matter the burden of showing unconscionability is not a light one. The judge, I think, proceeded on the basis that it could not be discharged unless the plaintiff was ready and able to complete the purchase, although the defendant having rescinded, no decree for specific performance could be made.

[1] [1916] 1 A.C. 275.
See also *Boericke v. Sinclair* [1929] 1 D.L.R. 561.
[2] [1954] 1 Q.B. 476.

I have had the advantage of reading the judgments which will be delivered by my brethren My brother Romer comes to the conclusion that after rescission by the vendor relief would only be given if there were some special circumstance, such as fraud, sharp practice, or other unconscionable conduct, and that before rescission a buyer would only get relief if willing and able to complete. In other words, the only relief would be further time. *I think that the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think that they indicate that the court would have power to give relief against the enforcement of the forfeiture provisions, although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances.*

Somervell L.J. then proceeded to discuss *In re Dagenham (Thames) Dock Co.*[1], *Kemble v. Farren*[2] and *Steedman v. Drinkle*[3] in the course of which he said at page 486:

As it seems to me, James L.J. (in the *Dagenham* case) is assimilating the retention of instalments, if the result would be penal in its nature, to a provision for the payment of a penalty sum on a breach or breaches. It is a question of the effect of the clause and not of the defendant's conduct.

If that is right, it would seem wrong and, as I think, illogical to hold that no relief could be given where the plaintiff in default was unable to complete. If the Lords Justices had had any such limited principle in mind they would, I think, have worded their judgments differently. I think that this view is supported by *Steedman v. Drinkle* [1916] 1 A.C. 275, although I agree that sentences in that case could be relied on as supporting the narrower view. There was a provision for forfeiture of instalments, time was of the essence and the buyer defaulted. The buyer sought a decree of specific performance, but as time was of the essence and the defendant was unwilling it was held that this claim failed. The Judicial Committee, however, were of the opinion "that the stipulation in question was one for a penalty against which relief should be given on proper terms." The terms were not settled, and the plaintiff was left to apply to the court of first instance. That, therefore, was a case in which the readiness and willingness could not lead to a decree for specific performance, but if the narrower argument is right, readiness and willingness is a condition precedent to any relief being given. This, as I have already said, seems illogical to my mind, if these forfeiture clauses are, as was said in the *Dagenham* case L.R. 8 Ch. 1022, in the same general category as penalty clauses. I am not, of course, suggesting that the plaintiff's readiness in *Steedman's* case [1916] 1 A.C. 275 was not relevant to the question whether relief should be given. I am only not satisfied that it is the sole condition of relief. If the Judicial Committee had intended to lay down this limitation it would have done so.

Denning L.J. summed up the position thus at page 489:

It seems to me that the cases show the law to be this: (1) *When there is no forfeiture clause.* If money is handed over in part payment of the

[1] (1874) L.R. 8 Ch. 1022.
[2] (1829) 6 Bing. 141; 130 E.R. 1234.
[3] [1916] 1 A.C. 275.

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purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money, but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages see *Palmer v Temple* (1839) 9 Ad & El 508, *Mayson v Clouet* [1924] A C 980, 40 T L R 678; *Dies v British and International Co* [1939] 1 K B 724, Williams on Vendor and purchaser, 4th ed, p 1006 (2) *But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause),* then the buyer who is in default cannot recover the money at law at all He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit That is, I think, shown clearly by the decision of the Privy Council in *Steedman v Drinkle* [1916] 1 A C 275, where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner

> The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell L J has said about it, differing herein from the view of Romer L J Two things are necessary first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money

If it were necessary for the purposes of this case to reach a concluded opinion on the extent of equity jurisdiction in matters of this kind I would adhere to the opinion of Somervell L.J. It seems to me that his view follows logically from what Duff J. (as he then was) referred to in *Snell v. Brickles*[1] as the traditional view of Courts of Equity that the substantial interest of the vendor in a contract of sale lies in his right to demand and enforce payment of the purchase price. In this view the amount of the puchase price, as of the day when it is due, is the measure of the vendor's interest in the contract and his rights under a provision such as paragraph 10 are neither in addition nor alternative to that interest but are ancillary to and a means of realizing it. It seems to me to follow from this that relief from the strict terms of a penal provision should be obtainable to the extent that the provision that he may retake the land and retain the money paid on account of purchase price as well gives the vendor more than full compensation for the purchase money, interest and any loss or expense to which he may have been put. This, to my mind, is what the

[1] (1914) 49 S C R 260 at 371 See also Jessell, M R. in *Lysaght v Edwards* (1876) 2 Ch D 499 at 506 and Kay L J in *Law v Local Board of Redditch* [1892] 1 Q B 127 at 133

order "for sale and payment, as in the ordinary case of vendor's lien" offered by the Master of the Rolls in the *Dagenham* case was intended and calculated to accomplish. Had the offer been accepted any surplus proceeds of the sale over the amount required to pay to the vendor the balance of the purchase price, interest and costs would plainly have been payable to the purchaser.

The *Dagenham* case was one in which the purchaser had had possession of the property under the agreement for several years but one-half of the purchase price had been paid, and it is, therefore, not difficult to see a basis upon which the court could regard it as unconscionable, in the sense in which the word is I think used by Somervell L.J., for the vendor to retake the land and keep the money as well. The same result, however, would not necessarily be appropriate in a case where a very small portion of the purchase price has been paid unless other circumstances are present which make retention of the money by the vendor as well as the land unconscionable.

Turning to the situation as I see it in the present case, as already mentioned, a number of incidents were put forward as constituting sharp practices on the part of Crown representatives and as being sufficient to bring the suppliant's case for relief even within the exception reserved by Romer L.J. but I am not persuaded that there is anything in any of the incidents which afford an equity in favour of the suppliant or advances its case. Moreover, it seems clear that no one acting on behalf of the Crown at any time gave the suppliant any reason to think that strict performance of the contract would not be insisted upon or that the time for making the final or any other payment would be extended.

There is also the fact, which militates, if at all, against the suppliant that the suppliant defaulted in paying the final instalment and interest when due and that through inability to raise the funds, rather than through any desire to abandon the purchase, it has never been in a position to offer to make the payment. With this there is I think to be weighed the fact that there has never been any indication of readiness on the part of the Crown to waive the strict terms of the contract on being paid the balance of the purchase price and interest and the further fact that the Crown is no longer in a position to complete even if the

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suppliant were in a position to offer the necessary payment since in the meantime a small portion of the land has been sold. To my mind the latter facts tend to neutralize the effect of the fact that the suppliant has not come forward with the necessary money since they tend to make the position somewhat similar to that in which the purchaser offers the money but the vendor relying on the contract will not take it. In the cases, such as *Steedman v. Drinkle*[1] and *Boericke v. Sinclair*[2], in which repayment was ordered there appears to have been an unconscionable insistence by the vendor on having the land and the money too, a fact which the unaccepted offer to complete even at a late stage was calculated to establish. Here though the suppliant has been unable to offer to complete the contract the material fact of the intention of the Crown (whether conscionable or not I come to next) to insist on having the land and the money too is I think apparent from the facts which I have mentioned.

I turn next to the picture presented by the Crown terminating the suppliant's rights in the unconveyed land and retaining $1,350,000 of the purchase price, (not being money paid as a deposit) as well. Of the total amount of $2,323,396.85 paid by the suppliant on account of the purchase price $973,396.85 appears to have been attributable to land actually taken up, leaving $5,548,549.15 of the total purchase price to represent the price of the remaining land. Of this amount the $1,350,000, even after deducting therefrom about $125,000 for interest to which the Crown was entitled under the contract up to the time of its termination, represented something in excess of 22 per cent. In the meantime while the contract was in effect the suppliant had not had possession of the land or revenue therefrom and the Crown had received interest on the unpaid portion of the purchase money. On the evidence there is thus nothing that the Crown could, as I see it, claim to set off as loss recoverable from the $1,350,000 with the possible exception of (1) some amount for fees of solicitors or agents of its own; (2) the commission of an agent whose services might be required to re-sell the property, the total of both of which items should I think be unlikely to reach 10 per cent. of the $5,548,549.15; and (3) any loss that might result

[1] [1916] 1 A.C. 275. [2] [1929] 1 D.L.R. 561.

from inability to realize that amount from the land. In these circumstances I should have thought that the suppliant was entitled to relief from the forfeiture of the $1,350,000 on proper terms including an opportunity for the Crown to establish and set off any loss which it may have sustained from the failure of the suppliant to complete payment of the balance of the purchase price and interest when due[1] and including, as well, a term limiting the amount to be repaid in any event to the $975,000 thereof which remained in the hands of the Crown at the time of the presentation of the petition of right.

However, in view of the conclusion which I have reached on the effect of s. 48 of the *Exchequer Court Act*, though not without some hesitation arising from the reflection that but for that provision I should have thought the suppliant entitled to relief, I am of the opinion that the judgment must be that the suppliant is not entitled to any of the relief claimed.

The Crown is entitled to its costs.

[1] *Vide Benson v. Gibson* (1746) 3 Atk. 395; 26 E.R. 1027. *Commissioner of Public Works v. Hills* [1906] A.C. 368 at 376.

Ottawa
1966
April 18-20
May 25

BETWEEN:

AKHURST-UBJ MACHINERY LIMITED ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE and P. B. YATES MACHINE COMPANY LIMITED ..... RESPONDENT.

Customs Duty—Appeal from Tariff Board—Whether imported machine of "class or kind made in Canada"—Tariff item 427(1)—Planer and matcher used in lumber industry—Whether Board erred in law—Difference between machines dimensional only—Customs Act, R.S.C. 1952, c. 58 s. 45(1).

Appellant imported from the United States a heavy-duty planer and matcher for use in the lumber industry. The Tariff Board determined that the machine was of a class or kind made in Canada by respondent company and therefore subject to a higher duty under Tariff item 427(1). Appellant appealed. Under s. 45(1) of the *Customs Act*, R.S.C. 1952, c. 58, the appeal was limited to a question of law.

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The imported machine was designed for feeding speeds up to 1,000 feet per minute although it was very seldom operated at that speed; the domestic machine had a design speed of 500 feet per minute and a maximum operating speed of 550 feet per minute The imported machine employed 16 cutting knives, the domestic machine, although normally equipped with 8 cutting knives, was capable of being equipped with 12 cutting knives The imported machine had a cutting circle of $11\frac{1}{4}$" compared with a 9" cutting circle for the domestic machine The imported machine had a profiler attached for splitting lumber; the domestic machine was capable of having a profiler attached The imported machine was very much heavier than the domestic machine Both served the same function There were no recognized standards in the trade for classifying planers and matchers.

Held, in view of the similarities of the two machines and the fact that the difference between them was dimensional rather than functional it could not be said that the Tariff Board erred in law in its decision, and the appeal must be dismissed. *Edwards v Bairstow*, [1955] All E R 48 per Lord Radcliffe at p 57, *Canadian Lift Truck Co. v Deputy Minister of National Revenue for Customs and Excise* (1956) 1 D L R (2d) 497, per Kellock J at p 498, *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel, Ltd.* [1965] S C R, 366, per Hall J at pp 369, 371-2-3-4, *John Bertram & Sons Co v. John Inglis Co* (1960) 20 D L R (2d) 577 per Thorson P at pp 582, 584, 585, *Deputy Minister of National Revenue for Customs and Excise et al v Saint John Shipbuilding and Dry Dock Co* [1966] S C R, 196, per Cartwright J, pp 201, 202, discussed

APPEAL from a declaration of the Tariff Board.

R. W. McKimm for appellant.

D. H. Aylen and *B. D. Collins* for respondent, Deputy Minister of National Revenue for Customs and Excise.

G. F. Henderson, Q.C. and *Antoine de L. Panet* for respondent P. B. Yates Machine Co. Ltd.

DUMOULIN J.:—This is an appeal from a Declaration of the Tariff Board, dated March 1, 1965, (including an interim Declaration of the Board, dated April 6, 1964) dismissing the W. A. Akhurst Company's appeal from a decision of the Deputy Minister of National Revenue for Customs and Excise.

Section 45(1) of the *Customs Act*, (R.S.C. 1952, c. 58 and amendments), pursuant to which this procedure is lodged, enacts that:

> 45 (1) Any of the parties to an appeal under section 44, .. may, within sixty days from the making of an order, finding or declaration under subsection (3) of section 44, appeal therefrom to the Exchequer Court of Canada upon any question of law

Under Vancouver entry of January 18, 1963, the appellant firm imported a Model 409 M-1 Heavy Duty Planer

and Matcher manufactured in the United States by the S.A. Woods Machine Company.

Planers and matchers of this kind serve in the lumber industry as a normal part of an over-all production line in dressing, end surfacing, conditioning, printing and grading of lumber for the market.

Paragraph 5 of the Notice of Appeal specifies that:

> 5 The imported machine is designed for speed-feeds, that is, the speed at which it will accept lumber for planing and matching of up to 1000 feet per minute
>
> It has a cutting circle of 11¼ inches and the cylinders contain 16 knives The machine, in addition, has a "Type C Profiler" which is an integral part of the imported machine and is used to split lumber to required size as part of the process of dressing lumber The imported machine weighs approximately 42,700 lbs and costs, excluding duty and taxes, approximately $54,000 00

At the time of importation, the Deputy Minister ruled that this 409 M-1 heavy duty planer-matcher was "a self-contained machine of a class or kind made in Canada by the P. B. Yates Machine Co. Ltd., Hamilton, Ontario. While the imported Planer and Matcher may contain certain features not necessarily found in Canadian built machines, it is, nevertheless, held to be of the same class or kind. Consequently, it is dutiable under Tariff Item 427(1)." This meant a levy of 22½ per centum instead of 7½ p.c., had the departmental decision favoured item 427a applicable to all machinery of a class or kind not made in Canada.

The above declaration was appealed to the Tariff Board members who, on April 6, 1964, issued a somewhat inconclusive report of which the gist reads:

> In the light of the evidence, the Board has concluded that the imported planer-matcher belongs in the class or kind of planer-matchers capable of having installed in them not less than 12 cutting-knives, with a profiler incorporated therein or with provision for the attachment of a profiler, with a board capacity of not less than 6 inches by 15 inches, either motor-driven or belt-driven
>
> The Board orders that the matter be referred back to the Deputy Minister for his determination as to whether the class or kind of planer-matcher adjudged above is or is not made or produced in Canada having regard to the requirements of subsection 10 of section 6 of the Customs Tariff

I had as well point out here the identity of the "class or kind" outlined in paragraph 6 of the Board's finding, *supra*, with the description of the machine manufactured by respondent P.B. Yates Machine Co. Ltd., as alleged in paragraph 7 of the latter's Reply to the Notice of Appeal.

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Egged on by this broad "hint" of the Tariff Board, it hardly needs saying that the Deputy Minister did not alter his initial opinion but imprinted it with additional directness and accuracy in these terms:

> Planer-Matchers coming within the "class or kind" category established by the Tariff Board are made in Canada by the P.B. Yates Machine Company Limited, Hamilton, Ontario. An investigation has shown that, during the relevant period, sufficient machines were produced in Canada to comply with the statutory requirements necessary to justify ruling the imported machine to be of a class or kind made in Canada. Accordingly, it is the decision of the Deputy Minister that the imported Model 409 M-1 15" x 6" Heavy Duty Motorized Planer and Matcher with profiler is of a class or kind made in Canada.

In turn, this determination of July 29, 1964, was referred anew to the Tariff Board, but in a more restricted form as agreed upon by the parties on January 29, 1965. The purport of the agreement was that:

> . . . if the class or kind defined by the Board in the sixth paragraph of its declaration dated April 6th, 1964, as that in which the goods imported fall, was intended by the Board to include the machines described and referred to in the evidence as P.B. Yates Machine Company Limited A-62 machines, then the class or kind of machines defined by the Board was made in Canada in substantial quantities and to the extent of ten per cent of Canadian consumption at all times relevant to this appeal ... [which should], in those circumstances, be dismissed.

Conversely, the alternative answer would favour the appellant company.

Subsequently, after a brief hearing, the Board, on March 1, 1965, held the imported machine to be "properly classified in tariff item 427 (1)", or, otherwise said, of a class or kind made in Canada.

Such was the sequence of proceedings. I must now advert to a sufficient recital of the conflicting points of fact and law adduced by the litigants in their written pleas.

Paragraphs 6 and 7 of the Notice of Appeal urge that:

> 6. There is only one Canadian firm which alleges it is a manufacturer of Planers and Matchers, the Respondent, P.B. Yates Machine Co., Ltd., and the largest machine sold by that Company is known as the Yates A62. That machine is designed for feeding speeds of 500 feet per minute, is normally equipped with a 9" cutting circle with 8 knives, weighs less than 21,000 lbs. and costs approximately one half of the cost of the imported machine, excluding duty and taxes.
>
> 7. The Yates A62 machine is virtually the same machine as the Yates A62 Planer and Matcher produced by the parent Company of the S.A. Woods Machine Company, Yates-American Machine Company of the United States, and the said Yates-American sells the basic component parts to P. B. Yates Machine Co. Ltd. for The Yates A62 machine alleged to be manufactured by that Respondent. The Yates A62 machine and smaller machines are used generally in smaller lumber mills in Eastern

Canada, and are not competitive in the market place with the Heavy Duty Planers and Matchers in question which are used largely in the large West Coast lumbering operations.

The principal co-respondent, P. B. Yates Machine Co. Ltd., devoted four paragraphs of its Reply to deny the appellant's factual claims.

However tedious it may seem I deem it advisable, in technical matters, to quote at length rather than attempt a summarization.

There now follow the respondent company's counter-explanations.

6. Machines similar to the one in issue have been made in Canada, in large numbers, for many years, by the Respondent P.B. Yates Company Limited (hereinafter called the Respondent Yates). The Respondent Yates manufactures a wide range of planing and matching machines, the largest of which is known as Model A62. This model has a maximum effective speed of 500 linear feet per minute, which varies as do all such machines according to the type of lumber used and the finish desired.

7. The machine manufactured by the Respondent Yates is capable of having installed in it 12 cutting knives, has provision therein for the attachment of a profiler, may be either motor-driven or belt-driven and has a board capacity of 15 inches by 8 inches.

8. The machine manufactured by the Respondent Yates performs the same function and operation and fulfills the same requirements in planing mills operations in Canada as the machine imported by the Appellant and by reason of this it competes directly with the machine in issue imported by the Appellant.

9. The machine in issue (ie. Model 409 M-1) embodies no unique design features or significant innovations and it operates on well known principles common to other machines in Canada. It represents no technical advance over planers and matchers built in Canada and is used for purposes similar to those which other Canadian made planers and matchers are used.

Mention should now be made that this firm's Sales Manager, Lloyd J. Blackburn, testified it had severed all corporate connections with Yates-American in 1946, although it continued using "the Yates-American literature to promote and sell P. B. Yates machines"; (cf. transcript, p. 253).

Since an appeal to this Court lies only on a question of law, the Akhurst Machinery Ltd. purported to submit four such reasons in support of its actual procedure; they are: (*a*) a complete lack of any competitive element between the imported Model 409 M-1 and the Yates A62 or any other planer-matcher supposedly made in Canada; (*b*) the Tariff Board's omission to compare the imported machinery with that of local fabrication when determining whether or not both "could be said to be of the same class or kind"; (*c*)

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the Board's reliance upon allegations concerning the number of knives the domestic planer-matcher could hold, unsubstantiated by proof of a like machine having ever been manufactured here; (*d*) the absence of evidence vindicating the Board's finding which, had the facts adduced received a proper interpretation, should have entertained the opposite conclusion.

Both of the respondents were satisfied with retorting there was ample evidence before the Tariff Board to support its declaration and, therefore, that no error in law had ensued.

After these lengthy yet unavoidable particulars, there now begins the exacting obligation of determining whether the case gives rise to a question of law, the essential condition of this Court's jurisdiction.

There is no dearth of juridical directives concerning the nature of a question of law and how it should be dealt with. Among the most recent pronouncements on this score, one issued from the House of Lords, another from the Supreme Court of Canada.

In the English case of *Edwards* v. *Bairstow*[1], Lord Radcliffe said:

> When the Case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too, the court must intervene. It has no option but to assume there has been some misconception of the law, and that this has been responsible for the determination.

Mr. Justice Kellock (as he then was) reasserted those well known tenets *in re*: *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[2] when, speaking for the Supreme Court, he expressed the unanimous opinion in these terms:

> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter is of such a nature or kind as to fall within the legal definition is a question of fact, nevertheless, if it appears to the appellate Court that the tribunal of fact had acted without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the Court may proceed under the assumption that a misconception of law has been responsible for the determination; *Edwards v. Bairstow* referred to.

[1] [1955] All E.R. 48 at 57. [2] (1956) 1 D.L.R. (2d) 497 at 498.

If this legal interpretation commands a wide consensus, it would appear, at least so I venture to think, that the views taken by the Courts, when differentiating the categories of goods that should be considered of a class or kind made or not in Canada, adhere to no set pattern. Nor would it prove an easy task to single out criteria applicable to all cases, each constituting a distinctive issue to be adjudged in the light of its particular circumstances.

However, some assistance is afforded by subsection (9) of section 6 of the *Customs Tariff Act* (1952, R.S.C. c. 60) which provides that:

(9) For the purposes of this section, goods may be deemed to be of a class or kind not made or produced in Canada where *similar goods* (emphasis mine) of Canadian production are not offered for sale to the ordinary agencies of wholesale or retail distribution or are not offered to all purchasers on equal terms under like conditions, having regard to the custom and usage of the trade.

Subsection (10) adds this complement:

(10) For the purposes of this Act goods shall not be deemed to be of a class or kind made or produced in Canada unless so made or produced in substantial quantities; and the Governor in Council may provide that such quantities, to be substantial, shall be sufficient to provide a certain percentage of the normal Canadian consumption and may fix such percentages.

Of the two preceding paragraphs, the former, especially, considers similarity between cognate kinds of goods as an indication of sufficient significance to warrant a conclusion. Accordingly, my investigation narrows down to a search for the material presence of this factor in those planer-matchers at issue, the imported 409 M-1 and the Canadian Yates A-62.

In order to diminish the risk of ambiguity, I will, as an initial precaution, cite a few dictionary definitions of the adjective "similar" and analogous terms currently assimilated with it.

In the Shorter Oxford Dictionary, *verbo* "Similar", we find:

2. Having a marked resemblance or likeness; of a like nature or kind.

Webster's 3rd New International Dictionary says:

1. Having characteristics in common.

Absolute identity of meaning existing between the English adjective "similar" and its French translation "similaire", one may safely refer to a lexicon widely acclaimed though the most recent of its class, Robert's

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Dictionnaire alphabétique et analytique de la langue française (1964), wherein we read this:

"Similaire": qui est à peu près de même nature, de même ordre.

Analogy of class or kind ("nature" in French) would, then, produce similarity.

The transcribed record of evidence heard by the Tariff Board reveals, as customary in most cases of this nature, contradictions possibly more apparent than real, which, at all events, demand a careful scrutiny to ascertain if a person, actually the Board, "properly instructed as to the law and acting judicially could have reached the particular determination" appealed from.

Three witnesses were called on appellant's behalf, the first of whom was Harold Weldon Akhurst, President of W.A. Akhurst Machinery Company, Ltd. To the following questions put by Mr. Corcoran, a Board member:

> . . . did I understand you to say that no matter what the capacity of the machine was in lineal feet per minute the cylinder would revolve at the same speed?

he replied:

> If it is a direct motorized machine, yes.
>
> MR. CORCORAN: The cylinders are not speeded up for the higher capacity machine?
>
> MR. AKHURST: No; they are constant at 3,450 rpm. That is universal no matter whether it is a Yates-American motorized machine, a P.B. Yates motorized machine, or a Newman, or anyone else—any of these machines which are made in North America.
>
> MR. McKIMM (for appellant): What is speeded up to give you increased production?
>
> MR. AKHURST: They increase the number of knives in the cylinders; and then the sideheads usually follow on with a corresponding number of knives. Therefore, as you put more knives into the cylinders it means you have to increase the diameter of that cylinder. Otherwise, as you put all these various slots in the cylinders to accommodate the knives the cylinders would be too weak.
>
> Another factor which comes into it is that as you get into these higher speed machines, by getting a bigger diameter cylinder it gives more sweep to the knives, so that those knife marks which you notice in that sample flatten out more. If you have a little cylinder those knives are coming round and are just hitting at that bottom spot. But as you get into the bigger knife it gives more sweep to the knife and you have a higher peripheral tip speed to your knife to accommodate the extra feed rate. So that as we go into the higher speed machines you have to get into more knives first, and the more knives require larger cutting circles.
>
> Yates-American, and I think it is the same with P.B. Yates on their A-62, they will supply a 12 knife cylinder on their nine inch cutting circle cylinders. But as far as Yates-American are concerned, they specify that it has to be only a 25 degree knife angle. We do get into different knife angles depending on whether the lumber to be dressed

is to be green lumber or dry lumber, and so on. Out on the coast, generally in most installations they like to have about a 30 degree knife angle. So Yates-American specify that it has to be a 25 degree knife angle.

We have some drawings which show various cutter-heads.

(cf. Official Report, p. 39, from line 18 to line 5 on page 41.)

These explanations led the Tariff Board to mention, in its April 6, 1964, decision, that: "The number of knives appears to be an important specification and this varies from as low as four knives to as many as 16 knives in those machines on which advertising brochures were submitted to the Board". Those brochures are exhibits A-3, A-4, A-5, A-7, A-10, D-6, Y-1, Y-2 (confidential) and Y-3.

Appellant's counsel, Mr. R. W. McKimm, next asked the witness if "...the trade (has) accepted standards of numbers of knife cuts per inch which they will accept for various types of wood?"

MR. AKHURST: Not that I know of, no. There is no definite standard laid down that I know of. As I say, this is only a guide. The circumference—that is the cutting circle—of the head has a definite bearing. If you just have a small cylinder the knife marks will get very much more pronounced at high rates of feed than if you have a big cylinder with a big sweep on it.

Then at page 51, from lines 2 to 23:

MR. McKIMM: In the trade is there any recognized standard by which planers and matchers are characterized?

MR. AKHURST: No, there is not any definite understanding, although I think if you asked any experienced planing mill operator what he considered a heavy duty planer-matcher, he would be thinking in terms of a machine which would be capable of consistently running at better than 500 feet per minute.

MR. McKIMM: What number of knives would he be thinking of?

MR. AKHURST: To do a proper job at that rate, you should at least have twelve knives.

MR McKIMM: Twelve to sixteen?

MR. AKHURST: Yes, at least twelve.

Right now, it is worthwhile noting the appellant's agreement that:

a) no trade standards exist as to any definite number of knife cuts;

b) Again no trade or custom usages are set up for the technical classification of planers and matchers;

c) A minimum of twelve knives would suffice "to do a proper job at that rate", namely, a consistent run "at better than 500 feet per minute";

d) Inferentially, the witness would range in the class of heavy planers and matchers a machine having "at least twelve knives".

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Mr. G. H. Glass, who presided at the hearing in his capacity of First Vice-Chairman of the Tariff Board, asked:

> Just to get that so that I understand it correctly, this machine which you imported, the 409 M-1, has 16 knives, has it?

MR. AKHURST: That is correct, sir.

THE CHAIRMAN: And it says on the back of exhibit A-3 that its production speed is up to 1000 lineal feet per minute. So that if you take exhibit A-9, the back page, and you follow the 1000 feet per minute across to under 16 knives, you get 4½ knife cuts per inch?

MR. AKHURST: Yes, sir. (cf. report, p. 46).

THE CHAIRMAN: Which is fewer than any of the recommended knife cuts?

MR. AKHURST: Yes, but as I explained this is qualified by the fact that with the bigger diameter cylinders you get more sweep on your knives. If you had only a nine inch cutting circle, and if it was possible to crowd 16 knives into that, the knife marks would be more pronounced on a small diameter cylinder than when you get into a large cylinder. Admittedly, 1000 feet a minute is really pushing it as far as—(report, p. 47)

An untimely interruption by the Chairman cut short the deponent's answer, and we must go to line 19, page 47, to find its normal ending, which I quote:

> ...although this machine is capable of 1000 feet a minute, it does not necessarily mean that they are running up to that full capacity. But it is possible to do so.

What precedes might qualify this advertised top speed of 1000 linear feet a minute as the ultimate velocity or the maximum speed resorted to at intervals only, not consistently, to ease some excessive business pressure. Yet, such a capacity would still be, on occasions, a relative advantage, if not an uninterrupted one utilizable throughout the run of milling operations.

Notwithstanding these reservations, Akhurst definitely believes that the 409 M-1 "is capable of producing up to double the A-62" (cf. pp. 50-51).

Asked how an A-62 compares in electric motor power with the 409 M-1, Akhurst answers:

> The normal power with the A-62 is up to about 70 horsepower on the top head, whereas on the 409 the standard is 125 horsepower. (report, pp. 55-56)

Mr. George Wehring, of Beloit, Wisconsin, Sales Manager of Yates-American since 1949, and also of S. A. Woods Ltd. which became associated with the first named company in August, 1961, was the second witness. Mr. Wehring merely said that most 409-M planer-matchers were sold on the American west Coast (report, p. 141) and set the cost per unit at approximately $79,000, profiler included, while

the price of an A-62 with a double profiler attached, but not of the "C" type, would be $36,000.

This does not quite tally with the assertion made in paragraph 5 of the Appeal Notice, where a 409 M, with 16 knives, is priced at about $54,000. Nor does the $36,000 alleged by Wehring to be the cost of an A-62 equipment agree with the confidential exhibit Y-2, a letter, dated February 14, 1964, to the Chairman of the Tariff Board, signed by J. L. Blackburn, Sales Manager of the Canadian P. B. Yates Machine Company. It suffices to say the information thus conveyed approximates the figure mentioned in the Notice of Appeal as the price of the imported planer-matcher.

Mr. Jack Horth, of Rockford, Illinois, a locality 18 miles from the plant site at Beloit, holds the position, since 1961, of Chief Engineer of the associated Yates-American and S. A. Woods machine companies. His lengthy testimony is frequently a repetition in more technical language and also, occasionally, with more detailed information, of Mr. Akhurst's evidence.

At the start of his examination (report, p. 147) Horth points out that: "As has already been brought out in the evidence, the two machines are quite different in both weight and production capabilities. The 409 is approximately twice the weight and has approximately twice the productive output per operating hour". The basic ground of appeal consists in this greater productive output, all other factors only tending to support, so it seems, this alleged mechanical superiority.

Another repetitious way of stressing the matter is to express it in terms of feed speed, as reported on pages 148, bottom line (30), and 149, lines 1 to 25; quotation:

MR. McKIMM (for appellant): What is the maximum feed speed recommended for the 409?

MR. HORTH: The 409 is approximately 1000 feet per minute feed speed.

MR. McKIMM: And for the A-62?

MR. HORTH: the A-62 is 450 to 500. Five hundred feet per minute is generally what we consider is the design limit.

THE CHAIRMAN: This is feeding what?

MR. HORTH: That would be feeding any type of lumber, even two by fours, which is the smallest. We would consider the design limit to be about 500 feet per minute.

THE CHAIRMAN: And in the other one 1000 feet per minute.

MR. HORTH: Yes.

MR. McKIMM: By that I take it you do not recommend that everything be run at 1000 feet per minute?

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MR. HORTH: No, we do not, although the customer would be perfectly within his rights to expect that, and that is why when a sales inquiry comes in for one of these machines, we scrutinize it very closely before the machine is itemized and sent to production in the shop, to make sure that we have adequate horsepower and adequate material strength in some of the components to withstand these rates of feeds and speeds—

The appellant company's chief engineer subsequently proceeded to compare the respective resistance to functional stress, wear and tear of the equipment at issue; I am now quoting from the official report, page 150, line 19 to page 151, line 19:

The 409-415 series machines are built to stand these quite normally incurred operational shocks without damage to the framing or the gearing, or the shafts and drives within the machine, at speeds, in the case of the 415, up to 750 feet per minute, and in the 409 up to 1000 feet per minute. Whereas in the A-62 series machines, were you to drive the thing beyond 500 feet per minute and incur some of these impacts and shocks which would occur from lap-ups or breaking of the lumber in the machine, it might do substantial damage to the frame and to the engine and mechanism of the machine.

MR. McKIMM: Have you had any experience of persons driving an A-62 beyond the recommended speed limit?

MR. HORTH: Yes, we have.

MR. McKIMM: What has been the result of that?

MR. HORTH: The result has been that within about three years time practically all the major components of the machine have been rebuilt and replaced, including new yokes, new cams for the feed rolls and so on. The machine definitely will not give normal life expectancy above 500 feet per minute.

That is a matter of experience. You could go into classical engineering perhaps and try to prove that these conclusions are wrong, but these machines have been out in the field now, machines of this basic type, and we feel it is a marvelous proving ground, and that is the conclusion we have come to as to operational performance limits.

Under cross-examination by Mr. G. E. Hooper, acting for the respondent P. B. Yates Machine Company, the witness reveals his sources of information regarding the thousand feet per minute speed of the 409 M-1 planer-matcher. It emanates from sales or servicemen's reports, and not from "completely detailed local type records". As the deponent remarks: "We merely have the information again in the form of information from our rates or serviceman's reports that this machine has been operating at that speed...They indicate that the machine was operating at that speed for a substantial portion of an operating shift;" (report, p. 197).

Without in the least detracting from the weight of Mr. Horth's evidence, nevertheless, it is not in complete accord with that of his company's president, Mr. H. W. Akhurst,

who, in his replies to Mr. McKimm and Mr. Corcoran, second vice-chairman of the Board, was by no means so positive. To Mr. McKimm's question, (page 33, lines 13 to 19):

> —well, Mr. Akhurst, when you say up to 1000 feet a minute, I take it the 1000 feet is the top speed you are running at under optimum conditions with the right kind of wood?

the witness answers:

> Yes, that is right. That is what the manufacturer considers his machine is capable of doing on certain types of wood;

and, (page 69, lines 19 to 22) when asked by Mr. Corcoran:

> Would they actually be running this machine at 1000 feet per minute?

Akhurst guardedly says:

> Very seldom, but it is capable of doing it if they have to.

One witness only, Lloyd F. Blackburn, testified on behalf of the P. B. Yates Machine Company (of Canada), of which he is the Sales Division Manager. He shares Mr. Akhurst's opinion that there is no single criterion by which planer-matchers with profilers are classified by users in Canada (report, p. 217).

A long discussion ensues about the respective production yield, the feed and speed rates of both machines. Starting at page 219, line 21, of the report, it covers some thirty pages and it seems hardly possible to avoid giving abundant excerpts:

MR. CORCORAN: Mr. Blackburn, if a customer asks you for a machine which would have the capacity of planing and matching at the rate of a thousand feet per minute, what machine would you recommend to him?

MR. BLACKBURN: I don't have a machine that will plane at a thousand feet a minute.

MR. CORCORAN: When you said that you had machines on the west coast which are planing and matching at higher rates—I take it that would be higher feed rates? (p. 220).

MR. BLACKBURN: Yes.

MR. CORCORAN:—than the 409 M-1? Or what did you mean by that answer?

MR. BLACKBURN: Based on information we had received, or production reports, the lumber being run at Squamish indicated a sustained yield feed rate of approximately 350 feet per minute, whereas we have reports of our own machines feeding in excess of 500 feet per minute on sustained yield.

Page 221, from line 6:

MR. HOOPER: (for P B. Yates of Canada): You told Mr. Corcoran that your records show that an A-62 has operated over a certain period at 550 feet?

MR. BLACKBURN: That is right.

MR. HOOPER: What period of time would that cover?

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MR. BLACKBURN: Usually we estimate it over a 22-day operating period.

MR. HOOPER: How long has the company been running at that speed—over a period of years?

MR. BLACKBURN: We do know of one particular case where they have run at that speed and the company has been doing that for the last seven years.

MR. HOOPER: Do some Canadian planing mills have the output of two planer-matchers feeding into one line for grading, etc?

MR. BLACKBURN: Oh, yes, definitely.

MR. HOOPER: What is the Canadian content in the A-62, the A-20-12 and the A-20 at this time?

MR. BLACKBURN: 100%.

Cross-examination by Mr. McKimm did not perceptibly shake the witness' previous assertions that, for all practical needs, an A-62 Canadian made planer-matcher is an acceptable counterpart of the imported 409 M-1.

I am now quoting from page 243:

MR. McKIMM: Didn't you say in your examination in chief that when you get a request for a quotation on a machine they tell you what they want to do with the machine, how much they want to produce?

MR. BLACKBURN: They usually tell you how much material they want to produce per month, or per year; but I have never heard them saying that they wanted their machine to produce so much per minute.

MR. McKIMM: When they tell you they want to produce so many million board feet of lumber per year, you work it down from that and decide whether or not they need a machine which will produce at 500 feet or 300 feet per minute?

MR. BLACKBURN: Yes.

MR. McKIMM: And you recommend the machine which will actually do the job for them?

MR. BLACKBURN: Yes.

MR. McKIMM: If they come along and said they wanted so many million board feet in a year's production—such and such a number—and it turned out that what they would have to operate on in a normal 2-shift basis—eight hours per shift, or a normal week—was 100 feet a minute, would you try to sell them the A-62?

MR. BLACKBURN: No; not unless they indicated to me that they might want to increase their production at a later date.

(Page 245, line 18, to page 246, line 14):

MR. McKIMM: If the same company came along and said "We have to produce at 850 per minute," I take it that it would not be fair to offer them a machine that could produce not more than 500 feet? They wouldn't be interested.

MR. BLACKBURN: I would offer them the A-20.

MR. McKIMM: To produce the 850 feet per minute?

MR. BLACKBURN: Are they going to produce the 850 feet per minute?

MR. McKIMM: That is what they say.

MR. BLACKBURN: This is what they say, but is that what actually it would work out to as a calculation?

MR. McKIMM: Let us assume that it is.

MR. BLACKBURN: Actually, in our installations there are only short runs at sustained yield; so therefore I can only guess at what might be the case in the United States.

MR. McKIMM: Let us assume that this was so, that the evidence was that they would run at 850 feet per minute.

MR. BLACKBURN: No; the only thing I can say is that the evidence is hearsay. I have never seen, and I don't know of any person who [has] ever seen, a machine running at 800 to a thousand feet per minute unless on a sustained yield basis.

Finally, the witness does not deny listening to Horth's declaration that "he had heard of installations" on the west coast where machines operated at 800 feet per minute, but questions its reliability because "...I have never seen it and I have never talked to anyone who has ever seen one in operation". (report, p. 247, at top). The cross-examining lawyer pursues his probing (same page, lines 5 to 30):

MR. McKIMM: But if somebody, in fact, asked for this I take it, then, that in those circumstances the 409 and the A-62 just don't compete? One can do it; the other one can't do it?

MR. BLACKBURN: Again I will have to say it is hearsay.

MR. McKIMM: But this would be a fair statement on that assumption?

MR. BLACKBURN: If those assumptions are correct I would say that would be a fair statement.

MR. CORCORAN: Can we make one more assumption? If someone asked for a machine that would have to produce at the rate of a thousand feet per minute would you offer him an A-62?

MR. BLACKBURN: If they came to us and said they had to have a thousand feet per minute it is quite likely that I would; it is quite likely that I would.

THE CHAIRMAN: If I remember aright, Mr. Blackburn, you mentioned that there were one or two installations where your A-62 was operating consistently at 500 feet per minute?

MR. BLACKBURN: Yes.

THE CHAIRMAN: Was that right? You said that this morning in your evidence?

MR. BLACKBURN: I know of one operating—of an A-62 operating—at 550 feet per minute consistently.

So much for the evidential chapter of this appeal. I shall now review most of the precedents cited.

The Supreme Court of Canada reversed the undersigned's decision in *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel, Ltd.*[1], a matter bearing a close resemblance to the instant one. The relevant facts, recited by Mr. Justice Hall, are hereunder reproduced from pages 369 and 371 of the Canada Law Reports:

> The appeal relates to a Beloit 276 inch newsprint machine made by Beloit Iron Works of Beloit, Wisconsin, having a rated mechanical speed of 2,500 feet per minute. The respondent MacMillan & Bloedel stated its intent to purchase the newspaper machine from Beloit Iron

[1] [1965] S.C.R. 366 at 369, 371, 372, 373, 374.

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> Works by letter dated January 25, 1955. (p. 371) The newsprint machine so imported is composed of iron or steel and is a large and complex piece of machinery composed of many parts. It was built to the specifications of the purchaser and cost approximately $3,000,000.
> ...MacMillan and Bloedel took the position that the design speed of the newsprint machine in question should have been taken by the Tariff Board as the determinant factor in arriving at a finding as to whether or not the said newsprint machine was of a class or kind not made in Canada and it argued that the Tariff Board had erred in law in not so finding.

This latter determination had decided that: (cf. p. 374)

> However, as appears from the evidence, design speed indicates only one of the primary determinants of the construction and mechanical capabilities of the machine and it is not universally, or even commonly, recognized as a single measure by which the whole machine may be characterized when it is being bought, sold or advertised. *We do not accept design speed as the criterion or determinant of class or kind.*

(emphasis not in text)

Such an enunciation, unanimously approved by the Supreme Court as constituting a finding of fact, is of particular importance in the instant case, similarly based upon the design speeds of the 409 M-1 and A-62 planers of 1000 and 550 linear feet per minute respectively.

The Supreme Court's endorsation of the aforesaid tenet, in a matter scarcely distinguishable from the actual suit, might warrant this appeal's dismissal without further comments. Nevertheless, as indicated previously, I will inquire into the legal significance attached to certain other factors by our highest tribunal.

Returning to Mr. Justice Hall's notes of judgment *in re*: *Deputy Minister of National Revenue v. MacMillan & Bloedel, Ltd.*, the learned Judge wrote:

> On the main argument that the Tariff Board erred in law in refusing to find that design speed should be the deciding factor in arriving at a conclusion as to whether or not the said newsprint machine was of a class or kind not made in Canada, the respondent MacMillan and Bloedel relied strongly on the judgment of Judson J. in *Dominion Engineering Works Limited v. Deputy Minister of National Revenue*[1].

This suit is more widely known under the abbreviated form of "*The A.B. Wing Case*". The facts are reported thus in the latter decision:

> The respondent (Wing) Co. imported a power shovel of a nominal dipper capacity of 2½ cubic yards. It is undisputed that such a shovel was not made in Canada at the date of import, but that those ranging from ½ cubic yards to 2 cubic yards were made in Canada

[1] [1958] S.C.R. 652 at 653, 654, 656.

at the time. The customs appraiser entered the shovel under tariff item 427 of the Act and the Deputy Minister confirmed the classification. The Tariff Board reversed the Deputy Minister's decision and classified the shovel under 427a, which carries a much lower rate of duty, as being of a "class or kind not made in Canada".

This classification under item 427a was confirmed by the Exchequer Court, hence a final and unsuccessful appeal (Rand J., dissenting) to the Supreme Court of Canada.

Albeit the decision in the A. B. Wing affair favoured the importer, it laid down certain transcendant directions of general applicability, quite apart from the issue's eventual outcome, such as the value of accepted trade classifications and the relative worthlessness of "potential or actual competitive standards".

In this line of thought, Mr. Justice Judson spoke thus for the majority (p. 654:)

> It is undisputed that power shovels with a nominal dipper capacity of two and a half cubic yards or more were not made in Canada at the date of import. On the other hand, power shovels with a nominal dipper capacity ranging from one-half cubic yard to two cubic yards were being made in Canada at that time. The Tariff Board found that a classification of power shovels by nominal dipper capacity was generally understood and accepted by the trade in both Canada and the United States *and was probably the most practical single standard according to which these implements could be classified.*

(Italics mine throughout these notes.)

We have seen, *supra,* that both Messrs. Akhurst (report, p. 51) and Blackburn (p. 217) admit the absence of recognized standards by which planer-matchers are characterized, so that in this instance "probably the most practical single standard according to which these implements could be classified" was admittedly missing. Now, this undisputed lack of an accepted classification norm could be a worthwhile retort to the appellant's complaint that the Tariff Board failed to properly classify the imported 409 M-1. Classification was necessarily achieved by means other than a recourse to established trade usages.

> The task of the Board [continues Mr. Justice Judson] was to classify a piece of machinery—to determine whether it was of a class or kind not made in Canada. This is a task involving a finding of fact and nothing more. *It is not an error in law to reject the classification by potential or actual competitive standards* and to prefer classification according to a generally accepted trade classification based on size and capacity. *I do not think there is any error in the Board's decision but, if there were, it could only be one of fact.*

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Mr. Justice Thorson, late President of this Court, expressed an analogous view of the classifying duty and of the competitive function criterion *in re*: *John Bertram & Sons Co. Ltd. v. John Inglis Co. Ltd.*[1]. The learned Judge wrote:

> While of course, the objective or purpose of the classification is to determine under what Tariff Item the article directed to be classified comes, the Act does not define the basis for the classification. The words "of a class or kind not made in Canada" are general terms appearing frequently in the Customs Tariff *and it is not possible to lay down any single criterion of general application.*

Competition relied upon by counsel as a significant test is dubiously spoken of, on page 584, in these terms:

> The next attack was really an economic complaint. The cloak under which the assumed error of law was placed was that the Board had failed to use the criterion of competitive function...Even if the criterion of competitive function should be accepted as a criterion of whether an article should be classified of a class or kind made in Canada or not made in Canada...,

the permissible inference, I believe, points to a negative conclusion or, at least, to a disparaging opinion of the competitive factor.

Even though some traces of hesitation might be detected in the Tariff Board's handling of the matter, it would be encompassed within factual, and in nowise legal, limitations, therefore an erroneous finding, had any occurred, would still remain one of fact.

Appellant's counsel, at the hearing, insisted on the difference in cost, that of the imported 409 M-1 being twice that of the Canadian A-62. This claim is doubtful; we know the price of an A-62 planer, with 12 cutting knives and a double profiler, dwarfs to nothingness the difference between both machines (cf. ex. Y-2 confidential), custom duties excluded. On the other hand, an argument of this nature carries little weight since it also essentially is one of fact.

I would add that *in re*: *Canadian Lift Truck Co. Ltd. v. D.M.N.R.* (*supra*), Mr. Justice Kellock, then of the Supreme Court, dealt rather summarily with a selfsame argument; he merely said:

> The question to my mind is, however, as to whether or not such a situation is sufficient to constitute the imported machine as being of a "class or kind" not made in Canada.

[1] (1960) 20 D.L.R. (2d) 577 at 582, 584, 585.

Altogether in line with several points of the issue at bar, the latest Supreme Court decision, that of *Deputy Minister of National Revenue for Customs and Excise et al v. Saint John Shipbuilding and Dry Dock Co. Ltd.*,[1] pronounced December 20, 1965, affirmed a majority conclusion of the Tariff Board, which I cite in part:

> The lifting capacity of the imported crane therefore exceeds that of the Port Weller crane (of Canadian manufacture) by 29 short tons or over 50%. This excess is substantial. However, in the market of very heavy cranes built only to purchasers' specifications there must be breadth in the application of criteria of similarity in the establishment of the class or kind distinction.
>
> In the present case the Board finds that for the purposes of this appeal the capacities of these two jib travelling gantry cranes are similar enough that it was not unreasonable for the respondent to include these two cranes in a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more.
>
> ....
>
> The Board, therefore, declares that the imported crane is not "of a class or kind not made in Canada".

Mr. Justice Cartwright who delivered the judgment for the Court reached this finding:

> I have already quoted from the reasons of Mr. Gerry (the dissenting member of the Tariff Board) the ground on which he disagreed with the majority. In his opinion the difference in lifting capacity between the Port Weller crane and the imported crane was so great that the two could not be regarded as belonging to the same class. The difference is large and is accentuated if expressed in terms of "overturning moment" instead of maximum lifting capacity but it is *dimensional rather than functional.* On this point it appears to me that the view of the majority and that of the minority were both tenable and that the *choice between them involved a finding of fact which it was for the Board to make* and as to which its decision is not subject to review.

It can be asserted that in the latter case as in the actual one, the discussion raised similar comparisons of size, weight and productive output of machinery differing in lifting capacity or in design speed, yet this disparity did not, according to the Supreme Court, transgress the limits of a question of fact.

Several pages back, the matter of similarity was suggested as a likely touchstone in keeping with the language of section 6, subsection 9, of the *Customs Tariff Act.*

When winnowed to its ultimate gist, the evidence, here, shows that:

1. the domestic A-62 planer-matcher is capable of having installed in it no less than 12 cutting knives, with

[1] [1966] S.C.R. 196.

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double profiler attached; it may be considered as of the heavy duty class, and pushed up to a design speed of 550 feet per minute, consistently, for a 22-day shift;

2. the imported 409 M-1 can rotate at 1000 feet a minute in optimum conditions, on certain types of lumber, and, though capable of such speed, it "very seldom" runs at that extreme velocity.

Otherwise put, the A-62 is susceptible of achieving better than 500 feet a minute, while the 409 M-1 infrequently attains its exceptional maximum.

Whatever difference persists may be likened, for all practical intents, to something "dimensional rather than functional" and does not exceed the realm of technical fact.

There is, I believe, sufficient proof that "a person, properly instructed as to the law and acting judicially, could have reached the particular determination" arrived at by the Tariff Board.

The problem of "substantial quantities" does not arise, both parties having agreed that "...if the class or kind defined by the Board...was intended...to include the machines described and referred to in the evidence as P. B. Yates Machine Company Limited A-62 machines, then the class or kind of machines so defined by the Board was made in Canada in substantial quantities and to the extent of ten per cent of Canadian consumption at all times relevant to this appeal".

For all the reasons above, I do not hesitate to answer negatively the question of law and to declare the imported planer, because of its similarity with the comparable machines of local fabrication, to be of "a class or kind made in Canada", and, therefore, dutiable under Tariff Item 427 (1).

Consequently, the appeal herein is dismissed with costs; the appellant, however, will be liable for only one set of costs and these payable to the respondent P. B. Yates Machine Company Limited.

BETWEEN:

SAMUEL DUBINER ..... PLAINTIFF;

AND

CHEERIO TOYS AND GAMES LTD. ..... DEFENDANT.

Ottawa
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July 6, 7, 8
1966
Jan. 24

Trade Marks—Infringement—Account of profits—Reference to officer of court—Appeal from—Accounting period—Exclusion of part of—Assessment of profits to date of reference—Whether permissible—What profits to be included—Exclusion of certain expenses—Cost of delivering up goods—No allowance permitted for unpaid services—Costs of reference—Exchequer Court Rules 185, 261.

On March 13th 1963 plaintiff commenced an action against defendant for infringement of plaintiff's trademarks. By judgment dated July 29th 1964 ([1965] 1 Ex. C.R. 524) the court found that the defendant had infringed some of the plaintiff's trademarks since December 28th 1962 and directed a reference to establish, at plaintiff's option, either the damages sustained by plaintiff or the profits made by defendant. Plaintiff elected an accounting of profits. The referee made his report and both parties appealed therefrom under Exchequer Court Rule 185.

Held, dismissing the appeal:—

(1) The Exchequer Court has jurisdiction under secs. 52 and 54 of the *Trademarks Act,* S. of C. 1953, c. 49 to grant the equitable remedy of an account of profits;

(2) While the referee had the right to assess the profits to the date of assessment (*Bell v. Read,* 3 A.T.K. 592; *Barfield v. Kelly,* 4 Russ 359; *Bulstrade v. Bradley,* 3 A.T.K. 582), no error could be found with his decision to exclude the period subsequent to the date of judgment, during which defendant suffered a loss, by reason of his own tortious acts, due to the expense of litigation and delivering up to the court infringing goods. *John B. Stetson v. Stephen L. Stetson Co.* [1944] 58 Fed. Suppl. 586 approved;

(3) Plaintiff was entitled only to an account of defendant's profits attributable to the use of plaintiff's trademarks in the accounting period and not to all defendant's profits during such period. *Cartier v. Carlisle* (1862) 31 Beavan 292, followed;

(4) The referee did not err in disallowing as an expense the cost of delivering up infringing goods to the court: *United Telephone Co. v. Walker and Oliver,* 4 R.P.C. 63, followed; nor in disallowing an amount in lieu of salary for services rendered to defendant without remuneration by its controlling shareholder during the accounting period;

(5) The accounting period was not limited to the period during which plaintiff had no notice of defendant's infringement; *Electrolux Ltd. v. Electrix Ltd.* (1953) 70 R.P.C. 158 distinguished;

(6) The court has power under Exchequer Court Rule 261 to deal with the costs of the reference.

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MOTIONS to vary the findings of the Deputy Registrar on a reference.

W. F. Green for plaintiff.

David Watson and *C. R. Carson* for defendant.

NOËL J.:—This is an appeal pursuant to Rule 185 of the General Rules of this Court against the report of the Deputy Registrar, Mr. W. C. McBride, resulting from an inquiry into an accounting of profits of the respondent in pursuance of a judgment of this Court dated July 29, 1964[1]. The appeal was brought about by the notices of motion of both the plaintiff and the defendant herein for an order varying the findings of the Deputy Registrar.

The plaintiff by its notice of motion requests that the Deputy Registrar's report be varied on the basis that the latter erred in holding that the plaintiff was only entitled to a percentage of the total profit of the defendant resulting from the infringing sales of the defendant and that, consequently, instead of being entitled to the sum of $25,-743 for which the Deputy Registrar found the defendant accountable, the latter would be accountable to the plaintiff for the sum of $128,717 which is all of its profits derived from the infringing sales during the accounting period; the plaintiff further requests the entry of judgment for costs of the reference to be paid by the defendant to the plaintiff forthwith after taxation thereof.

The defendant, on the other hand, by its notice of motion also moved for an order varying the finding of the Deputy Registrar in that the Deputy Registrar erred in the following matters:

1. Holding that the Plaintiff could carry on the reference up to and including the completion of the reference and then select a period of profit therefrom as the accounting period.

2. Not allowing as an expense the cost of goods delivered up to the Exchequer Court by the Defendant.

3. Not finding that to the extent that Mr. Krangle worked without salary a profit was realized which was not attributable to the use of the trade marks.

4. Not finding the period for accounting is dependent upon an equitable doctrine based on secret profits, and that the Plaintiff is entitled to an accounting with respect only to such period it can establish it was without notice.

[1] [1965] 1 Ex. C.R. 524.

5. Refusing to allow legal fees expended to protect the Defendant's right to sell its merchandise.

6. Failing to appreciate that the agreement of August 17, 1955, licensed the Defendant.

7. Not considering that if the agreement of August 17, 1955 is terminable, that a reasonable period of notice must be given.

8. Computing the percentage of the royalties attributable to the various trade marks.

9. Disallowing expenses which had not been questioned by the Plaintiff.

10. His rulings and findings with respect to the onus with regard to expenses.

11. Errors in the computation of the amounts due.

I should mention that the parties subsequent to the hearing of these appeals, in view of the fact that an entire transcript of the evidence on this reference had not been made, were requested by the Court and submitted a consent indicating the exhibits, examinations and documents upon which they relied in their appeals and it is upon such material that these appeals shall be determined.

The most important by far of the matters raised in these appeals is whether this Court has jurisdiction in an action for infringement of a registered trade mark to grant to a successful plaintiff the remedy of an account of profits which would give the plaintiff the right to recover all of the profits of the defendant derived from acts established, not only before the date of issue of the statement of claim and held to be an infringement of the registered trade mark, but also acts of the defendant established as infringements in the accounting of profits after the date of issue of the statement of claim and at least up to the date of judgment and even to recover defendant's profits for acts established in the accounting of profits as infringements after the date of judgment.

The relevant paragraph of the judgment rendered on July 29, 1964, as settled, comprised the following material paragraphs:

This Court Doth Further Order and Adjudge that the Plaintiff is entitled to recover from the Defendant those damages sustained by him by reason of the infringement of the said trade marks aforesaid, or the profits which the Defendant has made as the Plaintiff may elect.

This Court Doth Further Order and Adjudge that at the Plaintiff's election, enquiry may be made by the Registrar or Deputy Registrar of this Court to establish the damages sustained by the Plaintiff or profits

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made by the Defendant as the case may be, which damages or profits so determined on the said enquiry shall be paid by the Defendant to the Plaintiff forthwith after the determination thereof;

On the 23rd day of October 1964, the defendant moved before the Deputy Registrar to require the plaintiff to make his election between an assessment of damages and an accounting of profits prior to the opening of the reference. The plaintiff, accordingly, filed a notice that he elected an accounting of profits. The hearing before the Deputy Registrar commenced on November 30, 1964, and then was adjourned and an opportunity to inspect the documents was given to the plaintiff. It then came on for hearing on January 18, 1965 and more or less continued until March 15, 1965 and his report was rendered on June 11, 1965. At the beginning of his report, the Deputy Registrar deals with a number of questions of law raised during the course of the inquiry and primarily with the determination of the proper accounting period, the period over which the plaintiff is entitled to examine the operations of the defendant and whether the plaintiff must accept an accounting of profits or losses for the whole accounting period. I can do no better than reproduce hereunder the decisions reached by the Deputy Registrar with regard to the above at pp. 3, 4, 5 and 6 of his report:

1. With respect to the limitation of the accounting period the parties share common ground that the date of commencement of the period is the date when the defendant's permitted use of the trade marks in question was terminated and that was December 28, 1962, as found by the judgment under which this reference was directed. The termination date of the accounting period has presented some difficulty and confusion. The defendant has insisted that it cannot extend beyond the date of judgment, July 29, 1964, but I was long under the impression that the plaintiff took the position that the accounting period extended to the date of the reference. No authorities have been cited to me by either party on this point. I adopted the view that the accounting period did extend to the date of the reference and I so ruled on at least three occasions during the course of the hearing. Of course, if the terms of the judgment were obeyed and the defendant ceased dealing with merchandise in association with the trade marks found to be valid and owned by the plaintiff, there would be nothing for which the defendant must account to the plaintiff after the date of judgment, but if the defendant did in fact deal with such merchandise after that date I can see no reason why it should not account for its profits, if any, arising therefrom. Neither can I see any reason why it should be necessary to hold a separate reference in order to accomplish this.

2. I ruled during the course of the inquiry that the plaintiff is not restricted in his examination of the witnesses to the operations of the defendant during the accounting period proper. The defendant is an incorporated company, the fiscal year of which was April 1 to March 31

until 1963, when it was changed to coincide with the calendar year. As a result, three fiscal periods of the defendant fall wholly or partially within the accounting period. They are, the fiscal year April 1, 1962 to March 31, 1963; April 1, 1963 to December 31, 1963 and January 1, 1964 to December 31, 1964. Accordingly, I felt it was necessary for the plaintiff to investigate the operations of the defendant during the three fiscal periods covering the total period from April 1, 1962 to December 31, 1964 in order that I might have as clear a picture as possible of the operations of the defendant during the accounting period proper and I permitted him to do so.

3. It was argued by the defendant that since I had ruled that the accounting period extended to the date of the reference, the plaintiff was compelled to accept an accounting to that date and that he could not waive his right to an accounting for any part of the accounting period. It may be that I misunderstood the position of the plaintiff for it appears from page 141 of the reference transcript that he indicated as early as the third day of the reference that he might not claim an accounting to the date of the reference. His position, I think, was a reasonable one. He was examining the operations of the defendant and until he had done so he could not be expected to know what would be the effect of including the period from the date of judgment to the date of the reference. In fact, the evidence has established that during this period the defendant suffered a loss, due primarily, I think, to the cost of litigation, and the expense incurred in delivering up merchandise in accordance with the terms of the judgment and perhaps also to the necessity of carrying on business without the benefit of the trade marks in question.

In my opinion it would be most unreasonable to saddle the plaintiff with these losses and force him to set them off against any profit for which the defendant is required to account to him which was earned by the defendant after December 28, 1962 and before the date of judgment.

The only authority cited to me in connection with this particular matter was *John B. Stetson v. Stephen L. Stetson Co.* (1944) 58 Fed. Suppl. 586, where Bright J. District Judge of the District Court, S D. New York, affirmed the Master's decision, on a reference as to profits and damages in a trade mark infringement case, to permit the plaintiff to waive a part of the accounting period. In that case the accounting period was three years and nine months and the plaintiff had been permitted to waive the first five months thereof, during which there were losses.

It may be worth noting that in the present case, the losses suffered by the defendant from the date of judgment to the date of the reference were not ordinary business losses but losses directly attributable to the tortious acts committed by the defendant in continuing to use the plaintiff's trade marks after its legal right to do so had terminated There being no reason, in my opinion, why the plaintiff should absorb these losses, I have permitted him to waive an accounting by the defendant for the period following the date of judgment.

From this it appears that the Deputy Registrar has determined that (1) the commencement of the accounting period is December 28, 1962; (2) the termination date could have gone beyond the date of judgment up to the date of the reference; (3) that the actual termination date of the accounting period in the present case was the date of

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judgment, July 29, 1964; (4) the plaintiff, in the case of an accounting of profits is not restricted in his examination of witnesses to the operations of the defendant during the accounting period proper but may go beyond this in order to have as clear a picture as possible of the operations of the defendant during the accounting period proper; (5) although he had ruled that the accounting period extended to the date of the reference, the plaintiff was not compelled to accept an accounting period to that date and could still waive his right to part of an accounting period which he was allowed to do for the period after the date of judgment, July 29, 1964, during which the defendant sustained a loss, which the Deputy Registrar found was due primarily to the cost of litigation, the expense incurred in delivering up merchandise in accordance with the terms of the judgment and possibly also to the necessity of carrying on business without the benefit of the trade marks in question on the basis that it would have been most unreasonable to saddle the plaintiff with these losses.

At the reference, counsel for the plaintiff submitted that the Registrar should extend the inquiry period beyond the date of judgment, July 29, 1964, to the date of reference although, as pointed out by the Registrar at p. 5 of the report "he (counsel for the plaintiff) indicated as early as the third day of the reference that he might not claim an accounting to the date of the reference". Counsel for the defendant on the other hand took the position at the reference inquiry that the accounting period could not go beyond the date of judgment.

At the hearing of the appeal, however, there was somewhat of a reversal of positions in that counsel for the plaintiff submitted that the period could not go beyond the date of judgment and counsel for the defendant insisting that it should go down to the date of assessment, as it turned out that losses had been sustained since the date of judgment.

This matter was discussed at great length by both parties and became further involved when the Court pointed out that it was even doubtful that the accounting period could go beyond the date of the taking of the action as it is a general rule that at the trial of any action, judgment can be granted only in respect to such causes of action as had arisen at the date of the issue of the writ of summons or

the statement of claim initiating the proceedings. Such, at least, is the prevailing rule under the civil law, where if causes of action subsequent to the initiation procedure are to be invoked, a procedure called an incidental demand is used and once authorized allows these new causes of action to be dealt with at the same time as the original action. In a case such as here where we are dealing with the illegal use of trade marks, each time the infringement is repeated, there is a new cause of action, a new injuria or infringement of legal rights and a new damnum flowing therefrom and so where the acts continue, a plaintiff may, theoretically, issue a writ or a statement of claim every day for the new damage. For one who was brought up under the civil code, the granting of damages or profits as a result of infringements subsequent to the taking of the action is unacceptable. Indeed, a party has the right to have such questions, as they arise, tried according to the ordinary practice of the Court and there is no such procedure either under the civil law or under the common law that I know of under which a judgment can be obtained in respect of an anticipated wrong. It would appear, however, that under the law of Ontario, two exceptions have been made to the principle that at the trial of any action, judgment can be granted only in respect to such causes of action as had arisen at the date of the issue of the initiating proceedings. The first exception was by section 15(2) of the *Judicature Act*, R.S.O. 1960, c. 197 as amended by 1960-1961, c. 41 and 1961-1962, c. 65, where it is provided that "no action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right, whether or not any consequential relief is or could be claimed".

Under the practice which preceded the rule, no declaration would be granted unless the plaintiff was entitled to claim relief consequent upon the declaration, but the statute above quoted does away with this limitation, although, notwithstanding the above, a declaratory judgment or order can only be granted in respect of a right which existed at the date when the action was initiated.

The second exception to the general principle is covered by Rule 259 of the Ontario Rules of Practice:

> Rule 259: Damages in respect of any continuing cause of action shall be assessed down to the time of the assessment.

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This rule is similar to Rule 0.36 r 7 of the Rules of the Supreme Court under the English Act which reads as follows:

> 7. Where damages are to be assessed (whether under this order or otherwise) in respect of any continuing cause of action, they shall be assessed down to the time of the assessment.

This rule is available before our Court under Rule 42 of its General Rules and Orders which provides that in the absence of any practice or procedure provided for by any Act of the Parliament of Canada, or by any general rule or order of the Court, the practice and procedure should "conform to and be regulated as near as may be by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England".

The English rule 7 is merely declaratory of what was the practice in equity prior to the *Judicature Act,* but under it damages cannot be given in anticipation. In other words, the plaintiff, although entitled to actual damage, is not entitled to recover in respect to prospective damages, that is to say, anticipated damages expected to occur, but which have not actually occurred or which never may arise. This appears from a reading of *West Height Colliery Company Limited v. Turncliffe & Hampson Limited*[1] where it was decided that in assessing the damages recoverable by a surface owner for subsidence owing to the working of minerals under or adjoining his property, the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account to recover damages. The surface owner must wait until the damage or inquiry caused by a subsidence has happened.

It however would seem that if at the trial in the above case a reference has been directed to the Master to ascertain the amount due to the plaintiff, the Master, in taking the account, could have brought it down to the date of the making of his report under the authority of *Read v. Wolton*[2] where damages were claimed from the defendants as a result of nuisances committed by the latter as lessors of the plaintiff's property. Sterling J. stated here at p. 174 of the above decision:

> There is in the writ a claim for damages and under order XXXVI, rule 58 (which later became rule 0.36 r 7) where damages are to be assessed in

[1] [1908] A.C. 27.

[2] [1893] 2 Ch. 171.

respect of any continuing cause of action, they shall be assessed down to the time of the assessment.

Consequently, if it is proved at the trial that there has been a breach of the contract under which the premises are held before action brought, continuing at the time when the action is brought, and down to the trial, damages may be assessed down to not only the issue of the writ, but to the time of assessment.

It is interesting to note that although these nuisances were not strictly speaking what is considered as a continuing cause of action, yet the reference was allowed to deal with the damages down to the assessment.

A similar situation was dealt with in the same manner in *Hole v. Chard Union*[1] where the plaintiffs had brought an action against the defendants for permitting sewage to fall into and pollute a stream running through the plaintiff's land and obtained judgment for a perpetual injunction and for damages. The defendants continued to pollute the stream and three years after the judgment, the chief clerk assessed the damages sustained by the plaintiffs carrying the assessment down to the date of his certificate. It was held by the Court of Appeal here (affirming a decision of Chitty J.) "that there was a continuing cause of action within the meaning of Order XXXVI, rule 58 and that the damages were rightly assessed down to the time of assessment".

.. The question raised in the appeal is, What are the damages since the death of the original Plaintiff to which the Plaintiffs are entitled? That depends upon the construction of Order XXXVI, rule 58. Mr. Justice Chitty having directed an inquiry as to damages, the Chief Clerk has assessed the damages down to the time of his certificate. The question is whether he was justified in taking account of damage sustained by the Plaintiffs since the date of the grant of the injunction, or rather since the 25th of August, 1890, the date when it came into operation. It is contended on behalf of the Defendants that it was not right in principle to do this; because any nuisance committed after the date when the injunction came into operation gave rise to a fresh cause of action, and was not a continuing cause of action in respect of which the damages could be assessed down to the date of assessment under Order XXXVI, rule 58, What is a continuing cause of action? Speaking accurately, there is no such thing; *but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought. In my opinion, that is a continuing cause of action within the meaning of the rule.* The cause of action complained of and existing in the present case appears to me precisely the kind of mischief at which rule 58 was aimed, its object being to prevent the necessity of bringing repeated actions in respect of repeated nuisances of the same kind. To adopt the argument of the Defendants would be to render the rule altogether a nullity. I feel no doubt that the

[1] [1894] 1 Ch. 293.

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present case is a continuing cause of action within the rule. It is a repetition of acts of the same kind as those which had been investigated at the trial, and had been decided to constitute a nuisance. The Judge was, therefore, right in treating it as a continuing cause of action, and in assessing the damages down to the date of the Chief Clerk's certificate. (The emphasis is mine.)

Although the present case deals with an accounting of profits which is different from a reference on damages, there is some analogy in that in both cases the question is whether the calculation of damages or of an account of profits can be made with respect to infringing sales subsequent to the taking of the action, the judgment and even down to the assessment.

The matter of damages was dealt with here in order to show how the Courts in England have interpreted "a continuing cause of action" and have held in many cases that although strictly speaking they did not deal with continuing causes of action but repeated causes, they were to be held as continuing causes of action under the above rule and such an interpretation of a continuous cause of action under the rule became an exception to the rule that at the trial of any action, judgment can be granted only in respect to such causes of action as had arisen at the date of the issue of the initiating proceedings. It appears to have been accepted on the basis that it was more practical to allow such a procedure to be exercised than to force a plaintiff to be delayed in his relief and to put both parties to the expense of another action or to several actions before the plaintiff can get the relief to which the judgment in the action adjudges him to be entitled. A reference as to damages in patent cases has been granted in this country in numerous instances as well as in England. Cf. *Dominion Manufacturers Ltd. v. Electrolis Mfg. Co. Ltd.*[1]; *Colonial Fastener Co. Ltd. et al. v. Lightning Fastener Co. Ltd.*[2]; *The British Thomson-Houston Co. Ltd. v. Goodman (Leeds) Ltd and others*[3]; *Proctor v. Bennis Tool*[4]. It has also been granted in trade name or trade mark cases: *Edelsten v. Edelsten*[5]; in cases dealing with passing off by trade mark and get up of goods: *Draper v. Triste and Tristebestos Brake Lining Ltd.*[6] The matter of dealing with causes of

[1] [1939] Ex. C.R. 204.
[2] [1936] S.C.R. 37.
[3] 42 R.P.C. 75 at 305.
[4] 4 R.P.C. 333.
[5] 7 L.T. 768.
[6] 56 R.P.C. 429.

action subsequent to the initiating proceedings for which some particular defence or exception could be raised, appears to be assured an adequate treatment, at least, before this Court, by either the Registrar conducting the reference referring the matter to the Court by means of a certificate or if such a course of action is not taken, the matter can be dealt with by the Court upon an appeal against the Registrar's report or even possibly upon a motion for judgment to be entered.

The recourse chosen here, however, is an accounting of profits which is quite different from a reference as to damages and on which topic there appears to be very little written.

Halsbury's Laws of England, 3rd edition, at pp. 647 and 648, deals with the procedure as follows:

> The Court grants an account of profits where one party knowingly marks his goods with the trade mark of the plaintiff or passes off his goods as those of the plaintiff. Also an account will be granted where one party owes a duty to another; the person to whom the duty is owed is entitled to recover from the other party every benefit which that other party has received by virtue of his fiduciary position if in fact he has obtained it without the knowledge or consent of the party to whom he owes the duty.
>
> ...
>
> In taking an account of profits, which is an equitable relief, the damage which the plaintiff has suffered is totally immaterial; the object of the account is to give the plaintiff the actual profits which the defendant has made and of which equity strips him as soon as it is established that the profits were improperly made.

In *Draper v. Triste and Tristebestos Brake Lining Ltd.*[1] which was a passing off by trade mark and get up of goods case, Sir Wilfrid Green M/R stated at p. 439:

> Of course in taking an account of profits which is the equitable relief, the damage which the plaintiff has suffered is totally immaterial. The object of the account is to give to the plaintiff the actual profits the defendants have made and of which equity strips them as soon as it is established that the profits were improperly made.

That such a remedy is available in Canada and that this Court has jurisdiction to grant it, would appear to be clear. Sections 52 of the *Trade Marks Act*, 1-2 Elizabeth II, c. 49 specifically refers to this remedy:

> ...the Court may make any such order as the circumstances require including provision for relief by way of injunction and the recovery of damages *or profits* (the emphasis is mine).

[1] 56 R.P.C. 429.

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Section 54 of the same Act clearly indicates that the Court

> ...has jurisdiction to entertain any action or proceeding for the enforcement of any of the provisions of this Act or of any right or *remedy* conferred or defined thereby.

Section 40 of the *Exchequer Court Act* states that the Court may "for the purpose of taking accounts or making inquiries ... refer any cause, claim, matter or petition to the Registrar ... for inquiry and report".

As the relief of an account of profits is an equitable remedy and since the *Judicature Acts,* a common law court can also give it on the same conditions as those previously recognized in equity alone, decisions regarding an accounting of profits in England are useful in determining the extent and manner of the accounting to be conducted in this country.

Before, however, looking at the English decisions in this regard, it might be apposite here to point out that there is a complete dearth of Canadian decisions on this topic and that even in England such little use has been made of this remedy that it is difficult to produce English decisions which determine its limits with precision. The fact that this remedy was a difficult one to work out may, however, explain the fact that very few litigants appear to have used it.

In *Siddell v. Vickers*[1] which dealt with an action for infringement of a patent, damages and an account of profits, the Court of Appeal, after expressing an opinion that an account of profit was extremely difficult to work out and should rarely be chosen, discharged the order of the judge below and the certificate, and ordered the defendants to pay the plaintiffs £3000 in satisfaction of all demands with all costs. Lindley L.J. at p. 126 then stated:

> The Plaintiff having succeeded in his action for the infringement was entitled, as the law stands, to elect whether he would take damages or an account of profits I have been looking into that for reasons which I will state presently. The old form of decree in Chancery before Lord Cairns' Act, always was to give the Plaintiff an account of profits. They had no jurisdiction to give damages. After Lord Cairns' Act the jurisdiction to give damages was conferred upon the Court, and in Hills v. Evans, which is to be found in 4th De Gex Fisher and Jones, Lord Westbury pronounced a decree giving the plaintiff both damages and profits. As soon as attention was called to that, it was said to be wrong and that was put right in Neilson v. Betts, which is in law Reports, 5th English and Irish Appeals, page 1, and more pointedly in De Vitre v. Betts, which is in

[1] Cutter's Reports on Patent Design, Vol. 9, 1892, pp. 152-153.

6th English and Irish Appeals 319 The House of Lords then settled finally that the plaintiff in an action for infringement of a patent, having succeeded, is entitled at his election either to damages or an account of profits, and that is the state of the law. The Plaintiff therefore was perfectly within his right in electing, as he did in this case, to have an account of profits but I do not know any form of account which is more difficult to work out, or may be more difficult to work out than an account of profits. One sees it—and I personally have seen a good deal of it—in partnership cases where the capital of a deceased or outgoing partner has been left in the trade; an account has been directed of the profits made in respect of his capital, which is something like the profits made in respect of an invention, *and the difficulty of finding out how much profits is attributable to any one source is extremely great*—so great that accounts in that form very seldom result in anything satisfactory to anybody. The litigation is enormous, the expense is great, and the time consumed is out of all proportion to the advantage ultimately attained; so much so that in partnership cases I confess I never knew an account in that form worked out with satisfaction to anybody. I believe in almost every case people get tired of it and get disgusted Therefore, although the law is that a Patentee has a right to elect which course he will take, as a matter of business he would generally be inclined to take an inquiry as to damages, rather than launch upon an inquiry as to profits. (The emphasis is mine.)

There have been, however, a few decisions in England regarding this remedy, cf. *Ford v. Foster*[1] and *Lever Brothers, Peat and Sunlight Limited v. Sunniwite Products Limited*[2] which dealt with an action for the infringement of a registered trade mark. In *M. Saxby v. Easterbrook*[3], in the Court of Exchequer Chamber on appeal from the Court of Exchequer, Kelly, C. B. in giving judgment for the plaintiff stated:

From my own experience I can say that for at least thirty years past, it has been a matter of course in the Court of Chancery that upon a decree being pronounced in favour of a patentee in a suit in which complaint is made of infringement of the patent, application is at once made and granted that an account be taken of the profits made by means of infringement down to the time of the decree. In this case, the trial was before me; and upon the verdict being pronounced, I, at once, under the power given in the statute, granted an order for an account, meaning an account of profits from the time of the infringement to the time of verdict. Judgment was afterwards given in this court confirming the verdict.

It does appear that the plaintiff is entitled in an account of profits, to recover profits after the date of the institution of the action up to the date of the judgment or even thereafter, if an order extending the period remains unappealed.

[1] (1872) L.R. 7 Ch. 633. [2] (1949) 66 R.P.C. 84.
[3] (1872) L.R. 7 Ex. 207.

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Two old decisions, *Bell v. Read*[1] and *Barfield v. Kelly*[2], determine that the account may be carried on as long as the suit is pending between the parties and in *Bulstrade v. Bradley*[3] it was stated that though judgments for account do not contain future words, sums received after judgment must be accounted for.

It therefore follows that the decision of the Deputy Registrar to carry the accounting period in the present case to the assessment was in line with the procedure and practice followed in England in such matters and he was perfectly right in doing so.

I now come to the plaintiff's first ground of appeal to the effect that the Deputy Registrar erred in holding that the plaintiff could carry on the reference up to and including the completion of the reference and then select a period of profit therefrom as the accounting period.

I should point out here that in some cases the Registrar may be dealing with an inquiry period more extensive than the accounting period proper and necessary in order to properly evaluate the profits to be determined during the accounting period and although the Deputy Registrar here has not gone up to the date of assessment merely to be able to determine the profits during the accounting period which he has determined as ending on July 29, 1964, date of the judgment, he might well have done so here, as it was helpful for him to go as far at least as the end of the fiscal year of the defendant company, i.e., December 31, 1964, in order to properly assess the profits which the plaintiff was entitled to up to the date of the judgment. His decision not to include the period after the judgment in the accounting period is explained at p. 5 of his report where he states that:

> The evidence has established that during this period the defendant suffered a loss, due primarily, I think, to the cost of litigation, and the expense incurred in delivering up merchandise in accordance with the terms of the judgment and perhaps also to the necessity of carrying on business without the benefit of the trade marks in question.
>
> In my opinion it would be most unreasonable to saddle the plaintiff with these losses and force him to set them off against any profit for which the defendant is required to account to him which was earned by the defendant after December 28, 1962 and before the date of judgment.

[1] 3 A.T.K. 592.

[2] 4 Russ 359.

[3] 3 A.T.K. 582.

And at p. 6 he added:

> It may be worth noting that in the present case the losses suffered by the defendant from the date of judgment to the date of the reference were not ordinary business losses but losses directly attributable to the tortious acts committed by the defendant in continuing to use the plaintiff's trade marks after his legal right to do so had terminated. There being no reasons in my opinion why the plaintiff should absorb these losses, I have permitted him to waive an accounting by the defendant for the period following the date of judgment.

I can see nothing wrong in the action taken by the Deputy Registrar in doing what he did when he permitted the plaintiff to waive the period subsequent to the judgment and it appears to me to have been the reasonable and equitable thing to do in the circumstances. If an argument of reason is required to sustain such a course of action, his reference to the case of *John Stetson v. Stephen L. Stetson Co.*[1], although an American decision, appears to me to be a convincing enough authority to do so. In this case, the plaintiff in an accounting of profit had been permitted by the Master's decision to waive a number of months of the accounting period during which there had been losses.

I therefore see no reason why the decision of the Deputy Registrar in this respect should be disturbed.

I will now deal with plaintiff's submission that he is entitled to the sum of $128,717 instead of merely $25,743 as determined by the Deputy Registrar, the former being all of defendant's profit derived from the infringing sales during the accounting period. In order to properly understand this contention it is necessary to explain the basis of the Deputy Registrar's decision in this regard.

The difficulty the latter had to deal with in respect of determining the profit of the defendant was due to the fact that the total net profit of the defendant was composed of that derived from the sale of merchandise bearing one or more of the plaintiff's trade marks, some of which were infringing and others of which were not (Cheerio and Beginners could be used by the defendant whereas Pro, YoYo, Bo-Lo, 99 and Tournament could not and were infringements) or of merchandise otherwise sold in association with those trade marks and the sale of non-infringing merchandise. The plaintiff here takes the position that he is entitled to all of the profits made by the defendant during the

[1] (1944) 58 Fed. Suppl. 586.

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accounting period, because it is the goodwill of the trade marks that the defendant has obtained and that he has traded upon, whereas the latter maintains that the plaintiff is only entitled to that portion of such profits directly attributable to the use of the plaintiff's trade marks.

It is my view that the Deputy Registrar's decision that the plaintiff is entitled to require the defendant to account for only that part of the profit it realized on infringing sales during the accounting period that is attributable to its use of the plaintiff's trade marks is the right one in the present instance and the authority he has cited in this regard to sustain this finding and his interpretation thereof is also in accordance with my view on the matter. Indeed, in *Cartier v. Carlisle*[1] a trade mark infringement case, the Master of the Rolls stated at p. 298:

> I am therefore of opinion in this case, that the injunction must be made perpetual and that there must be the usual account, but, as I have stated, I do not propose, in taking the account in Chamber, to make the Defendants account for every species of profit during the last six years, but I shall consider how much of the profits are properly attributable to the user of the plaintiff's trade marks.

The Deputy Registrar here in determining what proportion of the profit realized can be attributable to the infringing use of the plaintiff's trade marks took into consideration a number of matters such as the value placed on plaintiff's trade marks by Krangle, the defendant's President, when he executed the agreement of August 17, 1955, Krangle's evidence during his cross-examination on an affidavit in September 1964, the fact that the defendant used its own trade marks during the accounting period and the way in which it used them and finally the significance of the sales achieved by the defendant during its promotion campaign in St. John's, Newfoundland in November 1964, which counsel for the defendant submitted was the first promotion campaign conducted by the defendant without the use of any of the plaintiff's trade marks. He then concluded, after due consideration to the evidence that was before him regarding the value of the plaintiff's trade marks, that 20 percent of the profit realized by the defendant on its sales made in the accounting period is attributable to its use of those trade marks and I must say that I fully

[1] (1862) 31 Beavan 292.

concur not only in the percentage he has arrived at in this regard, but also in the reasons given for arriving at this result.

To accept the submission of counsel for the plaintiff that, if an infringer is using infringing marks as well as other marks, the whole of the profits in an accounting of profits goes to the person whose rights he has been infringing even if some of the profits are attributable to the use of a trade mark which does not belong to such person would, in my view, lead to unconscionable results particularly in a case where use is made of several trade marks belonging to different owners. Indeed, one might ask whether, if the trade marks used together belonged to different people, the defendant should be compelled to pay an amount equal to all of his profits to each of the individual owners. To reach such a result would indeed be most unreasonable and would lead to unjustifiable abuses.

I now come to defendant's second submission that the Deputy Registrar erred in "not allowing as an expense the costs of goods delivered up to the Exchequer Court".

I can deal with this matter shortly by merely stating that if such a course of action was taken and the resulting expense was incurred after the date of judgment, it was because the defendant failed to take the alternative given to it in the judgment of either destroying the infringing wares or removing the offending labels or inscriptions and also because of the fact that it had attempted to avoid the judgment of this Court.

Having therefore determined that the Deputy Registrar had the right to allow the plaintiff to waive the losses during that period, these expenses should not be taken into account. But even if this period had been taken into account, these expenditures could not be considered in establishing the profits realized during such period. A similar situation occurred in a patent case in *The United Telephone Co. v. Walker and Oliver*[1] where an expense of a similar nature was refused:

> It was stated by the defendant that there ought to be a set-off, as against these damages, of the value of the instrument which had been given up under the judgment. That appears to me to be absolutely untenable. The judgment is that those instruments should be delivered up and the plaintiffs have not to pay for them in any form. That is one of the penalties which the Patent law imposes on the infringer.

[1] 4 R.P.C. 63.

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Defendant's third submission is that the Deputy Registrar erred in "not finding that to the extent that Mr. Krangle worked without salary a profit was realized which was not attributable to the use of the trade marks".

Mr. Krangle drew a salary of $8,500 in the fiscal period April 1, 1962 to March 31, 1963 and $10,000 for the year 1964. He did not, however, draw a salary for the nine month fiscal period April 1963 to December 31, 1963, and counsel for the defendant submits that the value of his services during this period should have been taken into consideration by the Deputy Registrar in establishing the profits during the accounting period.

From the Report it would appear that the Deputy Registrar could not see why he should allow an expense greater than what was actually paid during the period in question and I am not prepared to say that he was wrong in this regard particularly in view of the fact that during the 9-month period during which Krangle received no salary, he used funds from the defendant company to pay for personal wearing apparel for himself and his family and for things such as repairing golf clubs which had nothing to do with the affairs of the company. The evidence discloses that there were credit charges amounting to $4,000 covering Krangle's personal or family expenses during this period. It was also during this period that some of the profits of the defendant company were transferred to a company called Dulev of which Krangle's wife was the president, on the basis of some alleged promotion agreement between both companies. I also agree with the Deputy Registrar's additional reason for refusing to allocate or estimate a salary for Krangle during the 9-month period in that dealing as he was with the actual expenses incurred by the defendant during the accounting period, to allow an increased amount for management salary over that which the defendant actually paid, would be to artificially reduce its apparent profit because it would not be under any liability to pay the increased amount to Krangle.

Defendant's fourth submission is that the Deputy Registrar erred in "not finding the period for accounting is dependent upon an equitable doctrine based on secret profits, and that the plaintiff is entitled to an accounting with respect only to such period it can establish it was without notice".

Counsel for the defendant argued that in *Electrolux Ltd. v. Electrolix Ltd.*[1] Lloyd Jacob J. held that the right to an accounting having an equitable basis and being based upon agency applies only when a secret profit is made and that, therefore, the period of accounting should be only that during which the plaintiff did not have notice of the infringement, which would mean here that the plaintiff would have no claim to the profits earned by the defendant during the period commencing not later than the date of institution of the action and continuing to the date of the last act of infringement. I have read this decision and I agree with the Deputy Registrar that it is not authority for the above proposition as the Court in the *Electrolux* case was dealing with a situation where the plaintiff had deliberately stood passively by with full knowledge of the defendant's infringing activities for a period of several years and then after allowing the defendant to gain profits over that long period of time, had asked for an accounting of profits. Here, of course, the plaintiff sought his remedy with dispatch and can in no way be held to have acquiesced in any way to the infringing acts.

I now come to defendant's point five based upon the refusal of the Deputy Registrar to allow legal fees which had been expended to protect the defendant's right to sell its merchandise. The total amount under legal and audit adjusted to July 29, 1964, is $26,394, a sum of course which as pointed out in the Report, is very much greater than the sum normally expended by the defendant. On the basis that most, if not all of the legal services covered by the account were rendered to Krangle personally, and that the defendant declined to give any particulars of even the most general nature (or in some cases even satisfactory proof—as the Deputy Registrar put it at p. 32 of the Report—of the services represented by these accounts on the ground that such information is privileged) he disallowed the amounts claimed and allowed for legal and audit for the accounting period, a sum of $3,000. I am also of the view here that, under the circumstances, this was the only way these items could legally be dealt with.

As the matters which points 6 and 7 dealt with, i.e., the agreement of August 17, 1955, and the suggested reasonable

[1] (1953) 70 R.P.C. 158 at 159.

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notice of termination to be given have been dealt with by the Supreme Court in upholding the judgment of this Court, that the defendant on December 28, 1962, by not complying with its obligation to allow the plaintiff free access to inspect had infringed his user agreement, and from that date on had no longer the right to the use of the trade marks, the submissions which the defendant might have otherwise made in respect to these items can no longer be entertained.

Defendant's submission number 8 is that the Deputy Registrar erred in "computing the percentage of the royalties attributable to the various trade marks".

An agreement dated August 17, 1955, Ex. C. between the defendant and the plaintiff, provided for the payment by the defendant to the plaintiff of a royalty of 5 percent of the sales price. This agreement was amended twice by agreement dated August 30, 1955, Ex. D., and by agreement dated June 27, 1961, Ex. E. However, these subsequent agreements having been executed only in an attempt to settle a dispute between Krangle and one Gallo, a minority shareholder, the Deputy Registrar held that the undertaking of the plaintiff to accept for a period of two years the sum of $2,000, and 10 percent of the defendant's net profit, cannot be used to establish the value of the plaintiff's trade marks.

He then, after examining the evidence of Krangle on the value of some of the trade marks and the fact that the defendant used during a certain period the plaintiff's trade marks in association with those of the defendant, and after considering the evidence before him, concluded that 20 percent of the profit realized by the defendant on its sales made in the accounting period was attributable to its use of those trade marks. Now, although the figure arrived at here is only approximate, it cannot be anything else under the circumstances. Looking at the relevant evidence, I cannot find any fault with his decision on this point.

I also cannot find fault with the Deputy Registrar's apportionment of the total profit attributable to the use of the plaintiff's trade marks by the defendant as set down at p. 19 of the Report. He there apportioned 70 percent to "Yo-Yo", 15 percent to "Bo-Lo" and 5 percent to each of the trade marks "Pro", "Tournament" and "99". I cannot find anything unreasonable in such a determination.

Before dealing with defendant's points 9 and 10, shall deal with defendant's submission that the report contains a number of erroneous figures which counsel for the plaintiff admitted and which should be corrected as follows: the figure $50,039 on line 2, p. 21 of the Report is changed to $68,223; $150,197 in line 7 of p. 21 is changed to $168,381 and $322,002 in line 11 of the same page is changed to $303,818; $322,002 in the first line of p. 42 is changed to $303,818; $128,717 in the second line of the same page is changed to $110,533 and $25,743 in line 5 is changed to $22,106 and $128,717 in line 20 of the same page is changed to $110,533.

A further adjustment should also, I believe, be made in the total amount of sales $472,198.54 found by the Deputy Registrar from December 28, 1962 to July 29, 1964. The plaintiff was allowed to increase the amount of sales by the defendant by $9,419.83 for goods sent out on consignment prior to the accounting period and although this was a proper thing to do in order to obtain the total sales during the period, it would follow also, however, that some deduction should be made for an amount of $8,986.89 paid out by the defendant for returns after the period from consignment of wares sent out during the period.

I believe that in order to be consistent in this matter, this amount of $8,986.89 less a credit note of $279.18 for taxes (which is credit note No. 428 included in invoice No. 743), i.e., $8,707.71, should be deducted from the total amount of sales of $472,198.54 thus leaving a sum of $463,490.83 as the total amount of sales of the defendant during the period. After deducting from this amount the corrected amount of the cost of goods sold during the period, i.e., $168,381, the resulting gross trading profit of the defendant for the accounting period becomes $295,109.83 instead of $303,818.

By deducting the expenses of $193,285 from the amount of $295,109.83, a net profit of the defendant of $101,824.83 is arrived at instead of $110,533. By taking 20 percent of the net profit the sum of $20,364.96 is arrived at for which the defendant is accountable to the plaintiff instead of the amount of $22,106.

I can find no other item where the Deputy Registrar has disallowed expenses which should have been allowed and I

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can find no fault with the manner in which he dealt with the matter of expenses. This was a most difficult assessment to make and the manner in which he discharged his duties in this regard must be commended.

The defendant submitted under point 10 that the Deputy Registrar erred "in his rulings and findings with respect to the onus with regard to expenses". Here counsel for the defendant complained that the Deputy Registrar not only imposed on the defendant the onus of proving expenses but that of proving that the expenses were proper expenses. He admits that this would have been proper if ordinary trial procedure had been followed in this inquiry but he says that the inquiry was conducted on an inquisitorial basis, the plaintiff being given *carte blanche* to explore the expenses. He further adds that the plaintiff was allowed to have things all his own way.

Under Rule 178 of the Court the Registrar is required to proceed in like manner as at a trial before a judge of the Court and so far as was possible in this case, the proper procedure seems to have been followed. Whatever deviations the Deputy Registrar may have adopted during this long and difficult investigation (to which, I understand, objection was taken only at the end of the inquiry by the many counsels for the defendant) do not appear to have prejudiced the defendant in any way. The difficulties met by the Deputy Registrar here were in no way caused by adopting any improper procedure but were mainly due to Krangle's reluctance to give out information regarding certain expenses in order not to damage his interests in an accounting action between him and one Gallo in another jurisdiction and on other occasions. They were due also to Krangle's attempt to bring forth extraordinary expenses such as payments made to his daughter allegedly as wages, the charging of capital cost allowance to the defendant for certain items in the home of Krangle and for an automobile used by his wife and the very large legal accounts paid by the defendant, for which particulars were refused on the basis that this was a confidential matter covered by privilege.

I now come to the matter of costs on this reference which the plaintiff submits should be paid by the defendant to the plaintiff forthwith after taxation. Counsel for the defendant submits on this point that the costs of the reference

were disposed of by the award regarding costs made in the judgment of July 29, 1964, and as the award made therein was that there would be no costs, there can be no costs either on the reference.

The decision of the Court of July 29, 1964, on the question of infringement and validity regarding the matter of costs and reference reads as follows: "Both parties having been partly successful in this case, there shall be no costs for either of them and as for the matter of damages or profits, they will be such as the Registrar of this Court may award on a reference to him, if the plaintiff elects such reference."

The above has been the usual and customary way of referring matters to be inquired into by the Registrar and does no more in my view than turn the matter over to him to be dealt with thereafter in accordance with Rules 176 and following of the Rules of this Court and once his inquiry is terminated, he then proceeds in accordance with Rules 184, 185 and 186 to deposit his report and give notice of such filing to the other parties to the proceeding. Within 14 days after service of this notice any party may, by a motion, appeal to the Court against the report and the Court may confirm, vary or reverse the findings in the report and direct judgment to be entered accordingly or refer it back to the referee for further consideration and report. If there is no appeal within 14 days after the service of notice of filing of the report, the latter becomes absolute. However, unless otherwise directed by the order of reference, judgment on such report cannot be entered without an order thereupon obtained upon motion for judgment of which at least eight days' notice shall be given.

The parties to the present proceedings dealt with this reference in accordance with the above procedure as both appealed to the Court against the report on various grounds of appeal mentioned in their respective motions.

On this appeal the Court is empowered to confirm, vary or reverse the findings of the report and to direct judgment to be entered accordingly. In so varying this judgment, the Court may also, in accordance with the discretion given it under Rule 261 of the General Rules of this Court deal with the costs. This rule provides that: "The costs of and incidental to all proceedings in the Court shall in the discretion of the Court and shall follow the event unless

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otherwise ordered. The Court may also direct the payment of a fixed or lump sum in lieu of taxed costs."

It could not, however, if by the award of costs in the decision of the Court of July 29, 1964, it had disposed of in advance of the costs of the reference. This, in my view, the Court did not however do; it merely decided that at the date of the judgment of July 29, 1964, no party was entitled to any costs as (and this is specifically mentioned in the conclusions of the judgment) both parties had been partly successful in the case. In *Underwriter's Survey Bureau Ltd. v. Massie & Renwick*[1], which was an inquiry by the Registrar into damages for infringement of copyright and other relief in this Court, although, as here, the formal order of the Court did not reserve the question of costs on the inquiry, the Court exercised its inherent jurisdiction to award costs.

The proceedings at this stage are not terminated and in order to give the parties an appeal to the Supreme Court of Canada on the matters decided at that time, it is necessary to have a section such as 85(5) of the *Exchequer Court Act* which states that "A judgment is final for the purpose of this section if it determines the rights of the parties except as to the amount of damages or the amount of liability" otherwise there would have been no appeal.

The reference, however, is still part of the same case and the Court being still seized of the matter, the proceedings continue. The remedy chosen by the plaintiff, damages or account of profits, can be settled in several ways. In most cases the parties agree to an amount and the matter is ended and very little costs is involved. In some cases, however, the time and cost involved are considerable, and unfortunately this is the situation here where the inquiry degenerated into an inquiry of 37 days mainly because of, as pointed out by the Deputy Registrar, at p. 43 of his report:

...the virtual refusal of the witness Krangle (the President of the defendant corporation) to answer the questions put to him with anything even approaching candour, his failure to produce the required books and documents of the defendant at the opening of the inquiry and his production of some important documents late in the enquiry, and the almost incessant attempts made by the defendant, some of which seemed to me to border on desperation, to have the enquiry adjourned both before it commenced and during its course.

[1] 2 Fox P.C. 39.

The Deputy Registrar, accordingly, recommended strongly that serious consideration be given to adoption of the normal rule that the costs should follow the event and, in my view, adopted the proper procedure if reference is made to *Lightning Fastener Company Limited v. Colonial Fastener Company Limited*[1]. In the Supreme Court Kerwin J. dealt with the Registrar's recommendation as to costs as p. 49 as follows:

> The Registrar recommended that the plaintiff be allowed the costs of the reference since it was entitled to damages and the defendants had contested each claim. That recommendation is adopted.

The Deputy Registrar, although he had no power to award costs, made a finding on the matter of costs and also a recommendation which he had the right to do.

I therefore have no hesitation in the present case in accepting the recommendation and awarding costs to the plaintiff on the reference proceedings. I do feel, however, that the ends of justice would be met by the payment to the plaintiff of a fixed sum of $5,000 of the costs of the reference and of this appeal in lieu of taxed costs.

It then follows that judgment will be entered herein that the defendant is accountable to the plaintiff in the sum of $20,364.96 and that the defendant will pay the plaintiff a fixed sum of $5,000 in lieu of costs.

[1] [1936] Ex. C.R. 1; [1937] S.C.R. 36.

REPORT ON A REFERENCE before Mr. W. C. McBride, Deputy Registrar, to inquire into an accounting of profits of the Defendant Company in pursuance of Judgment of this Court dated July 29, 1964.

This reference has been held pursuant to the judgment handed down in this case on the 29th day of July, 1964 by the Honourable Mr. Justice Noël. The material paragraphs of the judgment as settled are:

> "This Court Doth Further Order and Adjudge that the Plaintiff is entitled to recover from the Defendant those damages sustained by him by reason of the infringement of the said trade marks aforesaid, or the profits which the Defendant has made as the Plaintiff may elect;
>
> "This Court Doth Further Order and Adjudge that at the Plaintiff's election, enquiry may be made by the Registrar or Deputy Registrar of this Court to establish the damages sustained by the Plaintiff or profits made by the Defendant as the case may be, which damages or profits so determined on the said inquiry shall be paid by the Defendant to the Plaintiff forthwith after the determination thereof;"

After having been set down for hearing on previous dates, the reference was

scheduled to commence in Toronto, Ontario, on the 3rd day of November, 1964. On the 23rd day of October, 1964 the defendant moved before me to require the plaintiff to make his election between an assessment of damages and an accounting of profits prior to the opening of the reference. I ordered that such election be made by the plaintiff at least two clear days before the commencement of the reference and the plaintiff accordingly filed a notice that he elected an accounting of profits. On more mature consideration I think that the plaintiff in such proceedings should be required to give perhaps two weeks' notice of his election. However, the short notice in this particular case worked no hardship on either party because the hearing was adjourned during the first day and was not resumed until the 18th day of January, 1965.

I might mention at this point that during the first day of the hearing the defendant offered to pay to the plaintiff the sum of $7,000.00 in full settlement of his claim in this action and this sum was subsequently paid into Court.

Several questions of law were raised during the course of the inquiry and I propose to dispose of them before dealing with the details of the account of profits as such. These questions concerned primarily the determination of the proper accounting period, the period over which the plaintiff is entitled to examine the operations of the defendant, whether the plaintiff must accept an accounting of profits or losses for the whole accounting period, the nature of the evidence to be adduced, the burden of proof to be borne by the parties, and the profits, if any, to which the plaintiff is entitled. I might frame the questions as follows and deal with them *seriatim*:

1. Does the accounting period end at the date of judgment or does it continue to the date of the inquiry?
2. Is the plaintiff restricted in his investigation of the defendant's operations and its books of account to the accounting period as such?
3. The accounting period having been defined, is the plaintiff compelled to accept an accounting for the entire period, or may he elect to have the actual accounting commence or terminate at some date within the accounting period?
4. Is it proper to adduce hearsay evidence in a proceeding such as an accounting of profits?
5. What burden of proof, if any, rests on the plaintiff or the defendant in such a proceeding?
6. Assuming that the defendant made a profit during the accounting period, to what part of it is the plaintiff entitled?

1. With respect to the limitation of the accounting period the parties share common ground that the date of commencement of the period is the date when the defendant's permitted use of the trade marks in question was terminated and that was December 28, 1962, as found by the judgment under which this reference was directed. The termination date of the accounting period has presented some difficulty and confusion. The defendant has insisted that it cannot extend beyond the date of judgment, July 29, 1964, but I was long under the impression that the plaintiff took the position that the accounting period extended to the date of the reference. No authorities have been cited to me by either party on this point. I adopted the view that the accounting period did extend to the date of the reference and I so ruled on at least three occasions during the course of the hearing. Of course, if the terms of the judgment were obeyed and the defendant ceased dealing with merchandise in association with the trade marks found to be valid and owned by the plaintiff, there would be nothing for which the defendant must account to the plaintiff after the date of judgment, but if the defendant did in fact deal with such merchandise after that date I can see no reason why it should not account for its profits, if any, arising therefrom. Neither can I see any reason why it should be necessary to hold a separate reference in order to accomplish this.

2. I ruled during the course of inquiry that the plaintiff is not restricted in his examination of the witnesses to the operations of the defendant during the accounting period proper. The defendant is

an incorporated company, the fiscal year of which was April 1 to March 31 until 1963, when it was changed to coincide with the calendar year. As a result, three fiscal periods of the defendant fall wholly or partially within the accounting period. They are, the fiscal year April 1, 1962 to March 31, 1963; April 1, 1963 to December 31, 1963 and January 1, 1964 to December 31, 1964. Accordingly, I felt it was necessary for the plaintiff to investigate the operations of the defendant during the three fiscal periods covering the total period from April 1, 1962 to December 31, 1964 in order that I might have as clear a picture as possible of the operations of the defendant during the accounting period proper and I permitted him to do so.

3. It was argued by the defendant that since I had ruled that the accounting period extended to the date of the reference, the plaintiff was compelled to accept an accounting to that date and that he could not waive his right to an accounting for any part of the accounting period. It may be that I misunderstood the position of the plaintiff for it appears from page 141 of the reference transcript that he indicated as early as the third day of the reference that he might not claim an accounting to the date of reference. His position, I think, was a reasonable one. He was examining the operations of the defendant and until he had done so he could not be expected to know what would be the effect of including the period from the date of judgment to the date of the reference. In fact, the evidence has established that during this period the defendant suffered a loss, due primarily, I think, to the cost of litigation, and the expense incurred in delivering up merchandise in accordance with the terms of the judgment and perhaps also to the necessity of carrying on business without the benefit of the trade marks in question.

In my opinion it would be most unreasonable to saddle the plaintiff with these losses and force him to set them off against any profit for which the defendant is required to account to him which was earned by the defendant after December 28, 1962 and before the date of judgment.

The only authority cited to me in connection with this particular matter was *John B. Stetson v. Stephen L. Stetson Co.*,[1] where Bright J., District Judge of the District Court, S.D., New York, affirmed the Master's decision, on a reference as to profits and damages in a trademark infringement case to permit the plaintiff to waive a part of the accounting period. In that case the accounting period was three years and nine months and the plaintiff had been permitted to waive the first five months thereof, during which there were losses.

It may be worth noting that in the present case, the losses suffered by the defendant from the date of judgment to the date of the reference were not ordinary business losses but losses directly attributable to the tortious acts committed by the defendant in continuing to use the plaintiff's trade marks after its legal right to do so had terminated. There being no reason, in my opinion, why the plaintiff should absorb these losses, I have permitted him to waive an accounting by the defendant for the period following the date of judgment.

4. The controlling shareholder, president and general manager of the defendant company and its owner, is one Albert Krangle. It is conceded by counsel that the defendant company is a one-man operation and the man who at all material times controlled every aspect of its operations was Krangle. The problem confronting the plaintiff was how best to get the evidence of the operations of the defendant before the inquiry. He accordingly started the inquiry by calling Krangle as his witness. I adopted the view that the inquiry was not strictly an adversary proceeding but was of an inquisitorial nature and that the rules governing the conduct of a trial need not be rigidly adhered to, and I therefore permitted counsel for the plaintiff to cross-examine Krangle without having first found him to be a hostile or adverse witness. No objection was made to this manner of proceeding by counsel for the defendant until much later in the inquiry.

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[1] (1944) 58 Fed. Suppl. 586.

The other procedural matter that has caused me some concern was the introduction of hear-say evidence, particularly through the witness, Krangle. Many questions were put to him concerning various accounts and book entries of the defendant which he could not answer, claiming he was not an accountant and knew little about bookkeeping. Counsel for the plaintiff directed him to inform himself from the defendant's accountant and bookkeeper, both of whom were present during most of the hearing Krangle did so and then gave the answer as his own. Once again, counsel for the defendant raised no objection to this procedure until much later in the proceedings Even on reflection I can think of no satisfactory alternative procedure that might have been adopted to get the required evidence before the inquiry.

5. The position I adopted at the opening of the inquiry was that the burden of proving that the defendant enjoyed an income from its operations during the accounting period rested on the plaintiff and that the defendant was required to bear the burden of proving that all or part of that income was derived from its operations not associated with use of the trade marks owned by the plaintiff, or that, in any event, there was no profit gained during the accounting period for which the defendant need account to the plaintiff.

There was a continuing dispute between the parties as to what was required of the defendant to establish the validity of certain extraordinary expenses incurred by the defendant during the accounting period. This is a case where admittedly the expenses claimed by the defendant against its gross income are very numerous and to require it to prove each one individually would be at least unrealistic. Not even the plaintiff has suggested that the defendant need to go that far. There is, however, a great difference, for the purpose of this inquiry, between establishing that an account was paid by the defendant and proving that it was a proper expense incurred by the defendant.

Now, there is no doubt that the bulk of the accounts paid by the defendant during the accounting period were the ordinary operating expenses one would expect to be incurred by a merchandising company engaged in operations similar to those of the defendant. The purchase of stock, the expense of promoting sales of its merchandise and the normal overhead expenses are all the kind of expense incurred by the defendant to which no exception could be taken. It is my opinion that payment of these expenses is properly established by production of the audited books and statements of the defendant. In this connection counsel for the defendant relied on the authority of Wigmore on Evidence, 3rd Edition, Vol. 4, p. 434, s. 1230·

> "1230.(11) Voluminous Documents (Accounts, Records, Copyright Infringements, Absence of Entries). Where a fact could be ascertained only by the inspection of a large number of documents made up of very *numerous detailed statements*—as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank-ledger—it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper. . . . "

However, this is not to say that all the defendant is required to do with respect to extraordinary expenses is to establish the fact of their payment, or even the fact that they have been approved or passed by its auditor. It must, I think, establish to the satisfaction of this inquiry that the payments, admittedly made by the defendant, were properly made and should be deducted from the defendant's gross revenue to establish its profit. Such extraordinary expenses include, in my opinion, the payment of $1,600 to one G. F. Button in consideration, according to the defendant, of his refraining from slandering the defendant and its merchandise, the large lump sum payments

made to Krangle's daughter, allegedly as wages, the charging of capital cost allowance to the defendant for certain items in the home of Krangle and for an automobile used by his wife, the very large legal accounts paid by the defendant during the accounting period, and several others, all of which I propose to deal with in detail, later.

In the case of this particular company, there is a further factor to be considered Krangle holds the controlling interest in three companies, the defendant, Dulev Plastics Limited or Contest Toys Limited. Under the circumstances, therefore, same office and factory or warehouse space during the accounting period and, in the main, employed the same personnel. However, the defendant's books and statements submitted to this inquiry indicate that consistently throughout the accounting period and before it the defendant paid most if not all of the overhead expenses for all three companies, such as rent, hydro, business taxes, wages and so forth In addition, it appears that Krangle himself drew no salary from Dulev Plastics Limited or Contest Toys Limited. Under the circumstances, therefore, it was, I think, incumbent on the defendant to propose some reasonable allocation of these expenses among the three companies. This the defendant did not do until very late in the inquiry when a completely inadequate allocation was offered.

The final point I propose to deal with now with respect to the defendant's expenses concerns mainly the large legal accounts paid by the defendant during the accounting period. I pointed out to counsel for the defendant on several occasions during the course of the hearing that he was required to prove not only that the accounts were submitted to the defendant and paid by it, but that they were for services rendered to the defendant. After indicating for many days that evidence of the nature of the accounts would be presented to the inquiry, the defendant finally claimed that such information was privileged I take the view that where a party seeks the benefit resulting from a claim of privileged communication or information, he must also accept the consequences flowing therefrom. I will deal with the legal accounts in more detail later.

6. It has become apparent that, assuming the defendant made a profit during the accounting period, the most difficult problem facing me is, to what part thereof the plaintiff is entitled.

The profit of the defendant can be considered as being composed of several segments The total net profit of the defendant is composed of that derived from the sale of merchandise bearing one or more of the plaintiff's trade marks or of merchandise otherwise sold in association with those trade marks, and the non-infringing sale of merchandise. As I understand it, the plaintiff claims an accounting only of the profit derived from the first type of sale, i e infringing sales. However, the defendant has argued that it need not account to the plaintiff for all of such profit but only that portion thereof directly attributable to the use of the plaintiff's trade marks Counsel for the defendant went even further and argued that the plaintiff is not entitled to any of the profit of any kind, made by the defendant after the plaintiff became aware that the defendant was infringing his trade marks.

Dealing with the second point first, i e. that the plaintiff is not entitled to any profit made by the defendant after the date on which the plaintiff became aware of the defendant's infringing use of his trade marks, counsel for the defendant cited the case of *Electrolux Ld. v. Electric Ld and Another*[1], a decision of Lloyd-Jacob, J on an application for an Order for an accounting of profits The material part of the learned Judge's decision is·—

> "The principle upon which the Court grants an account of profits, as I have always understood it to be, is this, that where one party owes a duty to another, the person to whom that duty is owed is entitled to recover from the other party every benefit which that other party has received by virtue of his fiduciary position if in fact he has obtained it without the knowledge or

[1] (1953) 70 R.P.C. 158.

consent of the party to whom he owed the duty. Had the present case fallen within that principle, in that the Defendants had secured profit to themselves without the knowledge of the Plaintiffs, I should have felt it my duty to leave to the Plaintiffs the election for which they prayed in their statement of claim; but on the facts as I found them (and, indeed, as the evidence, I think clearly showed without question) the Plaintiffs were aware for some period—a considerable period, if my recollection serves me aright—of the fact that the Defendants were utilising the mark complained of, and in those circumstances any profit that accrued to the Defendants by reason of that user could not have been profit accruing to them without the knowledge of the Plaintiffs.

"In those circumstances, put at its highest, the only account of profits that I could grant, consonant with that principle, would be of such profits as were made prior to the date when the Plaintiffs first became aware of the user by the Defendants. That was so long ago—if my recollection serves me aright again, I think it was in 1939—that the Statute of Limitations would in effect prevent them recovering anything under that head at all..."

Now, with respect, I do not accept that decision as binding on me in the present circumstances because there the learned Judge was dealing with a situation where the plaintiff had deliberately stood by, with full knowledge of the defendant's infringing activities, for a period of many years, and then, after allowing the defendant to gain profits over that very long period of time, the plaintiff asked for an accounting of those profits. In my view, there would have been something inequitable about affording the plaintiff this remedy. In the present case, the plaintiff sought his remedy with despatch. The first act of infringement could not have occurred before December 28, 1962 and this action was instituted in March 1963.

As I understand the defendant's argument based on the *Electrolux Ld. v. Electrix Ld.* decision, it is that in no case can a plaintiff in an accounting of profits claim to be entitled to the profits made by the defendant after the plaintiff becomes aware of the infringement, and that at the very least, this means that the plaintiff has no claim to the profits earned by the defendant during the period commencing not later than the date of institution of his action and continuing to the date of the last act of infringement.

Since I have come to the conclusion that the *Electrolux Ld. v. Electrix Ld.* case is not authority for that proposition and counsel for the defendant has not been able to furnish me with any other authority in support thereof and because I think the proposition is wrong in principle, I cannot accept it.

The remaining matter to be considered with respect to the portion of the profits to which the plaintiff is entitled to an accounting is whether or not those profits are to be confined to that part of the profits realized by the defendant on infringing sales which is directly attributable to the use of the plaintiff's trade marks.

I have reviewed the many authorities cited by both parties with respect to this question and the only reported case cited to me, or of which I am aware, where this question appears to have been dealt with is *Cartier v. Carlisle*,[1] a trade mark infringement case where the Master of the Rolls said at p. 298:

"I am therefore of opinion, in this case, that the injunction must be made perpetual and that there must be the usual account, but, as I have stated, I do not propose, in taking the account in Chambers, to make the Defendants account for every species of profit during the last six years, but I shall consider how much of the profits are properly attributable to the user of the Plaintiff's trade mark."

It is arguable that the "every species of profit during the last six years" for which the defendant in that case was not required to account comprised the total profit of the defendant during the period including that realized on sales made without the use or benefit of the plaintiff's trade mark. If that is so, then all the

[1] (1862) 31 Beavan 292.

learned Master of the Rolls has said is that the defendant need account for only that profit it realized on sales made in conjunction with the use of the plaintiff's trade mark. I doubt that the learned Master of the Rolls would have felt it necessary or desirable to record such an obvious proposition and I have come to the conclusion that he has in effect stated the law to be that with respect to the profits realized by the defendant on sales made in conjunction with the use of the plaintiff's trade mark, the defendant is required to account for only that part thereof that is attributable to the use of the trade mark.

Some authorities have likened the accounting required of the defendant to that which might be required of an agent by his principal. However, even in the case of an agency relationship, the agent would be entitled to a share of the profits gained through sales made on the principal's behalf, so that the principal could not claim all the profits made on those sales.

I have come to the conclusion that the plaintiff is entitled to require the defendant to account for only that part of the profit it realized on infringing sales during the accounting period that is attributable to its use of the plaintiff's trade marks.

There are four points raised by the evidence adduced during the inquiry which bear on this matter of just what proportion of the profit realized on a sale can be attributed to the infringing use of the plaintiff's trade marks. The first is the value placed on the trade marks by Krangle when he executed the agreement of August 17, 1955 by the terms of which he gained control of the defendant. The second is Krangle's evidence given during his cross-examination on an affidavit in September, 1964. The third is the way in which the defendant used its own trade marks in conjunction with the plaintiff's trade marks during the accounting period and this had an important effect on the fourth matter which is the significance of the sales achieved by the defendant during its promotion campaign in St. John's, Newfoundland in November, 1964, which, counsel for the defendant argued, was the first promotion campaign conducted by the defendant without the use of any of the plaintiff's trade marks.

By paragraph 9 of the agreement of August 17, 1955, ex. C, which was executed by Krangle as one of the parties thereto, he agreed to pay to Dubiner 5% of the sale price of all bandalore tops sold by the defendant as consideration for a non-exclusive licence to use the patents and trade marks of the plaintiff and the promise of the plaintiff to supply the defendant with information regarding marketing systems and his knowledge in connection therewith. My recollection of Krangle's evidence is that the plaintiff's patents were not used by the defendant and that he received very little trade information from the plaintiff after he gained control of the defendant. In addition it is apparent to me that because paragraph 9 is only one of many provisions in a comprehensive agreement by which control of the defendant was transferred from the plaintiff to Krangle the valuation of the non-exclusive licence was probably affected by one or more of the other provisions of the agreement, but of course, I cannot say to what extent or in which direction. I should think it would be reasonable to say that of the 5% of sales to be paid to the plaintiff, 3% of the sales would be attributable to the value of the non-exclusive licence to use the plaintiff's trade marks, and this would be a much greater percentage of the defendant's net profits. No attempt was made by either party to relate the value of a non-exclusive licence to use the trade marks with the value of the trade marks themselves.

I am not unaware that the agreement, ex. C, was amended twice, by agreement dated August 30, 1955, filed as ex. D, and by agreement dated June 27, 1961 and filed as ex. E. The provisions of paragraph 9 of ex. C were not affected by ex. D but were amended by ex. E, wherein it was provided that in lieu of royalties and other benefits as provided in ex. C, the plaintiff agreed to accept for a period of two years the sum of $2,000 and 10% of the defendant's net profit, and thereafter the original agreement, ex. C, was again to become effective. It is clear from a

perusal of ex. E in the light of the evidence of the parties thereto given at the trial and on the inquiry, that it was executed in an attempt to settle a dispute between Krangle and one Gallo, a minority shareholder and employee of the defendant. I do not think that either ex. D or ex. E has any effect on the value of ex. C as evidence of the valuation of the plaintiff's trade marks in 1955, and, indeed, until December 28, 1962.

In September, 1964 Krangle was cross-examined on an affidavit filed in support of an application by the defendant for a stay of execution under the judgment and particularly of the injunction granted thereby. On his cross-examination Krangle testified that in his opinion 75% of the sales of the defendant were due to the use by it of the plaintiff's trade mark "Yo-Yo". I realize that it was in the defendant's, and therefore Krangle's, interest to emphasize the importance to the defendant of the continued use of the trade mark "Yo-Yo", and I am satisfied, after the examination of Krangle, which occupied more than twenty days of this inquiry that he has a certain capacity to stray from the truth when it serves his purposes to do so. I accordingly do not accept at its face value his evidence that 75% of the defendant's sales were due to the use of the trade mark "Yo-Yo".

The defendant brought along its own trade marks such as, Big "C", Big Chief, Rainbow, Glitterspin, Whistler, Butterfly, and so on, in association with the plaintiff's trade marks and particularly the trade mark "Yo-Yo". To illustrate this, I might refer to ex. 44, 51, 235 and 236 to the inquiry. As I understand the evidence these sales brochures of the defendant were used more or less in the order in which they were filed as exhibits. The first one, ex. 44, is entitled "New Cheerio Yo-Yo Return Tops" and was used by the defendant probably as late as January, 1964. It was replaced by the brochure filed as ex. 51, entitled "New Cheerio Big-C Yo-Yo Return Tops", which was in turn replaced by the brochure filed as ex 235, entitled "New Contest Big-C Yo-Yo's". I might pause here to mention that, as I understand the evidence, this brochure, ex. 235, was brought out by the defendant before judgment was rendered, and when there was at least the possibility that the trade mark "Cheerio" would be found to be valid and owned by the plaintiff. It might also be noted that for the first time the word "Yo-Yo" is here used in a descriptive sense. After judgment the defendant used a new sales brochure, ex. 236, entitled "New Cheerio Big-C Tops" and for the first time the defendant does not use the term "Yo-Yo" anywhere on the brochure.

I think these sales brochures and the sequence in which they were used by the defendant illustrate the manner in which it developed acceptance of its products under its own trade marks by using them in association with the plaintiff's trade mark "Yo-Yo" after December 28, 1962, until, by November, 1964 it was able to hold a promotion campaign in St. John's, Newfoundland, apparently with little use being made of the trade mark "Yo-Yo" or any of the plaintiff's other trade marks, and to do so with comparative success.

However, to argue, as counsel for the defendant did, that the results of the St. John's campaign in November, 1964, prove the worthlessness of the plaintiff's trade marks, is, I think, in the circumstances, to ignore completely the value of the plaintiff's trade marks to the defendant in the development of acceptance of the defendant's own trade marks. This argument fails also because there is evidence that some use was made during that campaign of the trade mark "Yo-Yo" and the defendant conspicuously failed to call any witness who might have been able to testify as to how that campaign was carried out.

After giving due consideration to what evidence is available regarding the value of the plaintiff's trade marks, I have come to the conclusion that 20% of the profit realized by the defendant on its sales made in the accounting period is attributable to its use of those trade marks.

Counsel for the defendant posed a further problem when he argued that I should, in addition to determining the proportion of the total profit directly attributable to the use of the plaintiff's trade marks by the defendant, determine the relative values of the plaintiff's

trade marks, "Yo-Yo", "Bo-Lo", "Pro", "Tournament" and "99". Now, I have no doubt that by far the most important of these trade marks is "Yo-Yo". "Bo-Lo" is limited in importance because the sales of bats of the type bearing the "Bo-Lo" mark were rather modest compared to the sale of return tops The trade marks "Pro", "Tournament" and "99" were not used nearly as extensively as "Yo-Yo" and, in my opinion, were of little real value to the defendant during the accounting period. In the result, I would apportion the total value of the five trade marks as 70% to "Yo-Yo", 15% to "Bo-Lo" and 5% to each of the trade marks "Pro", "Tournament" and "99".

Turning now to the computation of the net profit earned by the defendant during the accounting period, it seems to me that the best way of doing this is to find the gross sales for the period and subtract from that the cost of goods sold, which will give the gross trading profit. If, from this figure, the operating expenses of the defendant for the period are subtracted the result will be the net profit.

In determining the gross sales of the defendant I have adopted the compilation of sales set out in a statement furnished to me during the course of argument by counsel for the plaintiff, entitled "Sales According to Cheerio Sales Journal—General Ledger Account". I have verified from the books of the defendant that the sales shown on the statement for each month during the accounting period are accurate but there appears to have been a slight error in addition, resulting in the total sales for the period being shown as $900 too much I accordingly find that the sales of the defendant from December 28, 1962 to July 29, 1964 were $472,198 54

After examining the various financial statements of the defendant filed during the inquiry I have come to the conclusion that I can do no better than accept the defendant's figures for the cost of goods sold as shown in ex S. The ratio of 36 87% used to calculate the cost of goods sold during the broken period of December 28, 1962 to March 31, 1963 may be somewhat high but I have no way of readily determining a more accurate figure. It will, however, be necessary for me to calculate the cost of goods sold for the period January 1, 1964 to July 29, 1964 because ex. S was prepared for the period ending December 31, 1964. To accomplish this I propose to apply the ratio of 36 87% to the total sales of $184,492 91 for the period January 1, 1964 to July 29, 1964, as shown in the statement furnished by the plaintiff during argument and referred to above The resulting cost of goods sold for the period is $50,039 00. Adding this amount to the cost of goods sold for the broken period, December 28, 1962 to March 31, 1963 and the nine-month fiscal period, April 1, 1963 to December 31, 1963, as shown on page 1 of ex. S, results in a total cost of goods sold for the accounting period of $150,197 00 When this amount is subtracted from the total sales for the accounting period of $472,-199 ($472,198 54), the resulting gross trading profit of the defendant for the accounting period is $322,002.00.

There remains now the task of calculating the expenses of the defendant to be deducted from the gross trading profit to determine the defendant's net profit for the accounting period I propose to accomplish this by making three amendments to the schedule of expenses as shown on page 2 of the defendant's ex S The first will be to recalculate the expenses set out in column 3 so that they relate to the period January 1, 1964 to July 29, 1964 rather than to the full calendar year 1964; the second will be to eliminate entirely from the schedule of expenses those claimed expenses or parts thereof that I find are not properly allowable, and the third will be to allocate a portion of some of the expenses charged to the defendant to one or both of the other two companies controlled by Krangle.

In recalculating the expenses for 1964 so that they relate only to the period from January 1, 1964 to July 29, 1964, I have adopted the defendant's auditor's classification of expenses into fixed, semi-fixed and variable expenses as shown on page 3 of ex S, and I have computed the expenses for the shorter period in accordance with his "basis used in apportioning expenses" as set out on page 3 I recall

that Mr. Soberman, the defendant's auditor and the author of ex. S, testified at the inquiry that certain problems would exist in using his classification of expenses in recomputing the 1964 expenses for the period ending July 29, 1964, but he did not explain what the problems were or how they might be overcome. Accordingly, I have had no alternative but to use his classification and basis for apportioning the expenses. Even so, I have not been able to apportion the "advertising, promotion and selling" expenses with any degree of accuracy for, try as I might, I could not relate the total of these expenses for 1964 in the sum of $23,939 00, with any ledger or account or combinations thereof in the defendant's books I have, therefore, allowed one-half of the full year's expense for the period ending July 29, 1964.

On the above basis the expenses of the defendant for the period January 1, 1964 to July 29, 1964 amount to $99,388 00. The expenses for the entire accounting period, using the amounts shown in columns 1 and 2 on page 2 of ex S and the sum of $99,388 00 in lieu of the total shown in column 3, I calculate at $274,231.00 I do not deduct from this total the amounts shown under notes (*a*), (*b*), (*c*) and (*d*) on page 3 of ex. S because they form parts of larger sums I intend to disallow as expenses of the defendant.

I think the most satisfactory way of dealing with the disallowance of expenses of the defendant during the accounting period is to discuss individually each expense as described by the defendant's auditor on page 2 of ex. S.

1. *Management Salary* — Mr. Krangle drew a salary of $8,500 in the fiscal period April 1, 1962 to March 31, 1963 and $10,000 for the year 1964. He did not draw a salary for the nine-month fiscal period April 1, 1963 to December 31, 1963. Counsel for the defendant argued that Krangle should be allowed not only a salary for the last mentioned period but, indeed, a much increased salary for the whole accounting period—of the order of $25,000 per annum. I am at a loss to understand this argument. If the defendant thought that its president and general manager was worth $25,000 per year, why did it not pay him at the rate? On the other hand, it may well be that Krangle is convinced he is worth that much to the defendant. But it seems to me that is a matter to be settled between Krangle and the defendant company, who are, I need hardly say, separate legal entities, the latter being a party to this action, but not the former. Indeed, a perusal of the defendant's minute book would appear to indicate that the amounts paid to Krangle as management salary were not properly authorized in accordance with the by-laws of the company But, although I am not disposed to allow the defendant more under this expense than it actually paid to Krangle during the accounting period I am not going to accede to the plaintiff's argument and disallow what was in fact paid. I might mention that a further reason for not allowing an increased amount under this head is that I am dealing with the actual expenses incurred by the defendant during the accounting period and to allow an increased amount for management salary over that which the defendant actually paid would be to artificially reduce its apparent profit because it would not be under any liability to pay the increased amount to Krangle. Accordingly, I allow this expense for management salary, which has already been reduced to $7,958 to coincide with the accounting period.

2 *Promotion Fees*—These are the amounts paid by the defendant to Dulev Plastics Limited pursuant to a written contract allegedly executed on or about April 1, 1963 and allegedly providing for it to be effective from January 1, 1963. The contract apparently provided for Dulev Plastics Limited to assume all promotion work formerly done by the defendant in return for payment by the defendant of a commission of 23% of the defendant's gross sales, the commission to be payable on the first of the month, calculated on the previous month's sales. Unfortunately, I was never favoured with the opportunity to examine the document. I understand that the original contract was in the possession of counsel for the defendant, or was available to him throughout the inquiry, but despite repeated invitations to file it as an exhibit he declined to do so until late in the

inquiry, when he offered to prove it and introduce it through a witness who obviously could not properly identify it or prove its due execution, and this even though the person who I understand was the witness to the signatures on the document was present at the inquiry at the time and virtually throughout its course.

The evidence established that the original oral agreement made allegedly on or about January 1, 1963 was that the commission payable by the defendant was 20%. This rate of commission was in fact paid for the sales of the defendant in January, February and March, 1963. Then, according to Krangle, the rate of commission was increased in April to 23%, retroactive to January 1, 1963. Later, in the fall of 1964, the rate was changed to 26% on the first $50,000 of sales, 29% on the next $50,000 and 32% on the sales in excess of $100,000, retroactive to January 1, 1964.

Although I have had serious doubts about when this agreement between the defendant and Dulev Plastics Limited was actually made, particularly in view of the vague evidence given by Krangle and Soberman, I have come to the conclusion that it did in fact exist as an oral agreement, at least, from early March 1963. I base this conclusion on the fact that the two cheques ostensibly in payment of the commission of 20% of the sales of the defendant during January and February, 1963 are dated March 4th and March 14th respectively and were negotiated at the bank on March 6th and 14th, respectively. It may well be that the written contract apparently dated April 1, 1963 was not executed until October, 1963. Certainly the only evidence that it was executed in early April 1963 was that of Krangle. Soberman, the defendant's auditor, could testify only that he saw the contract sometime between April 1, 1963 and the middle of October, 1963, when he finished work on the March 31, 1963 financial statement of the defendant. In addition, the comprehensive adjusting entry made to re-allocate to Dulev Plastics Limited a whole series of promotion expenses actually paid by the defendant between April 1, 1963 and September, 1963 and which should have been paid by Dulev Plastics Limited under the terms of the agreement appears on Folio 5 of the defendant's general journal under date of November 5, 1963. If it were a material fact, I would be prepared to find that the written contract allegedly dated April 1, 1963, was not executed until sometime in late September, or early October, 1963. But what difference does this make to an accounting of profits? There is evidence which to me is sufficient to establish that the commission agreement between the defendant and Dulev Plastics Limited was in existence, in an oral form at least, from March, 1963 and, in any event, it appears to have been effective from January 1, 1963. I, therefore, find that the commissions paid by the defendant to Dulev Plastics Limited as set out in columns 1 and 2 on page 2 of ex. S are proper expenses of the defendant. However, in the amount of $65,819 shown in column 3 on page 2 is included the sum of $12,104 36 paid by the defendant to Dulev Plastics Limited on account of its sales from January 1, 1964 to July 29, 1964 as a result of an alleged increase in the commission rate from 23% to 26% on the first $50,000 sales, 29% on the next $50,000, and 32% on the sales in excess of $100,000. This new arrangement is indicated on the statement or invoice of Dulev Plastics Limited to the defendant, dated October 1, 1964, and showing the re-calculation of commission on sales for the period January 1, 1964 to September 30, 1964 "as per Agreement". Such agreement was never filed as an exhibit but may have been one of those counsel for the defendant tried unsuccessfully to put in through the witness Soberman after the plaintiff had completed his examination of him. In any event, I do not consider it reasonable to permit the defendant to, in effect, greatly increase its expenses for the last seven months of the accounting period by means of the alleged retroactivity of an agreement apparently made sometime after the accounting period ended. I therefore deducted $12,104 from the sum of $65,819 before I recalculated the promotion fees expense for the period January 1, 1964 to July 29, 1964. The revised total for promotion fees for the accounting period is $105,174.

3 *Depreciation on Automobile*—As I understand the evidence, the defendant owned three cars until the end of the fiscal year ending March 31, 1963. One was used by Krangle, another was used by Mrs. Krangle, although during the first three months of 1963 she was not an employee of the defendant and was the president of Dulev Plastics Limited, and the third car was one which had been used by Gallo until about June, 1962 and had not been used since that time. I think I should allow full depreciation on the car used by Krangle but none for the other two cars, for the first three months of the accounting period. I have estimated this at $250 so that $338 will be deducted from the sum of $588 claimed under this head in column 1 on page 2 of ex. S. The amounts claimed for depreciation in columns 2 and 3 are apparently for only the car Krangle used—a Buick convertible. Although I rather doubt that it is customary for comparatively small companies to provide such elegant means of transportation for their chief executives, I think it proper to charge full depreciation as an expense of the company I therefore deduct from the total depreciation allowed for the accounting period, which is $1,885, the sum of $338, leaving a revised total under this head of $1,547, all of which relates to the automobile used by Krangle.

4 *Travelling and Car Expenses*—It has been difficult for me to arrive at a reasonable mode of dealing with this item As I understand the evidence, this includes the travelling expenses incurred by Krangle on his many trips but not the cost of his accommodation, and the amounts of the expense vouchers he submitted to the defendant.

I propose to deal with only a few of Krangle's trips under this head, viz several trips to New York, one to Boston and two to Puerto Rico and the Virgin Islands. Most of his other trips made during the accounting period were, I believe, made in connection with the various promotion campaigns held by the defendant, and certainly the cost of his fare on these trips is a proper expense of the defendant. I do not think the defendant should be charged with the cost of Krangle's wife accompanying him or these business trips because the business in connection with which they were made was at least as much the concern of Dulev Plastics Limited, of which she was president, as it was of the defendant. Now, with respect to the two trips in January, 1963, and January, 1964 to Puerto Rico and the Virgin Islands, there is evidence that Krangle transacted some business there. I think therefore that his air fare is a proper charge against the defendant, but I disallow the fare for his wife. The amount paid for their air fares on the first trip as indicated by ex. 79 to the inquiry was $406 80. I deduct $203.40 from the expenses charged to the defendant under this head. The account rendered by the Virgin Isle Hilton for Mr. and Mrs Krangle's 11-day stay there on the first trip is ex. 169 and is in the amount of $660 31. I realize that Krangle and his wife stayed at the hotel for less than twice as much as Krangle alone would have been charged so I reduce that account, which was paid by the defendant and charged to "travelling expense" by $225 to $435 31 In addition, Krangle submitted an expense voucher in the amount of $482 with respect to the first trip, which amount was paid to him by the defendant There are no receipts supporting his claimed expenditures, which in itself is not surprising, but in addition, the defendant offered no evidence as to what this not inconsiderable sum was spent for. I think an expense allowance of $35 per day in addition to payment by the defendant of Krangle's full air fare and hotel accommodation, the account for which last expense, incidentally, includes some meals, bar expenses, purchases of clothing and several long distance telephone calls is immoderately generous. I reduce it to $20 per day, which is a total of $280 for the 14-day trip This is a reduction of $202 from the amount claimed by the defendant. There is also on this trip, Mr and Mrs. Krangle's stay in New York for two days. Since I propose to disallow entirely any expense incurred by the defendant for Krangle's trips to New York unless there has been adduced some evidence that such trips were at least partly for business, I disallow the expense incurred on this occasion

in the amount of $86 88. I have also disallowed the amounts charged to the defendant for the second trip to Puerto Rico in January, 1964, on the same basis I have used with respect to the first trip.

Ex. 85 and one or two other documents not filed as exhibits indicate that Krangle made four trips to New York City during the accounting period in addition to the one already dealt with. It was only with respect to his trip to New York on December 30, 1962, that Krangle even attempted to establish that it was for business reasons, and on my reading of the transcript he failed in his attempt. I therefore disallow any expenses incurred by the defendant on account of these New York trips. The documents produced by the defendant indicate that the total expenses incurred by the defendant for payment of Dominion Travel Office Ltd. Accounts for air fares, hotel bills, and Krangle's expense vouchers in connection with these New York trips and the trip to Boston in August, 1963 were approximately $2,800 and I disallow this amount. I have taken into consideration the evidence of Krangle that on one of his trips to New York he went by automobile with the defendant's patent agent, Leon Arthurs. I am aware that some of the expenses I have disallowed under this head may have been allocated in the defendant's books to Promotion expense rather than Travelling, and, of course, I will not deduct these expenses a second time

The total amount I disallow under the heading "Travelling and Car Expenses" is $3,517

5 *Office Salaries*—Included under this head are the sums of $1,500 and $3,000 paid to Miss Wendy Krangle, the daughter of Albert Krangle The pay records of the defendant for 1963, filed as ex. 112, indicate that Miss Krangle worked for the defendant from January to August, 1963 and she appears to have been paid a generous weekly salary, considering her experience and qualifications Nevertheless, the sum of $1,500 was paid to her, in addition thereto With regard to 1964, I can find no evidence that Miss Krangle was employed by the defendant at all except that in September she received $200 However, she also received from the defendant the sum of $1,000 in each of the months of March, April and May, 1964. Since the defendant has not adduced any evidence at all to support these large payments I disallow the sum of $4,500 under this head.

Similarly, I disallow the sum of $1,600 paid to one G. F. Button and charged to office salaries, the defendant having failed utterly to justify payment of this amount.

In the result, the total amount I disallow under "office salaries" is $6,100.

6. *Legal and Audit*—The total amount under this head, adjusted to July 29, 1964 is $26,394, a sum which is very much greater than the normal expense of this kind incurred by the defendant. I reminded counsel for the defendant on several occasions during the course of the inquiry that I was not disposed to allow extraordinary amounts under this head, any more than under any other, in the absence of satisfactory evidence that the services for which the sums were paid were, in fact, rendered to or for the benefit of the defendant. The only evidence adduced by the defendant was with respect to the accounts rendered by Messrs. Gauld, Hill, Kilgour and Friend and this was to the effect that no part of these services was rendered to Krangle personally and that, with the exception of the adjustment made in note (*a*) on page 2 of ex S, all the legal work was done for the defendant With respect, I cannot accept this evidence. I am satisfied that much of the advice contained in the letter to Krangle dated January 7, 1963 and which was filed as ex 84, as a sealed exhibit, to which the plaintiff has not had access, was actually advice given to Krangle personally, not all of which was such as to benefit the defendant. Other than that the defendant has declined to offer any particulars, of even the most general nature, of the services represented by these accounts, on the ground that such information is privileged. Under the circumstances, I propose to disallow the amounts of these accounts as expenses of the defendant.

The same situation obtains with respect to the many accounts submitted by several

other law firms during the accounting period and paid by the defendant. The defendant did not even deign to mention most of them at all.

I think, therefore, that all the defendant is entitled to be allowed for legal and audit expenses is a sum similar to its normal annual legal and audit expenses which appear to me to be about $1,000. I allow the defendant the sum of $3,000 for legal and audit expenses during the accounting period and therefore disallow the sum of $23,394 on the simple ground that the defendant failed to prove these accounts, and aside entirely from the question of whether or not they would be allowable in whole or in part if they had been proved.

7. *Advertising, Promotion and Selling*— There was evidence that although the two payments to G F. Button totalling $1,600 are shown in the defendant's books as being charged to "salaries" the auditor re-allocated this expense to "promotion". However, I have disallowed this item under "Office salaries", so, of course, I shall not deduct it again under this head.

Krangle's credit cards, i.e. Diners' Club, American Express and Carte Blanche, were never properly explained during the inquiry. It is obvious that Krangle could draw expense money from the defendant at any time and that when travelling he was in the habit of charging a number of his meals to his hotel account. In addition, he was in the habit of charging the defendant at a rate of as much as $60 00 per day over and above his travel fares and hotel bills. Surely under these arrangements he would have had little use for dining credit cards while travelling. On the other hand, there are among the productions of the defendant several accounts from dining establishments in Toronto which were paid by the defendant.

I have calculated the total amount paid by the defendant during the accounting period for charges made through use of the American Express, Diners' Club and Carte Blanche credit cards to be $3,868 and in the absence of any evidence by the defendant as to what these charges were incurred for, I disallow the whole amount.

During the accounting period the defendant paid accounts rendered by the Oakdale Golf & Country Club Ltd. in the amount of $2,402, if my examination of the defendant's books of account has been accurate, and these accounts were all as a result of Krangle's use of the Club's facilities. I cannot recall any evidence put forward on behalf of the defendant that would indicate that these expenses were incurred for the benefit of the defendant and not for Krangle's personal enjoyment, not connected in any way with the business of the defendant However, I am prepared to allow Krangle's membership fees in the Club, which amount to $475. I therefore deduct the sum of $1,927 under this head, being the total golf club expense incurred by the defendant, less the amount of Krangle's membership and locker fee. I should have thought that Dulev Plastics Limited might have paid its president's membership fee.

The amount paid by the defendant during the accounting period for photographic work and camera equipment and supplies appears to be about $1,500. While there was some evidence given by Krangle that would indicate that some photographic work was done for the defendant it falls far short of establishing that the sum of $1,500 was paid by the defendant for work done for, and camera equipment supplied to, the defendant I reduce this amount as a proper expense of the defendant, to $750 and deduct $750 from the amount claimed.

The last item I propose to deal with under this head is the matter of gift certificates As nearly as I can determine from an examination of exs. 165, 183 and 184 and the books of the defendant, a total of $5,800 was expended on gift certificates during the accounting period. When questioned on the disposition of the certificates, all of which seem to have been in $5 and $10 denominations, with the exception of those purchased from Revitch Men's Shop Ltd., which were for as much as $20, Krangle stated they were used as prizes in the defendant's promotion campaigns and, in addition, some were given to the defendant's employees as Christmas bonuses one year. He had no record of the disposition of

any of them but the documents in ex. 52(2) indicate, if anything, that the defendant sent six certificates to be awarded as prizes on a campaign. There is no evidence that any greater number was sent out on any campaign. There were thirty-one campaigns held during the accounting period, some of which embraced more than one city or town, but there is no evidence that certificates were used as prizes in all of them. In fact ex. 52(2) would indicate the very reverse. I estimate that certificates for which the defendant paid $1,200 were disposed of as prizes during the accounting period and certificates costing the defendant $300 were disposed of as Christmas bonuses. The inventory of the defendant for October 31, 1964 included gift certificates valued at $1,160, but this would include certificates costing $1,080 purchased in September, 1964. It follows that the defendant paid $4,220 for gift certificates that are unaccounted for, and I disallow that amount.

The total amount I disallow under the head of Advertising, Promotion and Selling is $10,765.

8, 9 and 10. *Packing and Shipping Salaries, Rent and Warehouse Expenses.*—The books of the defendant indicate that the amounts claimed under these heads were paid by the defendant and I have no reason to believe otherwise.

11 *Telephone and Telegraph*—The Bell Telephone accounts paid by the defendant during the accounting period include the charges for the telephone in Krangle's residence. Although, admittedly he transacts some business from his residence, I should think he and his family derive the usual benefit from having a telephone in their residence. There is also no evidence that all the long distance calls charged to his residence telephone related to business. I think it would be reasonable to charge Krangle with $25 per month for his residence telephone. I therefore deduct $475 from the total claimed under this head.

12, 13 and 14. *Office Expenses, General Expenses and Donations*—I can see no reason to disallow any of these expenses.

15. *Bank Charges and Interest*—Included in this item is the interest charged by Dulev Plastics Limited to the defendant on the loan made to the defendant many years ago and the balance of which varies from time to time as funds are moved from one company to the other. As I understand the evidence, no interest at all was charged by Dulev Plastics Limited until, I think, 1961, when the rate was set at 6%. Then, in 1962 the rate was increased to 12% and in 1963 it was reduced to 6%, where it remained for the balance of the accounting period.

There is no evidence whatever that Dulev Plastics Limited ever notified the defendant that it proposed to charge interest on the loan, or that the defendant ever agreed to pay it. Furthermore, the evidence of Krangle is that the defendant started paying interest because he, Krangle, did not see why Gallo, who was entitled to a share of the defendant's net profits and with whom strained relations existed, should benefit through the defendant having the use of this money without interest. I disallow entirely the interest payments made by the defendant to Dulev Plastics Limited during the accounting period, which amount to $6,622.

16. *Postage*—The amount paid by the defendant for postage in 1964 appears to be far in excess of the normal expenses incurred by the defendant in previous years. However, the books of the defendant indicate that rather large sums were paid for postage in January, April, July and December, 1964. This does not indicate to me that the large postage expense had anything to do with the date of judgment herein, the recall of infringing merchandise or the distribution and subsequent recall of relabelled merchandise. There is the evidence of Krangle that late in 1963 and in early 1964 the defendant undertook the expense of free distribution through the mail of a large number of return tops in connection with its promotion campaigns. This could have caused the great increase in postage expense in 1964. In any event, I am not prepared to disallow any of this expense.

17, 18, 19 and 20. *Insurance, Freight and Cartage Outward, Unemployment Insurance and Business Taxes*—With the

exception of Freight and Cartage Outward, these expenses appear to be part of the normal expenses of the defendant and I know of no reason why the amounts thereof should be varied.

The amount claimed for freight and cartage appears to be high in 1964 in relation to sales but the books indicate the amount was paid by the defendant and I am not aware of any evidence before the inquiry that would support a disallowance of part thereof. There is also no indication that the amount was increased by any of the operations of the defendant resulting from the judgment herein.

21. *Depreciation on Furniture and Equipment*—This item, although small when compared with many of the others, includes depreciation on rugs and draperies purchased and used in Krangle's residence and such things as the colour television set and the "globe bar", both also used in Krangle's home I therefore reduce this amount to $1,000, thereby disallowing $275.

22. *Purchase Discounts*—As far as I am aware, this amount has not been disputed by the plaintiff.

23 *Bad Debt Provision*—Although the large increase in 1963 in this provision and its subsequent decrease to a normal amount was certainly not explained to my satisfaction, I do not think that manipulation of the provision had any effect on the defendant's expenses for the accounting period No change will be made in this expense

24 *Sundry Income*—This item was not dealt with by the parties to any extent and I see no reason to vary the amount claimed.

25 *Overhead Charges to Affiliated Companies*— I am going to disallow this so-called negative expense under the schedule of expenses because I propose to consider it with the $2,000 allowed under note (c) on page 2 of ex. S, in the light of the proper general apportionment of several of the defendant's expenses among the three companies controlled by Krangle.

The total of the expenses claimed by the defendant as set out in the schedule of expenses on page 2 of ex. S, and which I have disallowed, is $51,513.

In my opinion, the expenses charged to and paid by the defendant and a portion of which should properly have been charged to Dulev Plastics Limited and Contest Toys Limited, the other two companies controlled by Krangle and sharing the defendant's office and factory accommodation and staff, are all of those listed in the Schedule of Expenses on page 2 of ex. S except management salary, promotion fees, bank charges and interest, freight and cartage—Outward, bad debt provision and sundry income. I have already eliminated the overhead charges to affiliated companies from the schedule

I realize that the proportions of the various expenses that should be transferred to the other companies will vary with the nature of the expense and the relative degrees of activity of the various companies at different times during the accounting period However, any reapportionment can be nothing more than an estimate, so I do not propose to deal with each expense in detail.

I estimate that 30% of the depreciation on automobile and travelling and car expenses should be allocated to Dulev Plastics Limited and Contest Toys Limited I am aware that one automobile used by Mr Krangle and formerly owned by the defendant was transferred to Dulev Plastics Limited early in the accounting period However, the evidence is clear that it was Krangle himself who constituted the management of all three companies, all of which should share these expenses, which were incurred primarily as a result of his activities

I think the same proportion, 30%, of advertising, promotion and selling expense, telephone and telegraph and general expenses, should be allocated to the other two companies

With regard to office salaries, rent, office expenses, donations, postage, insurance, business taxes, depreciation on furniture and equipment and purchase discounts, the allocation should be 60% to the defendant and 40% to the other two companies.

The expenses identified as packing and shipping expenses, warehouse expenses and unemployment insurance relate mainly to the actual distribution of merchandise, partly by Contest Toys Limited, but primarily by the defendant. I would allocate 80% of these expenses to the defendant and 20% to the other two companies.

The legal and audit expenses I have largely disallowed, but even so, I take it that certain normal legal and auditing services were rendered to Dulev Plastics Limited and Contest Toys Limited during the accounting period and charged to the defendant. Although there is no evidence directly in point, I think such an inference is almost irresistible in view of all the evidence of the manner in which Krangle operated the three companies, charging virtually everything he possibly could to the defendant. I therefore allow 70% of this expense as a charge against the operations of the defendant.

In the result, I calculate the total allowable expenses of the defendant for the accounting period to be $193,285.

The following table indicates the process by which I have arrived at the total of the allowable expenses of the defendant for the accounting period:

CALCULATION OF PROPER EXPENSES OF DEFENDANT FOR ACCOUNTING PERIOD DECEMBER 28, 1962 TO JULY 29, 1964

	Description of expense as in Ex. S, page 2	Expenses claimed as in Ex. S, page 2	Claimed expenses adjusted to relate to accounting period ending on July 29/64	Expenses after deduction of portions held to be improper	Expenses of defendant after allocation among affiliated companies
1	Management salary.	$ 12,125	$ 7,958	$ 7,958	$ 7,958
2.	Promotion fees	130,507	105,174	105,174	105,174
3.	Depreciation—automobile	2,073	1,885	1,547	1,083
4.	Travelling and car expense	11,010	10,055	6,538	4,577
5.	Office salaries . .	22,780	19,158	13,058	7,835
6.	Legal and audit	37,382	26,394	3,000	2,100
7	Advertising, promotion and selling expense	50,542	38,483	27,718	19,403
8.	Packing & shipping salaries	27,571	19,473	19,473	15,578
9.	Rent	5,750	4,500	4,500	2,700
10.	Warehouse expense	3,722	3,123	3,123	2,498
11.	Telephone and telegraph	5,714	4,113	3,638	2,547
12.	Office expense	5,304	4,092	4,092	2,455
13.	General expense	407	372	372	260
14.	Donations	743	708	708	425
15.	Bank charges and interest ..	11,847	7,731	1,109	1,109
16.	Postage	1,547	1,317	1,317	790
17.	Insurance	1,407	1,115	1,115	669
18.	Freight & cartage outward	17,310	15,303	15,303	15,303
19.	Unemployment insurance	582	440	440	352
20.	Business tax	417	355	355	213
21.	Depreciation—furniture and equipment .	1,574	1,275	1,000	600
22.	Purchase discounts	(985)	(966)	(966)	(580)
23.	Bad debt provision, increase or (decrease)	284	402	402	402
24.	Sundry income	(166)	(166)	(166)	(166)
25.	Overhead charges to affiliated companies	(3,000)	(3,000)	—	—
	TOTAL . .	$ 346,357	$ 269,321	$ 220,808	$ 193,285

When the expenses of $193,285 are deducted from the defendant's gross trading profit for the accounting period which I have already calculated to be $322,002, the net profit of the defendant for the period is $128,717.

I have found that the defendant is accountable to the plaintiff for 20% of its net profit for the accounting period and this amounts to $25,743 This follows from two conclusions I have already reached in addition to the actual calculation of the defendant's net profit during the accounting period. These are that the total net profit of the defendant during that period was derived from sales of merchandise made in association with the use of one or more of the plaintiff's trade marks and that the defendant is accountable to the plaintiff for only that portion of its profit realized on infringing sales which is attributable to the use of the plaintiff's trade marks. Needless to say, if I am wrong in this latter conclusion, and the defendant is required to account for all of its profit derived from infringing sales during the accounting period, the total amount it would be required to account for would be $128,717. With respect to the question of whether or not some of the sales of the defendant during the accounting period may have been non-infringing, the evidence is clearly to the effect that at least very nearly all of such sales were infringing and there was no evidence adduced that would indicate that any of the sales made during the accounting period were of a non-infringing nature. This matter is concluded, I think, by the argument advanced by counsel for the defendant to the effect that the sales made during the November, 1964 campaign in St. John's, Newfoundland, were the first to be made by the defendant without the use of the plaintiff's trade marks, and particularly the mark "Yo-Yo".

The final matter I propose to deal with is that of costs. I am aware that I have no jurisdiction to award costs on a reference of this kind, but the matter was argued at length before me and the amount of costs if taxed in the normal way will obviously be very large. For these reasons I thought I might not be out of order in commenting on this aspect of the reference.

While there is no doubt that the inquiry would have been shortened somewhat if the plaintiff had examined Krangle, or some other officer of the defendant, for discovery prior to the commencement of the reference, and counsel for the defendant sought to make much of this; particularly during argument, there is one impression that stands out more clearly in my mind than any other, and that is that the overriding reasons why this inquiry occupied some 37 days are the virtual refusal of the witness, Krangle, to answer the questions put to him with anything even approaching candour, his failure to produce the required books and documents of the defendant at the opening of the inquiry and his production of some important documents late in the inquiry, and the almost incessant attempts made by the defendant, some of which seemed to me to border on desperation, to have the inquiry adjourned both before it commenced and during its course.

I, accordingly, have no hesitation whatever in recommending that serious consideration be given to adoption of the normal rule that the costs should follow the event. In fact, the conduct of the defendant during the inquiry has been such that should I have found no profit for which the defendant need account to the plaintiff, I would have recommended that no costs be awarded to either party.

All of which is respectfully submitted.

BETWEEN:

CREE ENTERPRISES LTD. .....APPELLANT;

Winnipeg 1966 Mar. 22 Mar. 24

AND

THE MINISTER OF NATIONAL REVENUE .....} RESPONDENT.

Income tax—Inter-corporate dividend—When deductible—Dividend paid from "designated surplus"—Control by two related corporations—Whether each controls—Income Tax Act, s. 28(2) and (3).

On December 1, 1960, M Co which owned beneficially 27 of the 40 voting shares in C R Ltd transferred 20 of those shares to appellant and immediately thereafter acquired the 13 remaining voting shares from their owner so that appellant and M Co then owned equally the 40 voting shares in C R Ltd. M. Co and appellant were respectively controlled by Mr. and Mrs. R, husband and wife, and Mr. R was throughout president of C R Ltd, under whose by-laws he had a casting vote at all meetings of directors and shareholders. On December 31, 1960, C R Ltd paid a dividend of $72,000 of which a substantial part was paid out of undistributed income on hand at the end of its preceding taxation year.

Held, appellant acquired control of C R Ltd on December 1, 1960, within the meaning of s. 28(3) of the *Income Tax Act*, and in computing its income for the year appellant was consequently prohibited from deducting that part of the dividend paid out of C R Ltd's undistributed income on hand at the end of its preceding taxation year, which amount became "designated surplus" under s. 28(2) of the *Income Tax Act*.

On the proper construction of s. 28 of the *Income Tax Act*, where more than 50% of the voting stock of a corporation is owned by two or more resident Canadian taxpaying corporations which do not deal with one another at arm's length, the first mentioned corporation is controlled by *each* of the others.

APPEAL from a decision of the Tax Appeal Board.

Harold Buchwald, Q.C. and *D. C. Abbott* for appellant.

G. W. Ainslie for respondent.

GIBSON J.:—The true meaning of "control" of a corporation as that word is employed in s. 28 of the *Income Tax Act* is the issue to be determined in this action.

The problem of determining when a corporation is controlled for the purpose of that section arises in this way. Inter-corporation dividends passing between two resident Canadian tax paying corporations are income for the recipient corporation by reason of s. 6(1)(*a*)(i) of the Act, but

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Gibson J.

are tax exempt by reason of being deductible under s. 28(1) of the Act unless the situation obtains as is envisaged by s. 28(2) of the Act "before the control was acquired", in which latter case no deduction is permitted because the surplus of undistributed income, out of which such dividends are paid, is categorized by this latter sub-section as "designated surplus".

"Control" by one corporation of another corporation for the purpose of ascertaining whether a deduction from income is permissible under s. 28(1) of the Act, or whether it is prohibited by s. 28(2) of the Act is delineated in s. 28(3) of the Act in these words:

> For the purpose of subsection (2), one corporation is controlled by another corporation if more than 50% of its issued share capital (having full voting rights under all circumstances) belongs to the other corporation or to the other corporation and persons with whom the other corporation does not deal at arm's length.

What is in issue in this case is not the same meaning judicially decided of "control" of a corporation employed in certain other sections of the *Income Tax Act*. (Compare *Buckerfield's v. M.N.R.*[1], Jackett P., at p. 302 regarding "control" as used in s. 39(4) the *Income Tax Act*:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39) The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares I am of the view, however, that, in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors

Pender Enterprises v. M.N.R.[2], Noël J., at p. 356 regarding "control" as used in section 139(5a) of the *Income Tax Act*: "...I am of the view, however, that in section 39 of the *Income Tax Act*, the word 'controlled' contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors.... Now, although this interpretation was given in connection

[1] [1965] 1 Ex. C.R. 299. [2] [1965] C.T.C. 343.

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with Section 39 of the *Income Tax Act,* I can see no reason why it should not apply as well to Section 139(5a) of the Act..."; and see also Cameron J., in *Vancouver Towing Co. Ltd. v. M.N.R.*[1])

For the determination of the issue in this case, I am of opinion that it is only necessary to interpret the meaning of the words employed in s. 28 of the *Income Tax Act,* and particularly s-ss. 1, 2, 3, 4, 5 and 6. That section provides a complete dictionary in itself. These sub-sections read as follows:

(1) Where a corporation in a taxation year received a dividend from a corporation that

(*a*) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year,

(*b*) (Repealed 1956, c 39, s 7, effective August 14, 1956.)

(*c*) (Repealed 1965, c. 18, s 8 (1), effective on Royal Assent, June 30, 1965)

(*d*) was a non-resident corporation more than 25% of the issued share capital of which (having full voting rights under all circumstances) belonged to the receiving corporation, or

(*e*) was a foreign business corporation more than 25% of the issued share capital of which (having full voting rights under all circumstances) belonged to the receiving corporation,

an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporations income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income.

(2) Dividends not deductible. Notwithstanding subsection (1), where

(*a*) a dividend was paid by a corporation that was resident in Canada and was controlled by the receiving corporation, and

(*b*) the payer corporation had undistributed income on hand at the end of its last complete taxation year before the control was acquired (which undistributed income is hereinafter referred to as the "designated surplus"),

if the dividend was paid out of designated surplus, no amount is deductible under subsection (1), and, if a portion of the dividend was paid out of designated surplus, the amount deductible under subsection (1) is the dividend minus the aggregate of

(*c*) the portion of the dividend that was paid out of designated surplus, and

(*d*) the part of any amount deductible under subsection (2) of section 11 in computing the receiving corporation's income reasonably attributable to the portion of the dividend that was not paid out of designated surplus.

(3) Controlled corporation. For the purpose of subsection (2), one corporation is controlled by another corporation if more than 50% of its

[1] [1946] Ex. C.R. 623 at p. 632.

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issued share capital (having full voting rights under all circumstances) belongs to the other corporation or to the other corporation and persons with whom the other corporation does not deal at arm's length.

(4) "Control period." In this section, "control period" means the period from the commencement of the payer corporation's taxation year in which the control was acquired to the end of the taxation year in which the dividend was paid.

(5) Amount of corporation's earnings in control period. In this section, the amount of a corporation's earnings for a control period that was available for payment of dividends at a particular time is the amount by which

(*a*) the aggregate of its incomes for the taxation years in the control period,

exceeds

(*b*) the aggregate of

(i) its taxes under this Part for the taxation years in the control period,

(ii) all dividends paid in the control period before the particular time, to the extent that they are not, for the purpose of subsection (2), deemed to have been paid out of designated surplus, and

(iii) such part of the dividends deemed under this Part to have been received from the corporation in the control period before the particular time as was included in computing the recipients' incomes to the extent that they are not, for the purpose of subsection (2) deemed to have been paid out of designated surplus.

(6) Dividends not regarded as paid out of designated surplus. For the purpose of subsection (2)

(*a*) where the amount of a corporation's earnings for the control period that was available for payment of dividends was, at the time a particular dividend was paid, equal to or greater than the particular dividend plus all other dividends paid by the payer corporation at the same time as the particular dividend, no part of the particular dividend shall be regarded as having been paid out of designated surplus, and

(*b*) DIVIDEND PAID OUT OF DESIGNATED SURPLUS—in any other case, the portion of the particular dividend that was paid out of designated surplus is the proportion of

(i) the aggregate of the particular dividend and all other dividends paid by the payer corporation at the same time as the particular dividend minus the amount, if any, of the corporation's earnings for the control period that was available for payment of dividends at that time, or

(ii) the designated surplus minus the aggregate of

(A) the tax-paid undistributed income of the payer corporation as of the commencement of the control period,

(B) any amount upon which tax has been paid by the payer corporation under Part II after the commencement of the control period and before the dividend was paid, and

(C) the dividends paid by the payer corporation out of the designated surplus during the control period but before the particular dividend was paid,

whichever is the lesser, that the particular dividend is of the aggregate of the particular dividend and all other dividends paid by the payer corporation at the same time as the particular dividend.

In this case it is necessary to consider two other corporations besides the appellant corporation, Cree Enterprises Limited. They are Metropolitan Construction Limited and Crown Realty Limited. Cree Enterprises Limited at all material times was a land developer. Metropolitan Construction Limited bought the developed land from Cree Enterprises Limited and built speculative houses for sale on such land. Crown Realty Limited sold such houses, and it also engaged in a general insurance business, but its only customer for such business in fact was Metropolitan Construction Limited.

It is agreed that Metropolitan Construction Limited and the appellant Cree Enterprises Limited at all material times were not dealing at arm's length within the meaning that such words are used in the *Income Tax Act*.

It is a dividend paid by Crown Realty Limited to the appellant Cree Enterprises Limited that gives rise to the subject matter of this action.

There was an Agreed Statement of Facts filed at the trial of this action made by the parties, which reads as follows:

1. The Appellant was incorporated under the provisions of the Manitoba Companies Act on the 2nd day of June, A.D. 1959, and its fiscal period ended on the 31st day of May, A.D. 1961.

2 Metropolitan Construction Ltd. (hereinafter referred to as "Metropolitan") was incorporated under the provisions of the Manitoba Companies Act on the 30th day of March, A.D. 1954, and its fiscal period ended on the 30th day of November, A.D. 1961.

3. Crown Realty Ltd. was incorporated under the provisions of the Manitoba Companies Act on the 25th day of November, A.D. 1961, and its relevant fiscal periods ended 29 February, 1960 and 28 February, 1961.

4. At all times material to this Appeal, all of the issued shares of Metropolitan, having full voting rights under all circumstances, were beneficially owned by Myles Sheldon Robinson.

5. At all times material to this Appeal, all of the issued shares of the Appellant, having full voting rights under all circumstances, were beneficially owned by Mrs. Constance Robinson.

6. Mrs. Constance Robinson is the wife of Myles Sheldon Robinson.

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7. Harry Moroz was not related within the meaning of ss. (5a) of sec. 139 of the *Income Tax Act* to either Myles Sheldon Robinson, or Mrs Constance Robinson.

8. The Common Shares of Crown Realty Ltd. had full voting rights under all circumstances.

9 The Preferred Shares of Crown Realty Ltd., did not have full voting rights under all circumstances.

10. Immediately prior to the 1st day of December, A.D. 1960, the following were the shareholders of Crown Realty Ltd.:

	COMMON	PREFERRED
Myles Sheldon Robinson (in trust for Metropolitan)	1	
Harry Moroz	13	1
Victoria Margaret Jardine (in trust for Metropolitan)	1	
Metropolitan	25	2
	40	3

11. On the 1st day of December, A D. 1960, Metropolitan sold and transferred 20 Common Shares and 1½ Preferred Shares to the Appellant for the sum of $36,250.00.

12. On the 5th day of December, A D. 1960, Harry Moroz sold and transferred his 13 Common Shares and 1 Preferred Share of Crown Realty Ltd , to Myles Sheldon Robinson.

13. On the 5th day of December, A.D. 1960, Myles Sheldon Robinson transferred 1 Common Share of Crown Realty Ltd. to Harold Buchwald who acknowledged that he held the Share as bare trustee for and on behalf of Myles Sheldon Robinson.

14. On the 10th day of December, A D. 1960, Mr. Buchwald transferred back to Myles Sheldon Robinson the 1 Common Share of Crown Realty Ltd. which he held in trust for Mr. Robinson.

15. On the 10th day of December, A D. 1960, Myles Sheldon Robinson sold and transferred 13 Common Shares and 1 Preferred Share of Crown Realty Ltd., to Metropolitan for the sum of $23,565 00, and also transferred back to Metropolitan the 1 Common Share which he held in trust for that Company.

16. On the 10th day of December, A.D. 1960, Mrs. Jardine transferred back to Metropolitan the 1 Common Share of Crown Realty Ltd. which she held in trust for that Company.

17 As a result of the Share transfers referred to in Paragraphs numbered 11 to 16, both inclusive, from and after the 10th day of December, A.D 1960 the following were the Shareholders of Crown Realty Ltd :

	COMMON	PREFERRED
METROPOLITAN CONSTRUCTION LTD	20	1½
CREE ENTERPRISES LTD. ..	20	1½
	40	3

18. On the 28th day of December, A.D. 1960, the Board of Directors of Crown Realty Ltd., passed a resolution declaring a dividend in the aggregate amount of $72,000.00 on the outstanding Common Shares of Crown Realty Ltd., payable to Shareholders of record at the close of business on the 31st day of December, A.D. 1960.

19. As of the 31st day of December, A.D. 1960, Metropolitan was indebted to Crown Realty Ltd. in excess of $36,000 00, and it was agreed between Crown Realty Ltd. and Metropolitan that the dividend of $36,000.00 payable to Metropolitan was to be applied to reduce Metropolitan's indebtedness to Crown Realty Ltd.

20. On the 31st day of December A.D. 1960, Crown Realty Ltd., paid to the Appellant the sum of $36,000 00 in satisfaction of the dividend declared by Crown Realty Ltd., on the 28th day of December, A.D. 1960.

21. The amount of Crown Realty Ltd.'s earnings, as that phrase is defined by ss. (5) of Sec. 28 of the *Income Tax Act*, R.S.C. 1952, c. 148, for the period from the 1st day of March, A.D. 1960 until the 28th day of February, A.D. 1961, was $22,509.36 and prior to the 1st day of March, A.D. 1960, Crown Realty Ltd., had undistributed income on hand within the meaning of the *Income Tax Act*, in excess of $24,745 32, namely $58,318.42.

22. The Directors and Officers of Crown Realty Ltd. were as follows:

(*a*) Prior to the 5th day of December, A.D. 1960:

President	Myles Sheldon Robinson
Vice-President	Harry Moroz
Secretary-Treasurer	Victoria Margaret Jardine

(*b*) From the 5th day of December, A.D. 1960 to the 10th day of December, A.D. 1960:

President	Myles Sheldon Robinson
Vice-President	Harold Buchwald
Secretary-Treasurer	Victoria Margaret Jardine

(*c*) From the 10th day of December, A.D. 1960 to the 29th day of November, A.D. 1965:

President	Myles Sheldon Robinson
Vice-President	Constance Robinson
Secretary	Saul Benjamin Zitzerman
Treasurer	Victoria Margaret Jardine

23. Clauses 17 and 27 of By-Law No. 1 of Crown Realty Ltd., the General By-Law of that Company, provide, *inter alia*, as follows:

"PRESIDENT

17. The President shall be the chief executive officer and Managing Director of the Company. He shall, if present, preside at all meetings of shareholders and Directors; ...."

"VOTES

27. Every question submitted to any meeting of shareholders shall be decided in the first instance by a show of hands and in the case of an equality of votes the Chairman shall both on a show of hands and at a poll have a casting vote in addition to the vote or votes to which he may be entitled as a shareholder...."

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24. An amount equal to the dividend of $36,000.00 paid to Metropolitan by Crown Realty Ltd. was deducted from the income of Metropolitan for the fiscal period ended on the 30th day of November, A.D. 1961, both by Metropolitan in its return of income and by the Respondent in assessing Metropolitan, for the purpose of determining Metropolitan's taxable income, pursuant to the provisions of ss. (1) of Sec. 28 the *Income Tax Act* aforesaid.

25. The Appellant and Metropolitan at all material times were resident in Canada.

(At times in these Reasons, Metropolitan Construction Limited, Cree Enterprises Limited, and Crown Realty Limited are respectively referred to as "Metropolitan", "Cree", and "Crown".)

In considering the respective relevant fiscal year periods of Metropolitan, Cree and Crown and s. 28(4) of the *Income Tax Act* in relation to the question of the control of Crown it more incisively points up the problem for interpretation by setting out the beneficial shareholdings in Crown Realty Limited during the period under review as follows:

(a) *Prior to December 1st, 1960:*

METROPOLITAN CONSTRUCTION LTD.	67 5%
HARRY MOROZ	32.5%
	100.0%

(b) *December 1st to December 5th, 1960:*

HARRY MOROZ	32.5%
METROPOLITAN CONSTRUCTION LTD.	17.5%
CREE ENTERPRISES LTD.	50.0%
	100.0%

(c) *December 5th to December 10th, 1960:*

MYLES SHELDON ROBINSON	32.5%
METROPOLITAN CONSTRUCTION LTD.	17.5%
CREE ENTERPRISES LTD.	50.0%
	100.0%

(d) *December 10th, 1960 (to date):*

METROPOLITAN CONSTRUCTION LTD.	50.0%
CREE ENTERPRISES LTD.	50.0%
	100.0%

For the purpose of demonstrating how the respondent applied the provisions of s. 28 of the Act in relation to the facts of this matter, it is convenient to record what happened for tax purposes to the surplus of Crown Realty Ltd.

by reason of what it and Metropolitan and the appellant Cree did during the relevant period.

CROWN REALTY LIMITED
SURPLUS

As at February 29th, 1960	$ 58,318.42	"Designated" S. 28(2) of Act
For period March 1st, 1960 to February 28th, 1961 (i.e. period in which "control" by the respondent is alleged to have changed) ...	22,509.36	"Control Period Earnings" S. 28(5) of Act
	$ 80,827.78	
December 28th, 1960 Dividend paid December 31st, 1960	$ 72,000.00	

Apportionment:

Metropolitan Construction Ltd. — 50% — $36,000.00
Cree Enterprises Ltd. ..... — 50% — $36,000.00

S. 28(6)(b)

Aggregate dividend	$ 72,000 00
Control Period Earnings	22,509.36
Portion out of Des. Surp.	49,490.64
Proportion taxable to Cree—50%	24,745.32

In support of his submission as to what canons of interpretation should be applied in construing s. 28 of the Act, counsel for the appellant referred to the following authorities:

A. *Interpretation of Taxing Statutes*

1. *Maxwell on the Interpretation of Statutes* 11th Ed. (1962) at p. 278.
2. *Denn v. Diamond* (1825) 4 B & C 243.
3. *I.R.C. v. Ross & Coulter* (1948) 1 All. E.R. 616 per Lord Thankerton—mentioned in *Regina v. MacDonald* (1959) 28 W.W.R. 309 (B.C.).
4. *I.R.C. v. Wolfson* (1949) 1 All E.R. per Lord Simonds at 868.
5. *Craies on Statute Law* 6th Ed. (1963) pp. 113-115 & 85.
6. *Simms v. Reg. of Probates* [1900] A.C. 323, 337.
7. *Dock. Co. v. Browne* (1831) 2 B & Ad 43, 58 per Lord Tenterden C.J.
8. *Re Micklethwait* (1855) 11 Ex. 452, 456 per Baron Parke.
9. *Partington v. Att. Gen.* (1869) L.R. 4 H.L. 100, 122 per Lord Cairns.
10. *Cape Brandy v. I.R.C.* [1921] 1 K.B. 64, 71 per Rowlatt J.
11. *Canadian Eagle Oil Co. v. R.* [1946] A.C. 119 per Viscount Simon, L.C.
12. *I.R.C. v. Ross & Coulter* [1948] 1 All E.R 616 at p. 625 per Lord Thankerton.
13. *Att. Gen. v. Earl of Selborne* [1902] 1 K.B. 396 per Collins M.R.

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14. *Dewar v. I.R.C.* [1935] 2 K.B. 351 per Lord Hanworth M.R.
15. *Ormond v. Betts* [1928] A.C. 143 per Lord Sumner.
16. *Pryce v. Monmouthshire Canal Co.* (1879) 4 App. Cas. 197 per Lord Cairns.
17. *Beeke v. Smith* (1836) 2 M & W 191 per Parke B.

B. *Canadian Cases on Interpretation of Taxing Statutes*

1. *Shaw v. M.N.R.* [1939] S.C.R. 338 per Duff C.J.C.
2. *Hatch v. M.N.R.* [1938] Ex. C.R. 208 per Angers J.
3. *R. v. Crown Zellerbach* 14 W.W.R. (NS) 433 at 439 per Manson J.
4. *Re Social Services Tax Act, Re W. & G. Grant Construction Co. Ltd.*—47 W.W.R. 125 per Munroe J. at 128.
5. *Trans-Canada Investment Corporation Ltd. v. M.N.R.* [1953] Ex. C.R. 292; 53 DTC 1227 [1231].
6. *Osborne—The Concise Law Dictionary*, p. 347.

C. *Canadian Cases on Interpretation of Statutes Leading to Absurdity*

1. *Massey-Harris Co. v. Strasbourg* (1941) 3 W.W.R. 586, [1941] 4 D.L.R. 620 per MacDonald J.A. (Sask. C.A.).
2. *M. v. Law Society of Alberta* (1940) 3 W.W.R. 600 per McGillivray, J.A.—Affirmed [1941] S.C.R. 430.
3. *Waugh and Esquimalt Lumber Co. v. Pedneault* (1949) 1 W.W.R. 14, per Sidney Smith J.A. (B.C. C.A.)
4. *Regina v. Scory* (1965) 51 W.W.R. 447.

D. *Judicial Interpretation of "Acquired" & "Acquire" Corpus Juris Secundum*, Vol. I., pp. 918 & 919.

Counsel for the respondent for a similar purpose referred to *Trans-Canada Investment Corporation Ltd. v. M.N.R.*[1] and in particular, the words of Cameron J., at p. 299 as follows:

> ...But in my view, there is another interpretation that may be put upon it, an interpretation which I think is more consonant with the intention of Parliament as I deem it to be from the language itself. ...
>
> Again, in *Shannon Realties v. St. Michel* [[1924] A.C. 192], it was stated that if the words used are ambiguous, the Court should choose an interpretation which will be consistent with *the smooth working of the system* which the statute purports to be regulating.;

[Emphasis is mine.]

and *Highway Sawmills Limited v. M.N.R.*, S.C.R., an unreported judgment pronounced March 11, 1966, the words of Cartwright J.:

> The answer to the question [as to] what tax is payable in any given circumstances depends, of course, upon the words of the legislation imposing it. Where the meaning of those words is difficult to ascertain it may be of assistance to consider which of two constructions contended for brings about a result *which conforms to the apparent scheme of the legislation*....

[Emphasis is mine.]

[1] [1953] Ex. C.R. 292; affirmed [1956] S.C.R. 49.

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In employing this jurisprudence the appellant submitted that the meaning that should be attached to the words "before the control was acquired" in s. 28(2)(*b*) of the Act necessitated that there be a "change" of control, or "surrender" of control, at the material time, before s. 28 (2) was applicable so as to deny this taxpayer the deduction from income otherwise permitted under s. 28(1) of the Act; and that such did not take place in that Metropolitan had control at all material times, so that there was neither a "change" of or "surrender" of control.

The respondent submitted that the purpose of s. 28(2) was to prohibit any dividends which were paid out of the existing surplus of undistributed income of a corporation when control was acquired by another corporation from being tax exempt under s. 28(1) of the Act in the hands of such receiving corporation, and to permit only dividends which were paid out of earnings made after control was so acquired to be deducted by such a corporation from its income under s. 28(1) of the Act; and that control within the meaning of s. 28(3) of the Act for the purpose of s. 28 (2) can be of two types, viz: (1) where more than fifty per cent of the issued share capital belongs to one other corporation and, (2) where such a situation obtains that more than fifty per cent of the share capital belongs to another corporation and persons with whom this other corporation does not deal at arm's length. ("Person" is defined in s. 139(1) (*ac*) of the Act.)

The respondent's submission is further that in this second type of control situation that every corporate shareholder who does not deal at arm's length with any other corporate shareholder or shareholders and who with it or them jointly owns more than fifty per cent of the issued share capital of another corporation, "controls" such latter corporation for the purpose of s. 28(2) of the Act; and that the appellant Cree was in this position at all material times.

In coming to the conclusion I do in this case, firstly, I am of the opinion that the word "acquired" as used in the phrase "before the control was acquired," in s. 28(2) of the Act, means something different legally when so used in conjunction with these words than when standing alone. To determine its meaning when used with these other words it is necessary to look to these other words and to the other

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parts of s. 28 in order to determine its true meaning. In doing so, as I do, in my opinion it is not necessary to import a meaning of "change" of or "surrender" of control in construing the words "before control was acquired" in s. 28(2)(*b*).

The application of these words also is not confined to "outsiders", so to speak, taking over control of such a corporation within the meaning of s. 28(3) of the Act, and includes those shareholder corporations such as those in this case who have what may be referred to as internal relationships.

Secondly, I am of opinion that the "control" means in s. 28(3) of the Act is limited to the special purpose only of computing the deduction from income, if any, under s. 28(1) of the Act and that otherwise the word "control" as used in the second type of situation envisaged in s. 28(3) of the Act, above referred to, might be called a misnomer.

It follows in my view that for the purposes of s. 28 of the *Income Tax Act* that two or more corporations may each control another corporation at the same time. It may be stated this way, namely, that all resident Canadian tax paying corporations (1) who do not deal at arm's length with each other and (2) who own shares ("having full voting rights under all circumstances") in a corporation, each "control" such latter corporation for the purposes of s. 28 of the Act, provided that the total shareholdings of them comprise more than 50% of such issued capital of such corporation.

In the result, therefore, I am of opinion that after March 1, 1960, namely on December 1, 1960, the appellant Cree Enterprises Limited acquired control of Crown Realty Limited within the meaning of s. 28(3) of the *Income Tax Act* and as a consequence at that time by reason of s. 28(2) of the Act the undistributed accumulated earned income in the surplus account of Crown Realty Limited became in law a "designated surplus" so that the portion of it paid out to the appellant as dividends, as stated above, not being part of earnings during the control period (see s-ss. (4) and (5) of s. 28 of the Act cannot be deducted by the appellant from its income during the fiscal period ending March 31, 1961 under the provisions of s. 28(1) of the Act.

The appeal is therefore dismissed with costs.

BRITISH COLUMBIA ADMIRALTY DISTRICT

Vancouver
1966
Jan 31,
Feb 1-4,
7-11
Mar 3

BETWEEN:

ANGLO-CANADIAN TIMBER PRODUCTS LTD. ..... PLAINTIFF;

AND

GULF OF GEORGIA TOWING CO. LTD. and RAYMOND McCULLOUGH ..... DEFENDANTS;

AND

STRAITS TOWING LIMITED ..... THIRD PARTY.

AND BETWEEN:

STRAITS TOWING LIMITED ..... PLAINTIFF;

AND

GULF OF GEORGIA TOWING CO. LTD. and RAYMOND McCULLOUGH ..... DEFENDANTS.

AND BETWEEN:

McKEEN & WILSON LIMITED ..... PLAINTIFF;

AND

GULF OF GEORGIA TOWING CO. LTD. and RAYMOND McCULLOUGH ..... DEFENDANTS.

Shipping—Scow sinking during loading—Damage to scow and berth—Whether negligence—Liability—Towing contract—Clause excluding liability "however caused" if tug seaworthy—Construction of.

S employed G to tow a scow a short distance from its berth in a scow grounds to A's scow berth where it was to be loaded with chips by A for delivery to A's customer. S was charterer by demise of the scow, which was owned by someone else. While being towed by G's tug the scow struck another scow and was then towed to A's scow berth where it was loaded during the next several days. On the last loading day the scow listed heavily to starboard with resultant damage to the scow berth, and on examination a hole was found in the scow's planking. A sued G and the tug's master for negligently causing damage to the

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ANGLO-CANADIAN TIMBER PRODUCTS LTD. *et al.* *v.* GULF OF GEORGIA TOWING CO. LTD. *et al.*

scow and to the scow berth, and S sued them for negligently causing damages to the scow. The towing contract between G and S declared: "providing the tugboat owner uses due diligence to make and keep the tugboat seaworthy the towboat owner is not to be liable for loss or damage to the tow or its contents, howsoever caused".

On the evidence the court found that the scow was not damaged whilst being towed by G's tug.

Held, dismissing both actions: (1) A's action for damage to the scow failed on the grounds: (*a*) the damage was not caused by defendants; (*b*) defendants owed no duty of care to A not to damage the scow as it was not A's property nor had A proved an exclusive right to its use.

(2) A's action for damage to the scow berth failed on the grounds: (*a*) neither defendant owed a duty to inform A of the damage to the scow as the tow was performed for S and not for A; (*b*) there being no contract between A and defendants there was no implied warranty of seaworthiness by defendants; (*c*) there was no proof of negligence by either defendant or that the alleged negligence was the cause of the damage complained of.

(3) S's action for damage to the scow failed on the grounds: (*a*) the damage was not caused by defendants' negligence; (*b*) G's liability was expressly excluded by the towing contract. *The West Cock* [1911] P. 208, distinguished.

ACTIONS for damages.

J. G. Alley for plaintiff Anglo-Canadian Timber Products Ltd.

John I. Bird, Q.C. for plaintiffs McKeen & Wilson Ltd. and Straits Towing Ltd.

D. B. Smith for defendant Gulf of Georgia Towing Co. Ltd.

V. R. Hill and *J. L. J. Jessiman* for defendant Raymond McCullough.

SHEPPARD D.J.:—This is a consolidation of three actions for the negligent towing of a scow, *Straits 43*. The first action is by the Anglo-Canadian Timber Products Ltd. who alleged that the defendant, Gulf of Georgia Towing Co. Ltd., by its master, the defendant, Raymond McCullough, on the 22nd December, 1961, did so negligently operate the tug *Grapple* owned by the defendant Company as to damage the scow *Straits 43* and did damage the plaintiff's scow berth by putting therein the *Straits 43* after it had been so damaged. Under third party proceedings, the defendant, Gulf of Georgia, claimed over against Straits Towing Ltd.

The second action is by the Straits Towing Ltd., a charterer by demise of the *Straits 43*, against the defendants, Gulf of Georgia and McCullough, for negligent towing of the scow *Straits 43* thereby causing it damage.

The third action by McKeen & Wilson Ltd., owners of the scow *Straits 43* was abandoned at the trial, probably by reason of the claim being raised in the second action.

The facts follow.

By charterparty of 15th February, 1960, McKeen & Wilson Ltd., the owners, chartered to Straits Towing Ltd. the scow *Straits 43*, the scow in question, for a period to continue until terminated by 30 days' notice, and as no notice has been given the charter has operated throughout as a charter by demise. In 1954 or earlier Puget Sound Pulp & Timber Co. of Bellingham, arranged with the plaintiff Anglo-Canadian to purchase chips to be delivered by Anglo-Canadian loading at its scow berth in North Vancouver on scows to be supplied by Puget Sound. In 1954 Puget Sound Co. arranged with Straits Towing Ltd. to supply empty scows and to do the towing necessary to put the empty scows into the Anglo-Canadian berth and to deliver the loaded scows at Bellingham. On the 22nd December, 1961, the Straits Towing, having their tugs otherwise engaged, employed the Gulf of Georgia to tow the empty scow *Straits 43* from Moodyville scow grounds to the berth of Anglo-Canadian that night. Accordingly, the Gulf of Georgia by its despatcher assigned the tug *Grapple* with Captain Raymond McCullough, the co-defendant, as Master, and Kenneth John Brewster, as deckhand, to make the tow.

At the Moodyville scow grounds the scows were opposite each other lying forward to forward in two parallel rows from north to south separated by a space of 10 feet between the two rows (Ex. 44). A lumber scow partly loaded was in the west row and the *Straits 43* was in the east row opposite the lumber scow but their forward ends separated by the 10 feet between the rows (Ex. 44). The tug then proceeded to yard out the *Straits 43* by moving out of the way an empty scow, next put the deckhand aboard the *Straits 43* to fasten a bridle to the port forward corner (the southwest) and began to tow the *Straits 43* to the south. The *Straits 43* began to turn counterclockwise as this corner

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moved to the south, and came in contact with the lumber scow to the west. The plaintiffs allege that in the contact the forward rake of the *Straits 43* was damaged to the extent of putting a hole in plank 5 and opening the seam between planks 5 and 6. On the other hand, the defendants contend that no damage was caused; that the corner only of the *Straits 43* made contact with the head log or bumper of the lumber scow.

When the forward starboard corner of *Straits 43* was around sufficiently to be reached, the tug went astern within 10 feet of the scow so that the deckhand could receive the bridle for that corner, then, with the two bridles, towed the scow to the Anglo-Canadian berth without incident, a distance of 1,000 to 1,500 feet. There about 2245 the deckhand tied up the scow at the chip berth of Anglo-Canadian. The log of the *Grapple* contains the following entry of the contact with the lumber scow:

> 20 30 Yard out MT S43 at MM (Moodyville)—1 stanchion on side of box smashed Hit rake of S43 on corner of LD at MM—Bruised.

Captain McCullough reported by telephone to his despatcher who made the following record:

> Grapple—reports hit empty S43 a load coming out of M/M (Moodyville) and bruised rake of S43, might only be sheeting but would be wise to check with mill—its on the end in first @ Anglo-Canadian mill. Phoned mill & advised.

The stanchion was previously "smashed" but not by these defendants.

Captain McCullough made no report of the contact with the lumber scow to Anglo-Canadian. The despatcher tried to telephone to Anglo-Canadian but apparently got a wrong number. The scow at the berth of Anglo-Canadian was loaded with chips at the rate of 60 units a shift as follows: On the night of 22nd December, 1961, one-half shift, on the 27th, 28th and 29th December, two shifts each, a total of 375 units, and on the 2nd January, 1962, in 7½ hours, loaded approximately 60 units, making a total of 435 units. That was well within the capacity of the scow. Haddon, the mill foreman, sounded the scow on the 27th December, 1961, and again on the 2nd January, 1962, about 1130 and on each occasion found therein 4 inches of water; that did not indicate any material defect in the scow. There was then no list but a slight rake aft which was intended.

The damage to the Anglo-Canadian berth occurred on the 2nd January, 1962. That morning the plaintiff began to load the forward end of the scow and there was noticed nothing wrong until 1445 when the scow began to list to starboard and this list increased in spite of the efforts of Seniowski, the chipperman, to reduce it by shovelling chips to port. About 1530 Seniowski reported the list to Haddon, his foreman, who found the starboard corner under water about 12 inches. The scow continued to sink and eventually she lost part of her load. Her listing damaged the chipper loading machinery and piling on the east of the berth and also some piling on the west of the berth.

On the 3rd January, 1962, a diver put a patch on the damaged forward rake. The scow was then pumped out and taken to McKenzie Barge & Derrick Co. Ltd. for repairs. She was there examined by surveyors, Symons and Clark, and by Brown of Straits Towing. Symons and Clark reported that the 5th plank below the bumper or head log had a hole about 4 inches in diameter with fracture of the surrounding wood; the 6th plank was damaged about 2 to 3 inches from its upper area—and the seam was pushed back and thereby opened up. Brown thought the hole about 3 inches in diameter and the damaged area to extend over 3 feet—from 3 inches down to zero. The real difference was whether the hole was 6 feet from the starboard side, as Symons and Clark testified, or a few inches to starboard of the midships as Brown testified. There was evidence that the damage was such as would be made by a steel rail, and Clark was of the opinion that the damage was consistent with having been made by a corner iron of a scow; further, that the sinking was probably due to the chips loaded forward on 2nd January, 1962, bringing the damaged rake below the water line whereby the water flowed in until the scow lost her stability, listed and sank.

Brewster, the deckhand aboard the *Straits 43*, said that at Moodyville the corner of the *Straits 43* hit the lumber scow and the point of contact was about 4 to 4½ or 4 to 5 feet above the water line and that the damage complained of, that is to the rake of *Straits 43*, was not then caused. "Corner" may be taken to mean that section of the scow from the corner of the deck down the edge of the rake beneath, as together making that corner of the scow.

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The question common to both actions is whether or not the *Grapple* in yarding out the *Straits 43* and bringing her into contact with the partly loaded lumber scow did cause the damage to the rake which was complained of by the plaintiffs.

The plaintiffs contend that as the scow was delivered by the defendants to the Anglo-Canadian berth in a damaged condition, therefore the onus was on the defendants to explain that the damage occurred without their fault: *Joseph Travers & Sons v. Cooper*[1]. The plaintiffs did not rely upon such presumption exclusively but adduced evidence to prove that the damage was not caused at other time or place and therefore inferentially it was caused in the yarding out at Moodyville. Also the defendants adduced evidence to prove that they had not caused the damage alleged. In some cases, the relation of bailee or the fact of a party being in the better position to explain may affect the onus of adducing evidence, but here can have no application as all parties have adduced evidence and the question is not who should begin but whose witnesses are to be believed, the defendants' or the plaintiffs.

The plaintiffs called Captain Wicks, tug master, who testified that he had towed the scow *Straits 43* from Bellingham and had put her into the Moodyville scow grounds on the 11th December, 1961 at 2155, and at that time the scow was in good shape and had no broken plank in the forward rake. The plaintiffs adduced further evidence to prove that the damage could not have been received in the scow berth of Anglo-Canadian because the berth is surrounded by pilings and inside thereof are bumper logs. The scow had been put into the berth with her forward rake to the shore where she would be safe, and a diver, after the sinking, had examined the berth and found nothing there which would account for the damage. Accordingly, the plaintiffs contend that the damage was received by the *Straits 43* coming in contact with the corner iron of the partly loaded lumber scow when the *Straits 43* was being yarded out of Moodyville scow grounds.

The defendants adduced the evidence of Captain McCullough and of Brewster to prove that in the yarding out there was no damage caused to the *Straits 43*. Captain

[1] [1915] 1 K.B. 73.

McCullough testified that he yarded out the empty *Straits 43* by putting the deckhand aboard to put the bridle on the forward port corner (southwest), then he (Captain McCullough) proceeded to pull to the south; that he proceeded slowly by letting the clutch in and out and did not exceed ½ knot. According to other evidence, the scow empty weighs about 325 tons, and it is to be expected he would slowly take up the single line holding the tow. Captain McCullough further stated that he did not actually see the *Straits 43* come into contact with the lumber scow, but when the starboard forward corner was around where it could be reached by the tug he went astern so that the deckhand could get the second bridle aboard the *Straits 43*. When doing so he saw a bruise on the rake at the place appearing on Exhibit 27, but he saw no hole in the rake and did not cause any hole or the damage complained of.

Brewster, the deckhand, testified that he was put aboard the empty scow and she was towed to a dolphin where he tied her. Then the tug put him aboard the *Straits 43* where he remained until the scow was tied up at the Anglo-Canadian scow berth, except for a few moments when he was aboard the lumber scow. The tug held the *Straits 43* by pushing against the south side while Brewster untied her, put the bridle on the forward port corner (southwest); the tug then began to yard out by towing to the south which caused the scow to turn. During that turning he saw that the starboard (northwest) corner, although moving slowly, would come in contact with the lumber scow, and he started towards that corner which he had not reached when he saw that corner (the starboard or northwest) take about midships the forward rake of the lumber scow. He jumped down to the lumber scow to make sure that her lines were fast and jumped back on to the *Straits 43* but in doing so he glanced at the rake of the *Straits 43* and saw no damage. The tug continued to pull to the south until the scow had swung around sufficiently to attach the bridle to that starboard (northwest) corner, then the Master passed to him the second bridle which Brewster fastened. Brewster also testified that no damage was done by the contact with the lumber scow, that he was close by when contact was made, and that the lumber scow had a freeboard of 4 to 5 feet. This height of the freeboard is significant as the corner iron of the lumber scow at such height would be too high to

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have caused the damage to the *Straits 43*, as the seam between the 5th and 6th planks is 2'8" above the water line (Ex. 34). Again, Brewster had no interest in this matter as his position as deckhand, and being on the scow not on the tug, did not permit fault being assigned to him; he gave the impression of being a truthful and careful witness who completely absolved Captain McCullough from having caused the damage. It is not overlooked that there are apparent contradictions, namely, that Brewster has estimated the freeboard of the lumber scow at 4 to 4½ feet and at 4 to 5 feet, also that he has testified that he was in the port corner, in the starboard corner or going to the starboard corner at the time of the contact of the two scows. The important fact is that Brewster was on the forward part of *Straits 43* from the commencement of the yarding until she was tied up at Anglo-Canadian berth, and in particular, was in the forward part when the scows made contact and he alone had the best opportunity of seeing the contact. Of that there can be no doubt. The differences in the height of the freeboard and in fixing his exact position on the forward end of the scow at the time of contact are merely matters of opinion with such apparent conflicts as might be expected in the case of a truthful witness after a lapse of three years.

Captain McCullough also gave the impression of a truthful witness who was trying to tell what he saw. Their evidence therefore cannot be disregarded and it becomes necessary to consider from the relative position of *Straits 43* and the lumber scow what probably happened in yarding out.

At the Moodyville scow grounds before the yarding out, the *Straits 43* appears to have been immediately opposite, that is, immediately east of the lumber scow (Ex. 44). When the bridle was attached to the forward port corner (southwest) of *Straits 43*, the *Grapple* began to pull towards the south which would result in the *Straits 43* turning in a counterclockwise direction as the scow proceeded to the south. When the forward starboard (northwest) corner was pulled around to the south so that it could be reached by the tug, the second bridle would be put aboard so that the towing by the two bridles could proceed to the Anglo-Canadian berth. But in turning, the length of the *Straits 43* would be extended to the west when the diagonal

line between the northwest and southeast corners became due west, that is towards the lumber scow, and she would touch the lumber scow if sufficiently close. But when *Straits 43* would have turned to the extent that such diagonal line or the northwest corner was extended to the west, then at such time the forward rake must have turned so far to the south as to be facing towards the southwest and in any event so far south of the northerly side of the lumber scow that it would be impossible for the forward rake to strike the northeast corner of the lumber scow. Brewster has so testified.

On the other hand, the plaintiffs' contention is that the forward rake of the *Straits 43* came upon the corner iron at the northeast corner of the lumber scow but that contention presents serious difficulties. In order that the forward rake of *Straits 43* could come into contact with the northeast corner of the lumber scow, the *Straits 43*, as appears from Exhibit 44, would have to move north sufficiently to bring the hole in plank 5 opposite the northeast corner of the lumber scow. That would mean moving *Straits 43* north 6 feet if the hole be 6 feet from the starboard side, or approximately 22 feet (Ex. 25) if the hole be within a few inches of the midships line, as also testified, also it would be necessary to move the *Straits 43* westerly the distance between the two scows. But that would not be sufficient; that would merely bring the bumper or head log of the lumber scow, with her lower freeboard, into contact with the rake of the *Straits 43*, or so much thereof as would be south of the northerly side of the lumber scow, whereas the plaintiffs' contention is that the corner iron of the lumber scow came in contact with the hole in plank 5. That would mean that the stern of the *Straits 43* did swing in an arc to the north sufficiently to permit the forward rake of the *Straits 43* at a distance of 6 feet from the starboard side or at midships, to strike the northeast corner of the lumber scow. As the *Straits 43* is 126 feet in length (Ex. 25) such a swing would be impossible by reason of the scows immediately to the north of the *Straits 43*, and also of the pylons to which such scows are tied. Moreover, on the plaintiffs' contention such swing must continue to sweep out of the way the scows and pylons north of the lumber scow in order that the *Straits 43* could bring its rake down upon the corner iron of the lumber scow with sufficient force to cause

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the alleged damage. It would require considerable force to damage the rake of *Straits 43* as the planks of the rake are 6 inches thick and are braced with 6 longitudinal keelsons in addition to the side walls (Ex. 33). In any event, the plaintiffs' contention should not succeed as it requires the pull of the *Straits 43* to be made to the north followed by a swing of the stern to the north, whereas the pull was in the opposite direction, to the south, and there is no evidence of any swing of the stern to the north.

Further, the damaged portion of the *Straits 43* is so close to the water line that it could not have been caused by the lumber scow. The seam between planks 5 and 6 of *Straits 43* is 2'8" above the water line (Ex. 34). According to Brewster the freeboard of the lumber scow is 4 to 4½ or 4 to 5 feet, whereas the plaintiffs must contend that it was so low that the corner did cause the damage to planks 5 and 6 at a distance of 2'8" from the water line. There is no evidence that the freeboard of the lumber scow was that low. If the freeboard be taken at 4 to 5 feet, then undoubtedly it was too high to have caused this damage.

On the other hand, if we assume that the lumber scow was so heavily laden as to reduce her deck line to 2'8" then as the deck of the *Straits 43* was 8'10" above the water line (Ex. 34) it would be 6'2" above the lumber scow (Ex. 34), and more than that to clear the bumper or head log (Ex. 34), but as Brewster jumped from the *Straits 43* down to the lumber scow, examined the lines and jumped back aboard the *Straits 43* all within 15 to 20 seconds, it is not credible that he could jump over 6'2" in that space of time or at all.

Again, the angle of the blow to the rake of *Straits 43* is significant. Brown testified that when the *Straits 43* was in drydock he had to bend down to see up into the hole. That is possible as the hole is 3 to 4 inches across and the plank holed is 6 inches thick. Clark put the angle at 30° to the rake (being at 45°), which, taken with the evidence of Brown, must mean 30° measured from below the hole, otherwise if the hole were 30° to the rake from above the hole, one looking down could see into it. Therefore, at 30° to the rake from below the hole, the blow causing that hole must have come vertically upwards from the direction of the water, not from the sweep of a scow, which would be

parallel to the water. Such a vertical blow could have happened on the 11th December, 1961, on the voyage from Bellingham to Moodyville scow grounds when the scow in tow could have been making up to 5 knots and a rounded deadhead in a rising swell could have hit the scow without being noticed by those on the tug. However that may be, the vertical angle of the hole explains why Brown had to bend down to see up into it; why Clark at the trial had to mark the photo (Ex. 24) taken at the horizontal, so that the location of the hole could be seen; why Captain Wicks, not down in the water did not see the hole when he delivered the *Straits 43* to the Moodyville scow grounds on the 11th December, 1961, and thought the rake to be sound; and why Captain McCullough on looking down from the bridge of his tug at Moodyville after having put his tug astern so that the deckhand could get the second bridle, then saw what appeared to him to be a bruise on the sheeting of the *Straits 43* which he reported with the broken stanchion. The vertical direction of the hole has this significance; the hole was not made by Captain McCullough in yarding out, because the hole, on the plaintiff's contention would have been horizontal and not vertical.

I therefore find that the damage to the *Straits 43* was not caused by the tug *Grapple* on the night of the 22nd December, 1961, either at the Moodyville scow grounds or elsewhere.

It also follows that the evidence of Brewster should be accepted that it was impossible for the rake of the *Straits 43* to have struck the corner iron of the lumber scow, and also that his following evidence accurately states what did occur:

Q. And would you agree that the lumber scow struck the *Straits 43* about 18 inches from the water line?

A. No, I believe it would be four feet. Four and a half feet above the water line.

* * *

Q. Down below the rake?

A. I had to jump down to the scow. It was lower than *Straits 43*.

* * *

Q. And when you jumped back up again, sir, did you jump up on the front of the bow or the side?

A. Right on the corner.

Q. Right on the corner?

A. On the starboard corner.

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Q. You scrambled right up on the starboard corner?
A. That's right.
Q. And was it difficult to scramble up, sir?
A. Not too hard, no.
Q. To reach up and pull yourself up?
A. No. It was about four feet, something like that.

The Anglo-Canadian Co. alleges that the defendants are liable for negligently damaging the scow *Straits 43* at Moodyville scow grounds. That fails on two grounds:

(1) The defendants did not cause the damage alleged, and

(2) The action in negligence cannot succeed without a duty of care. There appears no basis for imposing a duty on the defendants or either, to the plaintiff, Anglo-Canadian, not to damage at Moodyville scow grounds the scow, not the property of this plaintiff, but the property of McKeen & Wilson Ltd. and in the possession of Straits Towing Ltd. under charter by demise. Also, Anglo-Canadian has not proven any exclusive right to the use of *Straits 43*, hence there is no evidence that this plaintiff has suffered damage merely by reason of the alleged damage to the *Straits 43* at Moodyville.

This plaintiff's alternative case in negligence is for the putting of the defective scow into this plaintiff's scow berth, that is, that Captain McCullough, knowing that the scow was being used for loading chips, put into this plaintiff's scow berth *Straits 43* which he knew or ought to have known had been holed and was unfit for the purposes intended, and for failing to inform the plaintiff of the scow's condition, and that the Gulf of Georgia is liable on the principle of *respondeat superior*.

This plaintiff has not alleged that Captain McCullough put the scow into the scow berth wilfully intending to injure the plaintiff. That is neither alleged nor proven. Further, Captain McCullough has denied that he knew that the scow had been damaged as alleged, and that evidence is to be believed. Therefore this plaintiff's case is reduced to the contention that the defendants are liable by reason that Captain McCullough ought to have known that the scow was so damaged and ought to have informed this

plaintiff. In such an action this plaintiff must establish that Captain McCullough or the Gulf of Georgia was under a duty:

(*a*) to this plaintiff;

(*b*) to know the condition of the rake of the scow, that is to have examined it, and

(*c*) to have informed this plaintiff.

Without such duty this plaintiff's action must fail for the reasons stated by Lord Esher, M.R. in *Le Lievre v. Gould*[1]:

> A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.

Also such duty must be owing to this plaintiff, as it is not sufficient that the duty may be owing to another: *Winterbottom v. Wright*[2]; *Dickson v. Reuter's Telegram Co., Ltd.*[3]; *Le Lievre v. Gould, supra.*

To establish such duty this plaintiff has cited as applicable quotations from various judgments but such quotations must be understood in the light of *Quinn v. Leathem*[4], where the Earl of Halsbury, L.C. at p. 506 said:

> ... that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

and of *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.*[5], where Viscount Haldane, L.C. at p. 40 said:

> To look for anything except the principle established or recognized by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance

When so understood the quotations do not assist this plaintiff. The quotations from *Donoghue v. Stevenson*[6] as explained by *Farr v. Butters Brothers & Co.*[7] and *Grant v. Australian Knitting Mills, Ltd.*[8], must be understood as

[1] [1893] 1 Q B 491 at p 497.
[2] (1842) 10 M & W. 109 (152 E R. 402)
[3] (1877) 3 C.P.D. 1.
[4] [1901] A C. 495.
[5] [1914] A.C. 25.
[6] [1932] A C. 562.
[7] [1932] 2 K.B. 606.
[8] [1936] A.C. 85

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referring to the facts giving rise to the duty upon the manufacturer of goods intended to reach the consumer in the form sold without intermediate inspection. The quotation from *Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd.*[1], is applicable to negligent use of words, and must be read in the light of *Guay v. Sun Publishing Co. Ltd.*[2] therefore is not here applicable. The quotations from *Heaven v. Pender*[3], must be taken to define the relation of invitor and invitee and the duty arising therefrom. *Denny v. Supplies & Transport Co. Ltd.*[4], extends the duty of invitor to invitee to cover that case where stevedores who had loaded a barge into a dangerous condition were held liable to the wharfinger's employees who were injured in unloading it. *Chapman v. Saddler & Co.*[5] and *Grant v. Sun Shipping Co. Ltd.*[6], were decided under Scots' Law and at common law are mere illustrations of the duty of the invitor to an invitee.

In *Sewell v. B.C. Towing & Transportation Co.*[7], the plaintiff's vessel was negligently towed by two tugs on to a reef and the Court held the ship's owners could recover against the defendant with whom the captain had made the contract of towage and also against the other defendant who assisted in the towing. Henry J. at p. 553 stated:

> It is a clear proposition that when a party undertakes to aid in the performance of a contract entered into by another, he assumes the responsibility of performing his part of it, either singly or jointly with the original contractor; and if he fails in the proper performance of that duty, and the contract is not properly carried out through the negligence or improper performance of either or both the parties, the other party is entitled to recover against both.

That statement following *Quinn v. Leathem* and *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd., supra,* should be read as applicable to the facts of the *Sewell* case and hence not here applicable, as this towage was under a contract between the Straits Towing Ltd. and the defendant Gulf of Georgia and the services were performed for and at the request of Straits Towing Ltd., not at the request of this plaintiff.

[1] [1964] A.C. 465.
[2] [1953] 2 S.C.R. 216.
[3] (1883) 11 Q.B.D. 503.
[4] [1950] 2 K.B. 374.
[5] [1929] A.C. 584.
[6] [1948] A.C. 549.
[7] (1883) 9 S.C.R. 527.

The following cases deal with the implying of a warranty into contracts for carriage of goods by sea. In *Lyon et al v. Mells*[1], in *Kopitoff v. Wilson*[2] and in *Steel v. The State Line Steamship Company*[3], the Court held there should be imported the warranty that the vessel was seaworthy; in *The "Maori King" v. Hughes*[4], in *Elder, Dempster & Co. v. Patterson, Zochonis & Co.*[5], and in *Standard Oil Company of New York v. Clan Line Steamers, Ltd.*[6], the Courts implied a warranty that certain machinery aboard the ship such as refrigerators were fit for the purpose intended. There was no contract between this plaintiff and the defendants into which any warranty could be implied.

The *Overseas Tankship (U.K.) Ltd. v. Mort Docks etc. Ltd., The Wagon Mound*[7], does not assist this plaintiff; that is distinguishable. In *Donoghue v. Stevenson, supra,* the Judicial Committee emphasized the necessity of a duty and was concerned with the question whether facts gave rise to a duty; in the *Wagon Mound* case the Judicial Committee was concerned not with duty but with causation, namely, the damage caused by a breach of duty; that is not culpability but compensation: The *Wagon Mound,* pp. 418 and 425. In the case at Bar the question is whether the facts give rise to any duty. Also, in the former two cases the complaint was over the negligent doing of a positive act; in *Donoghue v. Stevenson* over the manufacture and distribution of a product and in the *Wagon Mound* case over the dumping of oil. In the case at Bar the complaint is over the omission to do an act, that is, the omission to examine the rake and to report the result. Towards this plaintiff the defendants, who are selling services, are in the same position as a merchant who, knowing that this plaintiff requires goods to continue the operation of his mill, nevertheless can take the position that there is no obligation to supply until this plaintiff buys.

Moreover, assuming that Captain McCullough or the defendant Company was under a duty of care to this plaintiff, there is no proof of negligence on the part of either defendant. It does not follow that reasonable care would

[1] (1804) 5 East 428 (102 E.R. 1134).
[2] (1876) 1 Q.B.D. 377.
[3] (1877) 3 A.C. 72.
[4] [1895] 2 Q.B. 550.
[5] [1924] A.C. 522.
[6] [1924] A.C. 100.
[7] [1961] A.C. 388.

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involve an examination of the rake under the circumstance that the employment was by Straits Towing Ltd. to make such a short tow at night or that a reasonable examination under the circumstances would have disclosed the damage to the rake of *Straits 43,* having regard to the fact that this plaintiff had possession of the scow for 11 days and did not discover the damaged rake, and that Brown, in examining the scow in drydock, had to bend down to look up into the hole, which was approximately 2'8" from the water line.

Again, causation has not been proved. That requires that the alleged negligence has caused the damage complained of: *Thompson v. The Ontario Sewer Pipe Co.*[1], and here the damage complained of by the plaintiff is the damage to this plaintiff's scow berth. This plaintiff had no loss of chips as the plaintiff was paid for the chips loaded.

Foresight is the test of causation applied in the *Wagon Mound* case, *supra,* and it has not been proven that the damage complained of would have been foreseen by either defendant or by a reasonable man in the position of the defendants, particularly as the source of the foresight is that learned in the yarding and towing of the scow 1,000 to 1,500 feet at the dead of night, and whereas the employees of the plaintiff had not foreseen such damage within the 11 days they were loading the scow, and Seniowski, the chipperman, who had the duty of loading properly, had thought to correct the list which developed on the 11th day by shovelling chips from starboard to port.

This action by Anglo-Canadian and the third party proceedings therein are dismissed.

The second action is by Straits Towing Ltd. in negligence for the damage alleged done to the scow *Straits 43* in yarding out at Moodyville scow grounds. As Straits Towing Ltd. did contract with the defendant Gulf of Georgia for the yarding out and towing to Anglo-Canadian berth, such contract would ordinarily imply a duty of care as in *Sewell v. B. C. Towing & Transportation Co., supra,* save for the special clause excluding certain actions for damages.

However, the basis of the action is the negligence of Captain McCullough, for which the Gulf of Georgia is said

[1] (1908) 40 S.C.R. 396 at 397.

to be responsible, as employer. This action must fail for each of the following reasons:

(1) There was no negligence. The yarding out by Captain McCullough at Moodyville scow grounds was not negligent nor did it damage the rake as alleged.

(2) Hence there is no proof of damage caused by the negligence of Captain McCullough and in this form of action, damage is the gist of the action: "Salmond on Torts" (14th Ed.) p. 698.

(3) Also, the cause of action against Gulf of Georgia is excluded by the special clause in the contract of towing. Reid, despatcher for Straits Towing Ltd., has stated in his examination for discovery that it was usual for his company so to deal with the Gulf of Georgia (Q. 18), that the towage was at a previously agreed rate (Q. 29), that the special clause which appears in the invoice and letters of the Gulf of Georgia was known to Straits Towing Ltd. (Qs. 111-118), and that such special clause was intended as a term of the agreement (ss. 121-125). That special clause reads (Ex. 29):

> It is a term of all towing contracts, written or verbal, that (providing the tugboat owner uses due diligence to make and keep the tugboat seaworthy) the towboat owner is not to be liable for loss or damage to the tow or its contents, howsoever caused.

The tugboat was fit for the purpose and the clause applies.

This plaintiff has cited *The "West Cock"*[1] where the defendant, when sued for negligent towage, relied upon a clause in the contract of towage excluding liability, but the Court held the defendant liable for the reason that the contract only applied to circumstances occurring after the commencement and during the towage and not to a state of things existing before the towage began, therefore the clause did not exclude liability for supplying an unfit tug to do the towing. *The "West Cock"* is distinguishable. The words "however caused" in the clause in question, following loss or damage, give loss or damage an extended meaning beyond that in *The "West Cock"*. Such words were commented upon in *Joseph Travers & Sons v. Cooper, supra,* by

[1] [1911] P. 208.

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Buckley L. J. at p. 85. Further, this action is for a negligent yarding out causing damage to the rake; all that followed, such as the expense of the diver in patching, of pumping out, of towing to the drydock, of repairs there effected, are not alleged as circumstances subsequent to the towage but are alleged as measures of the damage caused during the towage. Hence the clause would apply to exclude the liability of the defendant Gulf of Georgia raised in this action; the contract being with the defendant Company must intend the services be performed by a delegate, and Captain McCullough, the delegate, would have no higher duty.

This action also is dismissed.

In the result the action by Anglo-Canadian Timber Products Ltd. with the third party proceedings therein and the action by Straits Towing Ltd. are dismissed.

Toronto 1966 Mar. 15-18

Ottawa Mar. 25

BETWEEN:

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LIMITED ..... PLAINTIFF;

AND

CTV TELEVISION NETWORK LTD., SPENCER W. CALDWELL and THE BELL TELEPHONE COMPANY OF CANADA ..... DEFENDANTS.

Copyright—Infringement—Performance of musical work on television—Network transmission by micro-wave—Whether "communication" of "work"—Copyright Act, s. 3(1)(f).

Procedure—Counsel restricting case in opening—Alternative basis advanced in argument following hearing—Whether permissible.

In May 1963 the defendant CTV network, employing the defendant Bell Telephone Co. facilities, transmitted by micro-wave from its Toronto studio to local stations in Canada for broadcast to their listeners certain musical works in which plaintiff held copyright. Plaintiff had authorized the local stations to make use of its copyright but contended that the micro-wave transmission to the local stations was an infringement by defendants of plaintiff's copyright under s. 3(1)(*f*) of the *Copyright Act*.

Held, dismissing the action, the micro-wave transmission did not effect a "communication" of a musical "work" to the local stations as required by s. 3(1)(*f*): (1) the fundamental electrical signal received by the local stations was not a musical "work"; and (2) there was no "communication" of a musical work until the ultimate listener's receiving set reproduced the musical work as originally performed.

Held also, plaintiff's counsel in his opening address having restricted plaintiff's case for infringement as indicated above, and the case having proceeded on that basis, plaintiff could not seek to rest its case on an alternative basis in argument at the conclusion of the hearing.

Semble, it was not an infringement of plaintiff's copyright for CTV to authorize or cause the local stations to use plaintiff's copyright which plaintiff itself had authorized them to use.

ACTION for infringement of copyright.

G. W. Ford, Q.C. and *J. V. Mills, Q.C.* for plaintiff

W. Z. Estey, Q.C. for defendants CTV Television Network Ltd. and Spencer W. Caldwell.

A. S. Pattillo, Q.C and *James W. Garrow* for defendant Bell Telephone Co. of Canada.

JACKETT P.:—This is an action under the *Copyright Act,* R.S.C. 1952, chapter 55, for infringement of copyright rights in musical works.

The plaintiff's claim is that the defendants[1] have infringed its copyright rights. Its claim depends upon the application of section 3(1) of the *Copyright Act,* the relevant portion of which reads as follows:

> 3.(1) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and includes the sole right
>
> (*f*) in case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication;
>
> and to authorize any such acts as aforesaid.

This should be read with paragraphs (*p*) and (*q*) of section 2, which read as follows:

> (*p*) "musical work" means any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced;

[1] At the opening of trial judgment was given dismissing the action as against the personal defendant. Any reference to the defendants is therefore a reference to the two corporate defendants.

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(*q*) "performance" means any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication;

The plaintiff's claim[1] relates to the broadcasting by certain independent television broadcasting stations of music in relation to which the plaintiff had copyright rights. Such broadcasts were authorized by the plaintiff and there is no suggestion that such local stations infringed the plaintiff's rights. The plaintiff's claim is rather that the defendants infringed the plaintiff's copyright rights when the defendants did certain things for the sole purpose of enabling the local stations to make the broadcasts that were authorized by the plaintiff.

The plaintiff at all relevant times, owned that part of the copyright in a large number of musical works that consisted of the sole right to do the acts described in paragraph (*f*) of section 3(1) of the *Copyright Act* and to authorize any such acts. The defendant CTV Television Network Ltd. (hereinafter referred to as "CTV") is a company whose business, while it has been described as that of operating a private commercial network in Canada, was, for present purposes, that of acquiring "television programmes" and arranging for them to be broadcast in Canada by independently operated local television broadcasting stations. The Bell Telephone Company of Canada (hereinafter referred to as "Bell"), under arrangement with CTV, provided facilities whereby local television stations could be put in a position to broadcast such programmes.

By way of further background, while it is not material to what has to be decided, it may assist in appreciating the relevant facts to say that in the ordinary course of events,

[1] The trial proceeded upon the basis that there is to be an adjudication by the Court, as between the plaintiff and each of the defendants, as to whether there had been at least one act of infringement of the plaintiff's copyright rights in certain musical works by certain things done by the defendant on May 1, 1963 or May 5, 1963, and that, if such adjudication should be in favour of the plaintiff, there is to be a reference to determine the further acts of infringement, if any, that had been committed by the defendant as alleged by the statement of claim, and the damages or profits to which the plaintiff is entitled by virtue of all such acts of infringement. It further proceeded on the basis that, if it is found that there was no act of infringement on May 1, 1963 or May 5, 1963, the action must fail. The plaintiff made no attempt to establish any other act of infringement at the trial.

(a) CTV paid the producer of a programme, who might be a United States television network, for the right, and the necessary record or other means, to broadcast it in Canada,

(b) one or more advertisers paid CTV to arrange for the programme to be broadcast in Canada in conjunction with their advertising matter, and

(c) CTV paid local television broadcasting stations with which it had standing agreements (hereinafter referred to as "affiliated stations") for broadcasting the programme.

CTV was, therefore, in effect, a middleman between the producer of television programmes and the independently operated local television broadcasting stations who had a need for such programmes. It obtained advertising to be broadcast with such programmes and it made the necessary arrangements for the programmes to be "delivered" to the local broadcasting station.

On May 1, 1963, each of the affiliated stations broadcast a programme containing music in which the plaintiff owned copyright rights. Similarly, on May 5, 1963, each of the affiliated stations broadcast a programme containing music in which the plaintiff owned copyright rights. On both occasions, the plaintiff, as owner of the copyright rights in such music, had duly authorized the broadcasts.

Leaving aside the possibility of "live" broadcasts, the evidence shows that, in accordance with the ordinary practice in the television business, a local affiliated station could have been enabled to make such broadcasts

(a) by the use of a record or tape, which would have had to be delivered to the station physically,

(b) by the use of a "land" wire or cable, which would have conveyed to the station the same means of broadcasting the music as it would have got from the record or tape, or

(c) by the use of a combination of "land" wire or cable and a facility known as "micro-wave", which combination would also have conveyed to the station the same means of broadcasting the music as it would have got from the record or tape.

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Any one of these was an ordinary method commonly used in the television business to put a local television station in a position to broadcast a programme containing music. In fact, all three of them are used or have been used in enabling stations affiliated with CTV to broadcast programmes supplied to them by CTV. The plaintiff, in argument, admitted that there would be no infringement of its copyright rights in the doing of what is involved in either of the first two methods that I have described. It contended, however, that there would be such infringement in doing what is involved in the third method that I have described because that method involves transmission of the means necessary to broadcast the music by micro-wave and transmission by micro-wave is transmission by radio.

The plaintiff's contention[1] is that what was done in Canada by the defendants to enable a local affiliated station to broadcast one of the musical works in question was,

[1]The plaintiff rested this contention very largely on evidence of Mr. Frederick Gall, a consulting engineer in the field of telecommunications who gave evidence to the effect that, to an engineer in this field, "radio communication" involves five stages: (*a*) a *source* of information or intelligence (voice, music, picture, signal, etc.); (*b*) a *transmitter*, being a device that converts the information or intelligence received to a signal in which form it is to be transmitted; (*c*) a *channel*, being a passage through the atmosphere; (*d*) a *receiver*, being a device for receiving the signal and converting it back to the form in which the information or intelligence was received from the source; and (*e*) the *destination*, being the recipient to whom it is desired to convey the original information or intelligence. The plaintiff's case was that the "source" was the apparatus in CTV's premises in Toronto, the "destination" was the apparatus in the affiliated station, and the "intelligence" communicated from the source to the destination was the fundamental electrical signal. While Mr. Gall's analysis of communication by radio communication from a technical point of view is an aid in considering the effect of paragraph (*f*) of section 3(1) of the *Copyright Act*, I cannot accept this evidence as being evidence by which the Court may be guided in interpreting paragraph (*f*). The word "radio" is probably a word from the world of the engineers but Parliament has defined it in the *Radio Act*, R.S.C. 1952, chapter 233, section 2(1)(i), which reads as follows:

> (i) "radio" means radiotelegraph, radiotelephone and any other form of radioelectric communication including the wireless transmission of writing, signs, signals, pictures and sounds of all kinds by means of Hertzian waves;

and I think that it can be assumed that Parliament is using the word "radio" in the *Copyright Act* with the meaning which is given to the word by the statute specially enacted to regulate "radio". (Compare *Canadian Admiral Corporation Ltd. v. Rediffusion Inc.*, [1954] Ex. C.R. 382, per

when the third method to which I have referred was adopted, in effect, to "communicate" such musical "work" by "radio communication" within the meaning of those words in paragraph (*f*) of section 3(1) of the *Copyright Act*. In my view this contention is invalid because

(*a*) What was done by the defendants to enable the local station to broadcast was not the transmission of a musical "work" within the definition of such a work as found in section 2(*p*) of the *Copyright Act*, and

(*b*) the defendants, in doing what they did to enable the local station to broadcast, did not "communicate" a musical work within the meaning of the word "communicate" in section 3(1)(*f*) of the *Copyright Act*.[2]

To understand the reasons for my conclusion, it is necessary to explain, in so far as it is relevant for present purposes, what was involved when the third method to which I have referred was adopted to enable a local affiliated station to broadcast music.

To make that explanation understandable, I must first state certain basic facts:

(1) It is possible, by use of appropriate apparatus, to make a "record" of a musical performance.

(2) It is possible, by use of such record and appropriate apparatus,

(*a*) to produce sounds which are a replica of the musical performance of which the record was made (hereinafter referred to as the "original musical performance"), or

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Cameron J. at page 410; and *In re The Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 at page 310). The word "communicate" is, however, an ordinary English word and its effect in the statute must be determined by the Court as a question of law. In any event, it is clear that, according to Mr. Gall's evidence, what is, in accordance with the technical concept, communicated by radio to the local station is the fundamental electrical signal *and not the musical work* or any performance of it in an audible state.

[2] In view of my conclusion on these two grounds, it is not necessary to deal with a further argument by the defendants that it is implicit in paragraph (*f*) of section 3(1) that it extends to broadcasting by radio or communication by radio to the public.

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(b) to impress on an electric current what is described as a "fundamental electrical signal".[1]

(3) The fundamental electrical signal may be used at some point to which the electric current on which it is impressed runs along a wire or cable

[1]Neither the fundamental electrical signal nor the micro-wave signal are perceptible by the senses of seeing or hearing. They are quite different in kind from light waves or sound waves. At no time or place during the transmission of either signal can it be said that the musical work exists, or an audible performance of it, even in a concealed form. The micro-wave signal can be used, with appropriate apparatus, to produce a replica of the original fundamental electrical signal and that signal can be used as a sort of pattern or mold, with appropriate apparatus, to produce a replica of the original music. A similar situation was found in *Chappell & Co. Ltd. v. Associated Radio Co. of Australia Ltd.*, (1925) V.L.R. 350, by Cussen J., at page 357:

> "The object, as in the case of the gramophone and the ordinary telephone with a continuous metallic connection, is not to convey atmospheric disturbances directly, as in speaking or acoustic tubes and other early contrivances, but to reproduce at the place of audition atmospheric disturbances similar to those occurring at the place of sonation."

A similar situation was also found in *Buck v. Jewell-LaSalle Realty Company*, (1931) 283 U.S. 191, per Mr. Justice Brandeis at pages 199 to 201:

"We are satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction. As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. Thus music played at a distant broadcasting studio is not directly heard at the receiving set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the "ether." These radio waves are not audible. In the receiving set they are rectified; that is, converted into direct currents which actuate the loudspeaker to produce again in the air sound waves of audible frequencies. The modulation of the radio waves in the transmitting apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus. The transmitted radio waves require a receiving set for their detection and translation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original program heard; and, in the former, complicated electrical instrumentalities are necessary for its adequate reception and distribution. Reproduction in both cases amounts to a performance."

See also *Performing Right Society Ltd. v. Hammond's Bradford Brewery Co.*, [1934] 1 Ch. 121; *Canadian Performing Right Society v. Ford Hotel*, [1935] 2 D.L.R. 391; and *Canadian Admiral Corporation Ltd. v. Rediffusion Inc.*, [1954] Ex. C.R. 382, at pages 402 *et seq.*

(a) to produce, by means of appropriate apparatus, a replica of the original musical performance, or

(b) to produce, by means of appropriate apparatus, a new signal being an effect upon the character of a very high frequency wave known as a Hertzian or electro-magnetic wave, which may be transmitted from point to point through the atmosphere (this transmission is described as micro-wave transmission and the signal may be referred to as the micro-wave signal).[1]

(4) The micro-wave signal so produced may be used, at the point to which it is transmitted, by means of appropriate apparatus, to produce a replica of the original fundamental electrical signal.

(5) The replica of the original fundamental electrical signal may, by the use of appropriate apparatus (a broadcasting station and a receiving set) be used to produce sounds (at the point where the receiving set is) that are a replica of the original musical performance.[2]

What happened on May 1, 1963 and on May 5, 1963, involved many different combinations of steps. It is, however, as I understand it, common ground that the plaintiff cannot succeed in its contention unless that contention is valid when applied to the following series of steps selected from the various combinations of steps that actually happened:

1. A musical work in which the plaintiff had Canadian copyright rights was performed in the United States and a record was made of the performance.

2. That record was sent to CTV's studio in Toronto, Canada, where it was used to impress on an electric current in wires belonging to Bell a fundamental electrical signal which was transmitted along such wires to Bell's premises in Toronto.

3. In Bell's premises in Toronto, the fundamental electrical signal was used to create a micro-wave signal,

[1]See footnote at page 878.

[2]With reference to the nature of the reproduction of a musical performance by a private receiving set, see *Mellor v. Australian Broadcasting Commission,* [1940] A. C. 491, per Viscount Maugham at page 500.

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which was transmitted to Winnipeg by Hertzian waves by means of a micro-wave facility belonging to Bell.

4. At Bell's micro-wave station in Winnipeg, the micro-wave signal was used to create a replica of the original fundamental electrical signal, which was transmitted to the affiliated station in Winnipeg on an electric current in a land cable.

5. The replica of the fundamental electrical signal was used by the local station to broadcast to private receiving sets in such a way that a private receiving set that was tuned to the station could, by the application of its apparatus to a replica of the original fundamental electrical signal, create a replica of the United States performance of the musical work.

On these facts, I assume, for the purposes of this case, that there was, within paragraph (*f*) of section 3(1) of the *Copyright Act*, a communication by radio communication of the musical work in question to the persons listening to the private receiving sets.[1] This is, I believe, common ground as far as this case is concerned. The plaintiff contends, however, that there was in addition a "communication" of the musical "work" by "radio communication" completed when the replica of the fundamental electrical signal reached the local broadcasting station.

I reject this contention because what had been done in Canada up until the time the fundamental electrical signal reached the local station involved no transmission, much less communication, of the musical "work". Strictly speaking, nothing had been transmitted from Toronto to the local broadcasting station in Winnipeg. What had happened was that, as a result of electrical apparatus and

[1] I express this view subject to reconsideration on some subsequent occasion inasmuch as it is not necessary for the determination of this case and as there are very considerable difficulties in the application of the word "communicate" to the definition of "musical work" (section 2(*p*)) as sheet music, etc. The word "performance" (section 2(*q*)) is the word used in the statute for the acoustic representation of music as shown on the sheet music. Here there is, strictly speaking, no communication of the musical work (i.e., the sheet music), but a number of performances of the musical work (possibly all in private) as a result of a broadcast of signals by radio transmission.

phenomena, there had been created in Winnipeg a fundamental electrical signal that was an exact replica of the one in Toronto and it was that replica that had been delivered by wire to the local station in Winnipeg. Even if that be notionally regarded as a transmission of the original fundamental electrical signal, from Toronto to Winnipeg, the signal is not the musical work, whether the musical work be thought of as the written or other graphic representation of the melody and harmony, as the statute defines it, (compare section 2(*p*) of the *Copyright Act, supra*) or the audible "performance" of them. The signal is merely an electrical phenomenon whereby suitable apparatus can be made to produce an acoustic representation of the musical work or, in other words, to perform the work.

My second reason for rejecting the plaintiff's contention that there had been communication of the musical work by radio communication when the fundamental signal reached the local broadcasting station is that, even if, in one manner of speaking, it may not be inappropriate to regard the whole process as one of communicating the musical work by radio communication to the viewers of television sets, in my view there was no "communication" of the musical work, within the appropriate sense or senses[1] of the word, when all that had happened was that an electrical current having a signal "impressed" on it had reached the electrical apparatus of the local broadcasting station. Nothing that can be thought of as a musical work had, at that time, been communicated to anyone. Indeed, nothing that can be thought of as a musical work had been communicated to anyone until the receiving set created a replica of the programme originally performed in the United States. Just as "a message to be transmitted must have a recipient as well as a transmitter" and such a message "may fall on deaf ears, but at least it falls on ears",[2] so a

[1] The only senses of the word "communicate", as defined by the Shorter Oxford English Dictionary, that could have any application, are: "1. *trans.* to give to another as a partaker; to impart, confer, transmit....2. *spec.* to impart (information, etc.); to inform a person of....3. to give, bestow." Each of these senses involves causing information or something comparable to reach, or be imparted to, another person.

[2] *Cf. In re Regulation and Control of Radio Communication in Canada,* [1932] A.C. 304, per Viscount Dunedin at page 316.

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musical work is not communicated unless it has a recipient upon whose ears it falls.[1]

Having reached the conclusion that there was no infringement completed when the fundamental electrical signal reached the local affiliated station, it is not necessary to decide whether any such infringement, if there had been one, was committed by CTV or Bell, or both. Indeed, not having been able to find any infringement in what was done, I find it difficult if not impossible to adjudicate as to who would have been guilty of the infringement, if there had been one.

Although it was quite clear to me that the plaintiff, by statements made by its counsel during his opening address, restricted its case on infringement to that with which I have now dealt, during argument, after all parties had put in their evidence, counsel for the plaintiff submitted that the plaintiff had an alternative basis for its claim against CTV for infringement. I am of opinion that, having set the scene for the trial of the action on the single basis, and the case having been tried on that basis, it was not open to the plaintiff to seek to rest its case on an alternative basis at the conclusion of the hearing. As counsel for CTV pointed out, in strenuously resisting the position so taken by the plaintiff, he had relied upon the position taken by the plaintiff at the beginning of the trial both with reference to cross-examination of witnesses and in determining what evidence to adduce. The plaintiff should not be permitted to change ground in such manner unless he has made an

[1] It is important to bear in mind that the object of the *Copyright Act* is the benefit of authors, whether the works were musical or of some other kind, and that the subject matter with which the Act deals is "of a very practical and human kind" and that "it involves really nothing more than the advantages that works of the various sorts....derive from the senses of sight or hearing possessed by the public as a whole." *Cf. Performing Rights Society Ltd. v. Hammond's Bradford Brewery Co*, [*1934*] 1 Ch. 121 at pages 127-8 per Maugham J, whose judgment was approved by the Court of Appeal. Radio transmission of a microwave signal may be part of the process of communication of a musical work by radio communication; it is not, however, taken by itself, communication of the musical work. Put another way, "Copyright is....only a negative right to prevent the appropriation of the labours of an author by another". See *Canadian Admiral Corporation Ltd. v. Rediffusion Inc.*, [1954] Ex. C.R. 382, per Cameron J. at page 390. Radio transmission of a micro-wave signal can in no sense be regarded as being, in itself, the appropriation of the labours of the composer of the music that is the subject matter of the transmission.

application for, and obtained, an order for a new trial on proper terms. No such application was made.

In any event, I am of opinion that the plaintiff's alternative basis for supporting its claim of infringement by CTV would not have advanced its case. As I understood counsel for the plaintiff at the opening of his argument, he was putting the alternative ground on CTV's having *authorized* the broadcasts by the affiliated stations. At the end of his argument, he shifted his ground, as it seemed to me, to putting it that CTV had *caused* the broadcasts by the affiliated stations. Whichever it is, it seems to me to be a position that is remarkable for its lack of merit. The plaintiff authorized the affiliated stations to make use of its copyright rights. In my opinion, it was no infringement of the plaintiff's copyright rights for CTV to cause, or "authorize" the affiliated stations to make a use of the subject matter of the plaintiff's copyright rights that the plaintiff itself had authorized them to make. It cannot be a *tort* merely to authorize or cause a person to do something that that person has a right to do.

The action against each defendant is dismissed with costs.

All parties agreed before the conclusion of the trial that they had complete confidence in the professional integrity of Mr. Frederick Gall, a consulting engineer in the field of telecommunication, who gave evidence for the plaintiff, and that, if the Court should decide to make use of his services after the trial, he could be consulted as though he had been appointed under section 40 of the *Exchequer Court Act* as an assessor to assist the Court in the hearing of the cause. I have consulted Mr. Gall during the course of the preparation of these reasons for judgment and I desire to acknowledge his very real assistance in helping me reach my conclusion. In saying that, I do not wish to be taken, as indicating that Mr. Gall shares my views as to the result or as to any particular statement in these reasons. The conclusions are, as they must be, entirely my own.

Toronto 1965 / Nov. 2-5, 8-10 / Nov. 10

BETWEEN:

UNION CARBIDE CANADA LIMITED ...PLAINTIFF;

AND

TRANS-CANADIAN FEEDS LIMITED, *et al.* .....} DEFENDANTS.

Patents—Infringement—Importation and use or sale of goods in Canada—Goods made by patented process outside Canada.

Importation into Canada and use or sale in Canada of goods made outside Canada by a process subject to a Canadian patent is an infringement of that process.

Auer Incandescent Light Mfg. Co. v. O'Brien (1897) 5 Ex. C.R. 243 followed. *Elmslie v. Boursier* (1870) L.R. 9 Eq. 217; *Von Heyden v. Neustadt* (1880) 14 Ch. D. 230; *F. Hoffmann La Roche & Co. v. Commissioner of Patents* [1955] S C.R. 414 considered.

Jurisdiction—Exchequer Court of Canada—Stare decisis—Extent of application.

While the doctrine of *stare decisis* does not have the same application in the Exchequer Court of Canada, which has jurisdiction in the province of Quebec as well as in the common law provinces, as it does in a common law Court, nevertheless where a question has been decided by the Exchequer Court after argument, it is in the interests of the orderly and seemly administration of justice that in the absence of special circumstances that decision be followed when the same question arises subsequently in the Court.

Patents—Assignment of patent—Claim for infringement not impliedly included.

A mere assignment of a patent without express reference to outstanding claims for infringement does not impliedly include an assignment of claims in respect of those infringements.

Patents—Cause of action for infringement—Assignability of—Difference between common and civil law rule.

A right of action for infringement of a patent in Ontario is not assignable (but, *semble, secus* for infringement in Quebec). It is not legally possible at common law to assign a tort and there is no provision in the *Patent Act* which changes the common law in that respect.

Burns & Russell of Canada Ltd. v. Day & Campbell Ltd. [1966] Ex. C.R. 673 followed.

Patents—Patent Act, s. 57(1)—Damages for infringement—Rights of patentee and person claiming under patentee.

Section 57(1) of the *Patent Act* confers on a patentee a right of action for damages sustained by him from infringement of the patent and confers on a person claiming under the patentee a right of action for damages sustained by such person from infringement of the patent but not for damages sustained by the patentee.

Patents—Validity of—Lack of inventive ingenuity—Combination of variables—Excessive claim—Lack of utility—Insufficient description of

working of process—Construction of claim—Onus of proof—Necessity of experiment to obtain desired variations—Whether sufficient—Patent Act, ss. 36(1) and (2), 48.

Plaintiff sued for infringement of a patented process for making thermoplastic film of predetermined characteristics. Defendants contended that the patent was invalid (1) for lack of inventive ingenuity; (2) for claiming too much; and (3) for insufficient instructions as to the working of the process. It was established that at the time the process was devised a skilled workman would have known (*a*) that thermoplastics could be manufactured into shapes by extruding them at ordinary temperatures or after heating through different shaped dies, either wet or dry; (*b*) that the characteristics of thermoplastics can be varied by stretching them in either or both directions; (*c*) that air pressure inside a thermoplastic film in the course of extrusion was a method of stretching the tubing; and (*d*) that air cooling on the outside of the tubing accelerated setting. Plaintiff argued that the patent disclosed inventive ingenuity in the discovery (1) that cooling air directed circumferentially on the film near the point of extrusion could be used to control the rate of cooling the film, and (2) that the correlation of this cooling rate with the degree of inflation and rate of withdrawal of the film would permit the production of film of predetermined and controllable characteristics.

Held, the patent was invalid for two of the three reasons urged by defendants: (1) lack of inventive ingenuity and (2) claiming too much, and the action failed.

1. There is no inventive ingenuity in the alleged discovery as to the effect of cooling air and moreover knowledge as to the effect of cooling air was available to skilled workmen at the time the patented process was devised.

British Thomson-Houston Co. v. Duram Ltd. (1918) 35 R.P.C. 161, per Finlay L C. at p. 175; *British Celanese Ltd. v. Courtaulds Ltd.* (1935) 52 R.P.C. 171, per Lord Tomlin at p. 195; *Ernest Scragg & Sons Ltd. v. Leesona Corp.* [1964] Ex. C.R. 649; *Patent Act,* s. 48, referred to.

There is no inventive ingenuity in the alleged discovery as to the effect of the correlation of the three variables described, in the sense that one of the integers thereby did something which it could not do without one or both of the others (*British Celanese Ltd. v. Courtaulds Ltd.* (1935) 52 R.P.C. 171 at pp. 193-4 applied), and moreover the combination of the three variables was an obvious variation of what has been done before (*Longbottom v. Shaw* (1891) 8 R.P.C. 333, per Lord Herschell at p. 337).

2. Inasmuch as the patented process, though expressly claimed to be useful with *all* thermoplastics, could not as a practical matter be used with nitrous cellulose, a highly dangerous explosive, in the absence of special controls, and these were not disclosed in the patent, the patent was invalid as not being useful or, alternatively, for failing to describe the patented process.

The patent's claim could not be read so as to exclude nitro-cellulose on the ground that it was not suitable for the manufacture of tubing by dry extrusion after testing or because no one in the industry would ever think of using such a process with nitro-cellulose because of its well-known dangerous character.

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Minerals Separation North American Corp. v. Noranda Mines Ltd. (1952) 69 R.P.C. 81, per Lord Reid at p. 95; *Vidal Dyes Syndicate Ltd.* (1912) 29 R.P.C. 245, per Fletcher Moulton L.J. at pp. 271-2; *Norton and Gregory Ltd. v. Jacobs,* (1937) 54 R.P.C. 271, per Greene, M.R. at pp. 276-7; *Henriksen v. Taller Ltd.* [1965] R.P.C. 434, per Lord Reid at p. 442, applied; *B.V.D. Co. Ltd. v. Canadian Celanese Ltd.* [1937] S.C.R. 221 at p. 237. *Patent Act*, s. 36(1) and (2) referred to.

3. The patent was however not invalid for failure to describe the patented process adequately as required by s. 36(1) of the *Patent Act*. Although the patent stated that the variables in the process must be balanced by experiment to obtain various desired variations in the product, the instructions given were sufficient to enable a person skilled in the art to use the process, and there was no evidence to the contrary. The inventor was not obliged to supply a table showing various combinations in the process required to produce various typical products for each of the different thermoplastics. *Ernest Scragg & Sons Ltd. v. Leesona Corp.* [1964] Ex. C.R. 649, per Thorson P. at pp. 746 *et seq.* referred to.

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Nov. 10

ACTION for infringement of a patent.

H. G. Fox, Q.C. and *D. F. Sim, Q.C.* for plaintiff.

D. G. Kilgour and *D. G. Friend* for defendants.

JACKETT P.:—This is an action for infringement of Canadian Letters Patent No. 460,963, in respect of a "Method of Making Flattened Thermoplastic Tubing of Predetermined Desired Characteristics".[1]

While Patent No. 460,963 is a process patent, the alleged infringement consists in the importation into Canada, and the sale and use in Canada, of polyethylene film and tubing manufactured outside Canada in accordance with the patented process.

The defendant admits the plaintiff's title to Patent No. 460,963, having abandoned, at the opening of the trial, the attack that is to be be found in the Statement of Defence on the validity of the assignment whereby the plaintiff became registered as owner of the patent.

There remain for adjudication on the pleadings certain questions relating to infringement, namely,

First, whether any film has been shown to have, at a relevant time, been imported into Canada and so used

[1] By statement of counsel at the opening of the trial, the plaintiff dropped its claim in respect of the other patents referred to in the pleadings. It was also common ground at the trial that there is only one defendant as Dominion Poly Products Company is merely the name under which Trans-Canadian Feeds Limited carries on a part of its business.

or sold in Canada as to be an infringement of the plaintiff's patent assuming the other questions are answered in the affirmative;

Second, the question as to whether the process pursuant to which any such film was manufactured falls within one or more of the first twelve claims of Patent No. 460,963[1];

Third, the question whether an importation into Canada and use or sale in Canada of wares made outside Canada pursuant to a process in respect of which there is a Canadian patent is an infringement of the patent.

In addition to the question concerning infringement, there remain for consideration:

(*a*) certain questions raised by the defence as to the validity of Patent No. 460,963,

(*b*) the amount of the damages or profits related to such infringements as may be established,

(*c*) other relief claimed by the prayer for relief in respect of the alleged infringements.

It was decided by a consent order made before trial that the action should proceed to trial at this time on the issues of infringement and title only and that, if the action is not dismissed after the trial of those issues, a date will then be set for continuation of the trial upon the issues concerning validity. As the issue of title has disappeared, the only question that has to be decided at this time is that of infringement. I say this subject to the possibility that has arisen for the first time during the hearing that, independently of the claim for infringement, this action is to be regarded also as an action for an injunction in respect of a threatened infringement.

It was further decided before trial that, upon the plaintiff establishing at trial at least one act of infringement and otherwise establishing its cause of action, the matter as to other acts of infringement and the damages or profits resulting from all acts of infringement would be the subject of a reference pursuant to section 40 of the *Exchequer Court Act.* The question that I have to decide at this time, therefore, is whether the plaintiff has established at least

[1] At the opening of the trial, the plaintiff abandoned its claim in respect of the last six claims of the patent.

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one act of infringement. A further question that is to be decided at this time, assuming that the plaintiff is successful on that question, is whether the plaintiff is entitled to claim in this action for infringements of Patent No. 460,963 alleged to have been committed by the defendant at times when that patent did not belong to the plaintiff.

I shall first dispose of the question of law as to whether importation into Canada, and use or sale in Canada, of goods that were made outside Canada in accordance with a process that is the subject of a Canadian patent is an infringement of that patent.

Under the Canadian *Patent Act*, a patent is granted for an invention and an invention is, by definition, a new and useful "art", "process", "machine", "manufacture", or "composition of matter", or a new and useful "improvement" in any such thing. In other words, a new and useful product is one invention and a new and useful process for making the same product is a different invention.

In this case, the plaintiff has no monopoly in respect of the particular product. Its monopoly is restricted to the process whereby, it is alleged, the product was made.

Inasmuch as the Canadian Act clearly contemplates a monopoly for a process and a separate monopoly for a product, and inasmuch as a monopoly under that Act operates only in Canada, it would seem to follow that a Canadian monopoly for a process would not be infringed by the sale or use in Canada of a product made by the process in a foreign country.

In at least two English decisions, however, it has been held that importation and sale of a product made in a foreign country by a process that is the subject matter of a monopoly in England is an infringement of the English process monopoly. I refer to *Elmslie v. Boursier*[1] and *Von Heyden v. Neustadt*[2].

I have been able to discover no such difference between the ambit of an English patent for an invention and the ambit of the monopoly granted under the Canadian *Patent Act* as would warrant reaching a conclusion when this question arises under the Canadian Act different from that reached in respect of an English patent. The two English

[1] (1870) L.R. 9 Eq. 217. [2] (1880) 14 Ch. D. 230.

decisions to which I have referred are not, however, decisions under our statute and I do not find them persuasive. If, therefore, they were the only authorities that had to be considered, I should not be inclined to apply them in a case arising under the Canadian statute.

However, in *The Auer Incandescent Light Manufacturing Company v. O'Brien*[1], Mr. Justice Burbidge had to consider an application for an injunction based upon a process patent where some of the infringements complained of were with respect to importation and sale, and some of them were with respect to manufacture (see pages 262-3) and, after hearing argument on the question, at page 292 he applied the two English cases to which I have referred and held that articles made in a foreign country pursuant to a process in respect of which a patent had been granted under the Canadian statute cannot be imported for use or sale in Canada without infringing the Canadian monopoly.

In *F. Hoffmann LaRoche & Co. Ltd. v. Commissioner of Patents*[2], by remarks, which do not seem to have been necessary for the decision of the case, four of the five judges referred to one of the English decisions that I have mentioned and to Mr. Justice Burbidge's decision and said: "There seems to be no reason to doubt the correctness of these decisions". Mr. Justice Rand also referred to the English decisions, but it is not clear that he expressed approval of them.

While I appreciate that the doctrine of *stare decisis* does not have the same application in this Court, which has jurisdiction in the Province of Quebec as well as the common law provinces, as it does in a common law Court, nevertheless, in my view, where a question has been decided by this Court after argument, it is in the interest of the orderly and seemly administration of justice that that decision be followed when the same question arises subsequently in this Court, in the absence of special circumstances, the nature of which I am not prepared at this time to define. I should also say that, as far as I have been able to ascertain, there is no relevant difference between the Canadian legislation that was under consideration in the *Auer Incandescent Light* case and the present legislation.

[1] (1897) 5 Ex. C.R. 243. [2] [1955] S.C.R. 414.

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While, as I see it, the question would be open for reconsideration in the Supreme Court of Canada, I propose, having regard to the views expressed above, to follow the decision rendered by Mr. Justice Burbidge in 1897 so long as its authority remains unimpaired by a decision of the Supreme Court of Canada. In adopting this position, I do not wish to be taken as expressing any opinion as to the course that should be followed when a similar problem arises in this Court at a time when this Court is differently constituted.

The plaintiff's proof as to the process whereby certain samples of polyethylene film purchased from the defendant were made consisted principally of

(*a*) evidence as to the four commercial processes that are used in manufacturing polyethylene film in the United States, and

(*b*) evidence of qualified experts that in their opinions, based upon certain characteristics of the samples, those samples were made by a particular process that they referred to as the "air bubble" process and were not made by any of the other three processes.

This evidence was given by three witnesses each of whom is an officer of the plaintiff company or of its parent company and each of whom is well trained and experienced in the art or field of knowledge in respect of which he gave evidence. While I recognize that these witnesses, by reason of their positions, were likely to be biased in favour of the plaintiff's case, I was well impressed with their manner of presenting their evidence and I have no reason to doubt that each witness expressed an honest opinion after giving the matter the conscientious study and consideration that it deserved.

According to the evidence of the plaintiff's witnesses, all four of the processes in commercial use in the United States for the manufacture of polyethylene film involve the transformation of the raw material polyethylene while in a plastic or molten state into a film of desired thickness and size and then hardening or setting it in that form.

In one process, known as "calendering", the hot melt is put through rollers to obtain the desired sheet of film and is then cooled by the use of water.

In the other three processes, it is extruded from an opening in a metal object called a die. In what is called the "slot

die" method, the die has a long narrow opening through which the hot melt is extruded so that it comes out in the form of a sheet of film somewhat narrower than the length of the opening and is then cooled by the use of water.

The other two die methods involve the use of an annular or circular die in which the opening is in the form of a ring so that when the hot melt is extruded it comes out in the form of a tube. In both of these methods, which are referred to as "tubular" methods, the molten tube is passed through a pair of contiguous rollers known as "nip" rollers some distance from the die opening.

In one of the tubular methods, a water-cooled metal form or shape known as a "mandrel" is positioned in the tube between the die opening and the nip rollers and, being cooled by water, causes the molten tube to "set" at the size dictated by its circumference. This may be called the "mandrel" method. In the other tubular method, an air bubble is positioned in the molten tube between the die opening and the nip rollers to dictate the size at which the tube sets and the tube is caused to set by external cooling, such cooling, in the form of the process to which these witnesses referred, if not always, being by the external application of air to the molten tube near the die opening. This has been called *inter alia* the "air bubble" method.

As indicated, the molten material is caused to "set" in the air bubble method by air cooling in the form of the process described by the plaintiff's witnesses. In the other three methods, it is caused to set by some form of water cooling, which operates much faster than air cooling. Rapid cooling, or "quenching" as it is called, such as is achieved by water cooling, results in a film that is more transparent and more glossy than film produced by an air cooling process. Such film has a a more pleasing appearance than film produced by air cooling and is suitable for film for food covering and other uses where appearance is important. Air cooled film is used for construction and agricultural uses and other uses where the appearance of the film is unimportant.

Another feature of the air bubble process is that the size of the air bubble is capable of being changed readily so that the size of film to be produced may be adjusted from time to time speedily and inexpensively within relatively wide limits without changing any of the equipment.

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This gives the air bubble method an element of versatility. Mandrels, especially for wide widths, are heavy and expensive and a different mandrel is required for each width of film. Slot dies are subject to a similar comment. Having regard to the nature of the process, it would also be very costly to make very wide widths of film by the calendering process. In the result, for these reasons and other reasons that I need not detail, the air bubble method as described by the plaintiff's witnesses is the only method used commercially in Canada or the United States to make seamless polyethylene film in widths of 10 feet or more.

Other differences between the products of the various processes have some significance to the experts in forming an opinion as to the process whereby a particular product was made. In the manufacture of film by the slot die method, the material is pulled longitudinally but not transversely. In the manufacture by the mandrel method, and the air bubble method as described by the plaintiff's witnesses, it is pulled both ways but the longitudinal pull is much greater than the transverse pull. (I should say parenthetically that, in theory at least, the air bubble method could be worked without any transverse pull, that is, by leaving the molten tube the same size as the die opening or causing it to shrink, but that is not the form of the process to which the plaintiff's witnesses referred.) The tensile strength of the product made by the slot die method is greater than the tensile strength of that made by the mandrel or the air bubble method as described by the plaintiff's witnesses. The "impact" strength of film made by a water cooling process is greater than that of a film made by the air bubble method when the cooling is by use of air. The product made by the mandrel method has scratches and strain lines as the result of the film being dragged over the mandrel. Such scratches and strains are not present in film produced by the other methods. Film made by extrusion from a die has marks resulting from peculiarities of the die used in its manufacture. Such marks are not to be found in film produced by calendering. Where the hot melt has been cooled rapidly by water cooling, the density of the resulting film is considerably less than that of a film produced by relatively slow air cooling. When the cooling is by a mandrel or a chill roll (i.e., a water-cooled metal roll) so that it is cooled significantly more rapidly on one side than on the

other, there is a higher degree of crystallization on one side than on the other, which gives rise to a tendency for the film to curl when a piece is laid on a flat surface.

Of the commercial production of polyethylene film in the United States, very small amounts were, during the period from 1955 to the present time, made by either the calendering process or the mandrel process. (Indeed, the witnesses all seemed to agree that the calendering process is not practical as a commercial process.) Of the balance of commercial production in the United States during that same period, the polyethylene film made by the air bubble process as described by the plaintiff's witnesses amounts to at least three times as much as the film made by the slot die process.

Much, if not all, of the polyethylene film imported and sold by the defendant was building or agricultural film, which was a heavy film in wide widths, and did not therefore have to have the decorative features of clarity and gloss which could be obtained by the water cooling feature of the process other than the air bubble process.

On the question of the process used to manufacture polyethylene film purchased from the defendant, as I have already indicated, the plaintiff adduced opinion evidence of one of its officers and of two officers of its parent company each of whom was well qualified, both by training and experience, to give such evidence. Two of them gave their evidence after doing tests on pieces of polyethylene film. Only one of them had an opportunity of doing tests on pieces of a sample of film purchased from the defendant on August 15, 1963 by one Dungan, an employee of the plaintiff. Both of them did tests on pieces of three samples of film sold during the course of discovery in this action by the defendant to the plaintiff as being samples of film imported by the defendant. Both of these gentlemen expressed the opinion that the samples of film were made by the air bubble method that had been described by the plaintiff's witnesses and they supported their opinions by detailed reasons based upon an examination of the respective samples and upon the results of various tests, all of which related in one way or another to the characteristics of the products of the respective process, most of which I have already outlined. Having observed these witnesses with care while they were giving their evidence, I am of opinion that, in

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each case, the witness expressed his opinion honestly and frankly and that he formed it after conscientiously taking steps that, in his opinion, would aid him in determining the relevant facts. I do not think it is necessary to detail their evidence. It is sufficient to say that I am satisfied that each of them had adequate material upon which to form his opinion and that neither cross examination nor the defendant's evidence weakened their evidence in any way. Neither will any good purpose be served by detailing the defendant's evidence. There is nothing in the defendant's evidence to shake the opinions given by these two witnesses that all four samples were made by the air bubble method as described by the plaintiff's witnesses[1].

The next question then is whether the air bubble method to which these witnesses referred in expressing their opinions falls within one or more of the first twelve claims of the plaintiff's patent. I have read and re-read the first of such claims and I have not been able to escape the conclusion that the air bubble method as described in the evidence of the plaintiff's witnesses falls clearly within its limits. I have also studied the differences which, according to counsel for the plaintiff, existed between each of the other claims and the first claim and, upon such a study, it would appear that the air bubble method as described by the plaintiff's witnesses falls within each of the first twelve of the claims in Patent No. 460,963.

Counsel for the defendant contended that the "air bubble method" includes

(*a*) a process where the molten tube is set when it is the same circumference as it was at the point of extrusion, and

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[1] While the witness Sachs did not himself describe the "air bubble method", he sat through the evidence given by the witness Haines and the witness Sanderson and it was clear that he was referring to the process described by them when dealing with the "air bubble method". This is confirmed by an examination of the details of his evidence.

The reasons given by the plaintiff's witnesses for expressing the opinion that the samples were made by the "air bubble method" as described by them not only support a conclusion that the samples were not made by the calendering, slot die or mandrel process but also a conclusion that they were not made by an "air bubble method" employing cooling other than by air or other gas (which is a slow cooling process), or an "air bubble method" where the molten tube is set at the circumference that it has when it emerges from the die (in which event there would be no transverse pull in the production of the film).

(*b*) a process where the molten tube is cooled by some means other than air cooling in the vicinity of the point of extrusion,

and that such processes would not fall within any of the twelve claims relied on by the plaintiff. While it may well be that the expression "air bubble method" may aptly be applied to such methods, I am satisfied that the "air bubble method" described by the plaintiff's witnesses was one where the molten tube was expanded before it was set and was one where the molten tube was cooled by air near the point of extrusion.

The final question with reference to the plaintiff's attempt to prove, by reference to the aforesaid samples, at least one act of infringement is whether any of the four samples in respect of which the plaintiff's witnesses gave evidence falls within the principle applied in the *Auer Incandescent Light* case. In other words, were any of the samples, at a relevant time, imported by the defendant into Canada and sold or used by the defendant in Canada so as to be an infringement of the plaintiff's patent within that principle?

The Dungan film was purchased by the plaintiff in Canada prior to the commencement of this action. The defendant says, however, that there is no evidence that it was imported by the defendant from the United States and indeed, he says, that, as far as the evidence goes, it might have been manufactured in Canada by the plaintiff and sold by the plaintiff to the defendant or to someone else who then sold it to the defendant. The plaintiff's answer to this is

First, having regard to the evidence that has been given as to purchases of polyethylene film similar to the Dungan film in the period prior to the Dungan purchase by the defendant from the plaintiff and from its United States supplier, respectively, the balance of probability is that the Dungan sale was made by the defendant from imported film rather than from film bought from the plaintiff; and

Second, evidence, that film of the Dungan type had been acquired from another Canadian supplier, A. & B. Plastic Co. Ltd., in a period sufficiently close to the Dungan purchase to make it not improbable that such

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purchases were the source of the Dungan film, should be disregarded because of the improbability of the witness who gave that evidence being able to remember the details in question.

If the evidence were that the purchases by the defendant from its United States supplier and those from the plaintiff that have been proved were all the purchases that the defendant had made of the Dungan type film during the period covered by those purchases, having regard to the "quick turnover" of the defendant's business, I should have had no difficulty in concluding that the balance of probability is that the film sold to Dungan had been acquired by the defendant from its United States supplier and had therefore been imported into Canada before it was sold to Dungan. However, that such were all the defendant's purchases of such film in that period has not been proved, even if I were to disregard the evidence concerning the purchases of such film from A. & B. Plastic Co. Ltd. In any event, in my view, I cannot disregard that evidence. It was given quite clearly and confidently, it was not contradicted, and it was not challenged on cross-examination or otherwise before the witness who gave it left the box. With reference to the necessity of giving a witness notice, either by cross-examination or otherwise, that his credibility is challenged, at a time when he can give any answer that he may have to such challenge, before suggesting that his evidence is untruthful, I refer to *Browne v. Dunn* of The Reports, 67, per Lord Herschell, L.C. at pages 70-1, where he said:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to

suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.

and per Lord Halsbury at pages 76-8;

My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses, upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

I find, therefore, that the plaintiff has failed to establish that the Dungan film was imported into Canada and it is therefore unnecessary for me to deal with the further argument made by the defendant that a sale to the plaintiff could not be an infringement of the plaintiff's patent.

It is common ground that the three samples sold to the plaintiff by the defendant after the commencement of this action were samples of film imported by the defendant. Such sales cannot, however, be infringements upon which a judgment for infringement[1] can be based in this action because they did not take place before the action was instituted. Furthermore, there is no evidence upon which it may be determined that the importation of these samples took place before the action was instituted even if importation in the course of trade alone would be sufficient to constitute an infringement, a matter upon which I express no opinion. There is, in addition, no evidence of any use of these samples in Canada other than that involved in the sales some seven months after the commencement of this action.

[1] The finding that a sale after the commencement of the action is not a basis for a judgment or infringement does not imply that such a sale may not be relevant to the plaintiff's claim for an injunction if the claim for an injunction is based upon the anticipation that the defendant will infringe in the future. It may be also that, upon a reference as to damages, such sales will be taken into account upon the view that what is involved is a continuing tort. I express no opinion on either of these questions at this stage of the action. I also express no opinion at this stage as to whether, assuming that the action for infringement fails, this action can be regarded as a properly framed independent action for an injunction against anticipated infringements.

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My conclusion is, therefore, that, while all four samples were made by a process covered by each of the first twelve claims of Patent No. 460,963, it has not been established that any of the samples was, at a relevant time, imported into Canada by the defendant and sold or otherwise used by the defendant in Canada so as to be an infringement of that patent within the principle applied in the *Auer Incandescent Light* case.

That does not, however, dispose of the matter because counsel for the plaintiff made two additional submissions that the plaintiff has otherwise established at least one act of infringement. Both submissions are based in part on the fact that the defendant admitted by way of examination for discovery that it had acquired from Gering Plastics Company in the United States, and imported, polyethylene film and tubing from September, 1956 to 1959 and from April, 1963 to the time of the examination for discovery.

The first of those two submissions is based also on a statement made by a Mr. Herman Gering before a tribunal known as the Federal Trade Commission in the City of New York in the United States on March 19, 1958 in a proceeding described as "In the Matter of United Carbon Corporation, a corporation". This statement was placed in evidence by filing copies of four pages of a transcript of evidence, which counsel for the defendant agreed represented evidence that was given by Gering at the date and place indicated on the transcript. According to the transcript, Gering was at that time Secretary and Vice President of Gering Products Inc. and, in answer to the question "By what method does Gering manufacture polyethylene film?" he answered, in effect, "the so-called blown tubing method, blown film". I am not satisfied that this establishes that the film purchased from Gering Plastics Company by the defendant at and subsequent to that time was made by the process covered by the plaintiff's patent. While it is admitted by the defendant that it bought film at that time from Gering Plastics Company, it is not admitted and has not been established that Gering Plastic Company manufactured the film that it sold to the defendant. We know nothing of the issue that was before the Federal Trade Commission and the isolated piece of evidence taken from

that proceeding in relation to such unknown issue, in respect of which the defendant had no opportunity to cross-examine, fails to persuade me that the method referred to by Gering was the only method by which Gering Products Inc. manufactured film or indeed was the air bubble method in respect of which the plaintiff's witnesses gave evidence and which I have found to be covered by the plaintiff's patent. Finally, I am of opinion that the statements made by Gering before the Federal Trade Commission are not admissible in this case to prove the facts there stated. Counsel for the plaintiff endeavoured to support his contention that it was admissible for that purpose on a passage in the third Edition of Halsbury's Laws of England, Volume 15, at page 299, which digests cases that establish that statements made by a predecessor in title when in possession of property, and affecting his rights thereto, are evidence against but not in favour of a party claiming through him. It is clear from reading the whole of that passage in Halsbury that "Such evidence is not, however, admissible when no question of title arises". No question of title to the film purchased by the defendant from Gering Plastic Company arises here and the principle laid down in the passage from Halsbury on which the plaintiff relies has therefore no application. The plaintiff also relies upon a quotation from volume 4 of Wigmore at pages 142-3. I do not, however, read that passage as laying down a principle of the law of evidence that would be applicable in this Court to support the admissibility of the transcript in question to establish the truth of the facts stated in it.

I do not, therefore, accept the submission that Gering's statement before the Federal Trade Commission in 1958 is any support for a contention that there has been at least one act of infringement.

The plaintiff finally relies upon the fact, that has been established, that the only process by which, during the relevant period, seamless polyethylene film has been manufactured in widths of 10 feet or more is the air bubble process which is the subject of the plaintiff's patent and the fact, which has also been established, that the defendant did import prior to the commencement of these proceedings, and subsequent to the plaintiff having become the owner of Patent 460,963, polyethylene film in widths of 10 feet and more.

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Having regard to the fact that many of these importations took place some months before the institution of these proceedings, I have no hesitation in finding that most if not all of the film in question would, in the ordinary course of the defendant's trade, have been sold in Canada before these proceedings were instituted. It would follow that a necessary act of infringement has been established subject to consideration of the defendant's contention that it has not been established that the wide width film so imported was not produced by joining together narrower widths that could have been produced commercially by some method other than the air bubble as described by the plaintiff's witnesses. This point is one which is difficult to resolve.

If the evidence had been simply that polyethylene film had been imported by the defendant in 10 ft., 20 ft. and 40 ft. widths, I should have been inclined to assume that all the wide widths of film in question were seamless and were therefore made by the air bubble process. I say this having in mind all the evidence and particularly the evidence that 75 per cent or more of all commercial polyethylene film is manufactured by the "air bubble method" in question, the evidence that film so produced is of the kind that is suitable for the building trade which is serviced by the defendant and is not suitable for decorative uses which require film made by other processes, to the evidence that it is the only commercial process for making such wide widths and to the evidence that the wide widths which have been examined were seamless. The doubt that I have arises from further evidence led by the plaintiff. One of the plaintiff's experts gave evidence that he examined the samples of film "for the presence of seams that might have been put in by some heat-sealing method" and that he did this by taking the full width of the film and "examining it carefully in cross-polarized light". This suggests, if it does not establish, that such seams would not be obvious on a superficial examination. The plaintiff then put in evidence an answer given by an officer of the defendant company on examination for discovery that he believed the tubing received from Gering Plastics to be "seamless". Such an answer on discovery, by itself, might well relate only to the sort of seam that a trader would know about because it was apparent in the ordinary handling of the material in the course of trade.

I am left in the quandary that there is no evidence that there is, or is not, a practice of joining narrow widths made by other processes to make wide widths for the building trade and there is no evidence that such seams, if they do occur, would, or would not, be apparent to persons handling the film in the course of trade. In these circumstances, I find it very difficult to reach a conclusion on the matter. Giving it the most careful consideration that I can, and not overlooking the fact that the onus of proof is on the plaintiff, I have reached the conclusion, having regard to all the evidence, that the balance of probability is that the importations in question, or at least some of them, were of seamless film.

I have come to the conclusion, therefore, that the plaintiff has established at least one act of infringement.

There will therefore be no judgment at this time and I am prepared to hear, either at this time or any other convenient time, submissions as to when the trial should be continued on the validity and other outstanding questions.

Before hearing counsel on that question, there are some other matters with which I should deal.

The first is the question as to whether the plaintiff is entitled to claim in this action in respect of acts of infringement alleged to have been committed by the defendant prior to the plaintiff becoming owner of the patent.

The relevant facts are

(*a*) Patent No. 460,963 was issued on November 8, 1949 to The Visking Corporation;

(*b*) the defendant first imported polyethylene film in September, 1956.

(*c*) On December 19, 1956, The Visking Corporation assigned to Union Carbide and Carbon Corporation, which was subsequently re-named Union Carbide Corporation, "the entire right, title and interest" in Patent No. 460,963.

(*d*) On April 30, 1962, Union Carbide Corporation assigned to the plaintiff "all its right, title and interest in and to" Patent No. 460,963 "together with all rights of action and claims for damages, profits and costs arising from past infringements" thereof.

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Two questions arise with regard to these assignments, namely,

(*a*) Can a right of action for infringement of a patent in Ontario, which is where the alleged infringements took place, be validly assigned? and

(*b*) If the answer to that question is in the affirmative, does a mere assignment of a patent without express reference to outstanding claims for infringements, such as the assignment from Visking to Union Carbide Corporation, impliedly include an assignment of claims in respect of past infringements?

In my view, both of these questions must be answered in the negative.

Taking the second question first, as a matter of interpretation, in my view, an assignment of specific property is quite a different thing from an assignment of an outstanding "right of litigation" for damage to that property and the one does not impliedly include the other. No authority to the contrary was cited to me.

With reference to the general question as to the assignability of claims for past infringements of patents for inventions, I adopt the principle enunciated by my Brother Gibson in a judgment delivered by him in *Burns & Russell of Canada Ltd. v. Day & Campbell Limited* on June 17, 1965[1], where he said:

> This assignment, save and except for the clause "together with the right to claim and recover damages or profits with respect to past infringements" is clear and unequivocal and purports to confer absolute legal title on the plaintiff. I say all, except for this clause, which is meaningless, because this clause purports to assign the right to sue for past infringement which is a cause of action in tort. It is not legally possible at common law to assign a tort and there is no provision in the *Patent Act* which changes the common law in respect thereto.

If the infringement has occurred in the Province of Quebec, the result would probably have been different because, under the Civil Law system, which is in vogue in that province and in Scotland, such claims are assignable. See the Scottish case of *United Horse Nail Company v. Stewart & Co.*[2], cited by counsel for the plaintiff.

[1] [1966] Ex. C.R. 673.

[2] (1885) 2 R.P.C 122.

I have not overlooked the argument of the plaintiff based upon subsection (1) of section 57 of the *Patent Act*, which reads as follows:

> 57. (1) Any person who infringes a patent is liable to the patentee and to all persons claiming under him for all damages sustained by the patentee or by any such person, by reason of such infringement.

To me it is quite clear that the section confers a right on the "patentee" to damages sustained by the patentee and upon a person claiming under the patentee for damages sustained "by any such person". It does not confer on a person claiming under the patentee a right to damages sustained by the patentee.

Even if I am not correct in the view that I have just expressed concerning subsection (1) of section 57, the plaintiff cannot succeed in this action in respect of infringements that took place when some other person was the patentee having regard to subsection (2) of section 57, which reads:

> (2) Unless otherwise expressly provided, the patentee shall be or be made a party to any action for the recovery of such damages.

My conclusion is therefore that the plaintiff has no right to claim for infringements committed before it became owner of the patent on April 30, 1962.

I should add at this stage that, while there was some argument as to whether the terms of reference, if there should be a reference, will provide for determining infringement, as well as damages, to the time of the reference, I made it clear that this was a matter that would be left for argument and decision at the second stage of the trial.

The second matter I wish to deal with at this stage is a question as to the nature of the injunction that it would be proper to grant in this case, assuming the ultimate success of the plaintiff in its action for infringement. The question that occurs to me, and upon which I should like to have assistance, at the proper time, is what, if anything, can the defendant be enjoined from doing. I realize that it is not uncommon for an injunction to be framed so as, in terms, to enjoin against infringing the plaintiff's patent and I realize that this, while somewhat inelegant, may be adequate when there is no doubt as to what act constitutes such an infringement. Here, however, the situation is different. A person, such as a jobber like the defendant, who is not skilled in the particular art, cannot be expected to

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know whether any particular polyethylene film was made by the plaintiff's patented process. Having regard to my findings, it may be, although I have some doubt, that the defendant can properly be enjoined from importing and selling or using unseamed polyethylene film that is 10 ft. or more in width.

At the moment, I have difficulty in seeing what other acts he can conceivably be enjoined from performing without, in effect, enjoining him from importing film made by some process other than the patented process. Indeed, it does occur to me to raise the question whether, in view of the authority conferred upon the Court by section 59 of the *Patent Act* to restrain or enjoin the defendant from use, manufacture or sale "of the subject matter of the patent", which in this case is the process, the Court has any power to enjoin the use or sale of something that is not the subject matter of the patent. There is also a question in my mind as to the period for which any such injunction would run. It would presumably, not be beyond the date when the patent expires. At least in theory, however, it seems to me that it should be open to the defendant to apply to dissolve the injunction upon showing that the factual basis upon which the injunction was issued has ceased to exist. I raise these matters so that they can be the subject of argument, if the plaintiff is successful on the second stage of the trial.

I also have to refer to paragraph (*d*) of the prayer for relief in the Statement of Claim, by which the plaintiff claims

> (*d*) An order that the Defendants and each of them forthwith deliver up under oath to the Plaintiff all articles in the Defendants' possession or power made in infringement of the said Letters Patent or that the said articles be destroyed.

In the first place, I can find no authority for such relief in our statute and, in view of the express authority for damages and injunctions, I should, at the proper time, like assistance as to the authority for any such relief. Secondly, I might say that I have some doubt as to the application of that part of the paragraph which refers to "articles...made in infringement" to the facts of this case.

Finally, I wish to leave with counsel, a rough draft of a *fiat* for judgment for a possible reference so that they can be prepared to make submissions with regard thereto in the

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event that the plaintiff is ultimately successful in this infringement action. This draft *fiat*, which was not prepared with any particular action in mind, reads as follows:

Let judgment go:

1. declaring and adjudging that the patent referred to in paragraph .. of the Statement of Claim is valid;
2. declaring and adjudging that the said patent has been infringed by the defendant;
3. declaring and adjudging that the plaintiff is entitled to be paid by the defendant an amount equal to either
   (*a*) the amount of the damages sustained by the plaintiff as a result of the infringement by the defendent of the said patent, or
   (*b*) the amount of the profits derived by the defendant from infringing the said patent;
4. for the purpose of determining the amount that the plaintiff is so entitled to be paid by the defendant (if the parties cannot agree on it), referring to the Registrar (or a Deputy Registrar nominated by the Registrar or, if none such be available, an officer of the Court agreed upon by the parties or appointed by the Court) for inquiry and report, the following questions, viz:
   (*a*) what acts of infringement by the defendant of the aforesaid patent have occurred as alleged by the statement of claim; and
   (*b*) according to the election of the plaintiff, (which election must be made in writing and filed in the Court and served upon the defendant before the plaintiff may take any step in connection with the reference) what is the amount of the aforesaid damages sustained by the plaintiff or the amount of the aforesaid profits derived by the defendant; and
5. ordering the adjudging that the plaintiff recover from the defendant his costs herein to be taxed except the costs of the reference, which shall be left to be dealt with upon the motion for judgment upon the report of the referee under Rule 186 of the General Rules and Orders of this Court.

H. G. Fox, Q.C. and *D. F. Sim, Q.C.* for plaintiff.

G. F. Henderson, Q.C. and *D. G. Kilgour* for defendants.

Toronto
1966
Jan. 11-13
24-28
Mar. 11

JACKETT P.:—These reasons are to be read with the Reasons for Judgment that I delivered herein on November 10, 1965 at the conclusion of the first part of the trial of this matter.

As indicated therein, the defendant's attacks on the validity of the patent in suit had been left to be heard after the disposition of the other issues. The parties have now put in their evidence on the questions so left to be heard and have been heard in argument with regard thereto.

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At the conclusions of such argument, on January 28, 1966, I reserved judgment on the understanding that I would in due course deliver reasons for judgment indicating my findings as to the validity of the patent and that I would, at the same time,

(*a*) if I conclude that the patent is invalid, pronounce judgment dismissing the action,[1] subject to hearing the parties concerning costs before the minutes of judgment are settled, and

(*b*) if I conclude that the patent is valid, defer pronouncement of judgment until after the parties have been given a suitable opportunity to be heard as to the relief that should be awarded to the plaintiff.

On the questions relating to the validity of the patent in suit, the plaintiff relied in the first instance upon the fact, which had already been established, that the patent in suit (hereinafter referred to as the "Fuller patent") had been granted under the *Patent Act*, R.S.C. 1952, chapter 203, as amended. Its position was based, *inter alia*, upon section 48 of the *Patent Act*, which reads, in part, as follows:

> 48. Every patent granted under this Act shall be issued under the signature of the Commissioner and the seal of the Patent Office; the patent shall bear on its face the date on which it is granted and issued and it shall thereafter be *prima facie* valid...

It has been established by decisions of this Court that section 48 imposes upon a party attacking the validity of a patent granted under the *Patent Act* the onus of showing that the patent is invalid "no matter what the ground of attack may be".[2] If an attack on the validity of such a patent is to succeed, there must be evidence that satisfies[3] the Court that the patent "is invalid". In the consideration of such evidence, however, the presumption contained in section 48 has "no weight capable of being put in the balance".[4]

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[1] During the course of the trial, the defendant abandoned its counterclaim.

[2] *Ernest Scragg & Sons Ltd. v. Leesona Corporation*, [1964] Ex. C.R. 649, per Thorson P. at page 723.

[3] I employ the verb "satisfy" here to deal with "the incidence of proof, not with the standard of proof . . ." See *Blyth v. Blyth* (H.L.) London Times Law Reports, February 16, 1966, per the Master of the Rolls.

[4] *Ernest Scragg & Sons Ltd. v. Leesona Corporation*, (*supra*) at page 724, and Halsbury's Laws of England, Third Edition, Vol. 15 at page 343, as quoted by Thorson P. at the same page.

The only attacks on the validity of the Fuller patent upon which the defendant relied at trial are

(*a*) that the process that is the subject matter of the Fuller patent (hereinafter referred to as the "Fuller process") is not an "invention" for the purposes of the *Patent Act* because it does not involve any inventive step having regard to the state of the art at the date of the "invention";

(*b*) that, although the claims in the Fuller patent are that the Fuller process will work on all thermoplastics, that process as described by the disclosure will not operate on nitro-cellulose, which is a thermoplastic,[1] and

(*c*) that the Specification in the Fuller patent fails to meet the requirements of section 36 of the *Patent Act* in that the instructions for the working of the patented process leave it to further experiment to determine how to work the process in respect of all applications of the process not covered by the examples given.

Any other attack on the validity of the patent that may be found in the pleadings is to be disregarded because it was not relied upon at trial and was, in effect, abandoned. Any question as to whether the three attacks that I have outlined were properly raised by the pleadings was either waived by agreement of counsel for the plaintiff that the attack was properly raised or was met by an amendment to the pleadings that was made during the course of trial.

The first attack by the defendant on the Fuller patent was based upon the proposition, with which the plaintiff agreed, that for a process to be an invention within the concept as defined by the *Patent Act*, it must not only be novel in the sense that it must be different from any pre-existing process but it must be new from an inventive point of view,[2] which requirement has been expressed by such statements as the following:

(*a*) that it must involve an inventive step,

(*b*) that it must be the result of inventive ingenuity,

[1] This attack was raised by an amendment to the defence permitted during the trial which referred to cellulose nitrate and two other substances During argument, counsel for the defendant conceded that there was no evidence concerning the other two substances. Cellulose nitrate is another name for nitro-cellulose.

[2] *The Commissioner of Patents v. Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning*, [1964] S.C.R. 49.

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(*c*) that it must not have been obvious, or

(*d*) that there must be subject matter.

No matter which of these expressions is used, it is a way of describing the same requirement, which requirement is implicit in the definition of "invention" in the Canadian *Patent Act*. Whether a particular process complies with that requirement (which I shall refer to as the requirement of "inventive ingenuity") is to be judged against the background of the relevant state of affairs as it existed at the time when the alleged "invention" was "invented", that is to say, when the process was devised. I shall hereafter refer to this as the time of the alleged "invention".

The relevant state of affairs constituting the background against which the requirement of inventive ingenuity must be judged in any particular case is the information that would have been available[1] at the time of the alleged "invention" to the ordinary fully qualified and experienced person in the particular industry or activity who would, at that time, have had to deal with problems such as that in respect of which the alleged "invention" was "invented". (Such person is sometimes referred to as "the ordinary skilled workman" and I shall so refer to him in the remainder of these reasons.) Such information consists in the general knowledge that the ordinary skilled workman would have had at that time, in addition to any information available to him at that time in publications including patents of inventions. (Such publications are sometimes referred to as "prior art".)

In this case, as appears to be not unusual in recent cases of this kind in the Court, no evidence was led that tended to show *directly*

(*a*) the time that the alleged "invention" was "invented"—that is, the time when the Fuller process was devised,

(*b*) the history of the manner in which the alleged invention was invented,[2]

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[1] This includes not only what is "common knowledge", but also what is "public knowledge". Compare *Savage v D. B. Harris & Sons*, (1896) 13 R P C. 364, per Lindley L J. at page 368.

[2] Compare *Sharp & Dohme Inc. v. Boots Pure Drug Company Ld.*, (1928) 45 R.P C. 153, per Sargant L J. at page 187.

(c) what class of person constituted the relevant ordinary skilled workman in the industry or other activity for which the Fuller process was devised,[1] or

(d) what general knowledge such ordinary skilled workman would have had, what prior art would have, in fact, been available to him, or what meaning the prior art would have had for him in the light of his general knowledge.[2]

With reference to the time of the alleged "invention", since the defendant is neither the inventor nor the assignee of the inventor, it is perhaps not too surprising that there was no direct evidence available to him. Had an objection been taken to the lack of evidence on this point, I should have found it very difficult to escape the conclusion that there was no evidence.[3] However, as this point was not raised, and as the parties fought the case on the apparent assumption by both parties that, in the absence of other evidence as to the time of the alleged "invention", evidence as to when the application was made for the patent determined the date when the alleged "invention" was invented, I am relieved from reaching a conclusion on that question. I shall therefore reach a conclusion, on the balance of probabilities, on the composite question as to whether the

[1] Compare *Osram Lamp Works Ld. v. Pope's Electric Lamp Company Ld.*, (1917) 34 R.P.C. 369, per Lord Parker, at pages 391-2.

[2] See *British Celanese Ld. v. Courtaulds, Ld.*, (1935) 52 R.P.C. 171 at page 196, where Lord Tomlin indicates that, while an expert witness may not say what a document means, he may say what, at a given time, to him as skilled in the art, a given sentence, on a given hypothesis as to its meaning, would have taught or suggested to him.

It would be of particular assistance to the Court in connection with the effect to be given to any document constituting part of the "prior art" to have evidence as to "what would this document in fact convey to those in the art?" See Blanco White's "Patents for Inventions", Third Edition, 1962, pages 134-5, and *British Thomson-Houston Company Ld. v. Charlesworth, Peebles & Co.*, (1925) 42 R.P.C. 180, per Lord Shaw at pages 204 to 206. Compare *The Lancashire Explosives Co. Ld. v. The Roburite Explosives Co. Ld.*, (1895) 12 R.P.C. 470 at pages 479 and 481, and *Allmanna Svenska Elektriska A/B v. The Burntisland Ship-building Coy Ld.* (1952) 69 R.P.C. 63, per Jenkins L.J. at pages 76 *et seq.*

[3] Offhand, it would not seem that the fact that the alleged "invention" must have been invented *before* a particular date establishes that any information available at some point of time *before* that date must have been available when the alleged "invention" was invented. All it would seem to establish in connection with the prior art is that information that was not available until after that date was clearly not available when the alleged "invention" was invented.

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relevant background information at the time of the alleged "invention" was such as to lead to the conclusion that it did not take inventive ingenuity to devise the Fuller process.

I am also relieved from deciding whether there was any evidence as to the prior art that would have been "available" to the ordinary skilled workman during the general period that was, in effect, accepted by the parties as being relevant. It was common ground that mere proof of patents published anywhere in the world containing teaching bearing on the particular branch of knowledge, without any proof as to whether they would have been available in fact to the ordinary skilled workman (and, by implication, because the point was never raised, without any proof of what meaning they would have had for him in the light of his general knowledge) was evidence that the Court must consider as tending to establish the background against which the question of inventive ingenuity must be decided.[1] I must therefore by reason of the position so taken by the parties, reach the best conclusion that I can on the background information put before the Court.

The Fuller patent is entitled "Method of Making Flattened Thermoplastic Tubing of Predetermined Desired Characteristics". Before examining the nature of the Fuller process, I propose to outline, as nearly as possible in chronological order the evidence as to background material including the evidence as to the date of the alleged "invention", and then to examine the nature of the Fuller process with a view to determining whether, having regard to the background material, it took inventive ingenuity to devise it.

Before doing so, however, it is important to note that a *thermoplastic*, according to the evidence, is a substance of a particular chemical type[2] that has the following characteristics:

(*a*) at ordinary temperatures (room temperature) it is solid;

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[1] The plaintiff, of course, reserved the right to argue as to the cogency or effect of the teaching of any particular patent and also took a special objection to a particular patent.

[2] Variously described as a high molecular weight polymer type of compound or an organic polymer.

(*b*) when heated it becomes plastic or malleable so that its shape can be changed;

(*c*) when it is brought back to ordinary temperatures after its shape has been changed while it was plastic or malleable—that is, when it has been "set"—it retains the shape it was so given;

(*d*) it retains the characteristics set out in paragraphs (*a*), (*b*) and (*c*) after it has been previously heated, moulded and cooled one or more times.

It should also be noted at this preliminary stage that, while thermoplastics have the characteristic that they become malleable when heated, some of them, at least, can be "conditioned" for "working" by being put in certain types of solution or "colloidal dispersion".

The evidence to show the background of information available to the ordinary skilled workman at the time of the alleged "invention" falls into two classes: general evidence concerning earlier manufactures from thermoplastics and "prior art" patents.

The most important points in the general evidence may be summarized as follows:

1. In "the early days", there was a method for "dry" [1] extruding nitro-cellulose for propellants for artillery shells—no evidence was led as to the process but it presumably had safeguards against premature explosion. Early in this century, a better "wet" extrusion method was devised and the "dry" extrusion of nitro-cellulose for this purpose was abandoned.

2. Since *1905* or earlier, *celluloid*, which is a thermoplastic consisting of a mixture of nitro-cellulose and camphor, has been extruded in solution commercially. It has also been stretched and moulded. It has been produced in the form of more or less solid tubes, plates, sheets, rods, etc.

3. Since *1905*, rayon filaments or fibres[2] have been produced commercially by extruding the thermoplastic known as cellulose xanthate, and more commonly known

[1] "Dry" extrusion, for purposes of this judgment, may be defined as extrusion of a substance that has *not* been put in solution and "wet" extrusion is extrusion of a substance in solution.

[2] The original rayon was produced from nitro-cellulose, apparently by a process of wet extrusion that was commercialized in 1891.

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as "viscose", through a "spinnerette" die (consisting of a nozzle with many very small holes) and regenerating the resultant filaments or fibres into cellulose.[1]

4. Since *1927*, or *1928*, cellophane, which is a transparent film of regenerated cellulose, has been produced in the same way as rayon filaments or fibres, with the exception that a slot die is substituted for the spinnerette.

5. Since *1931* or *1932*, viscose has been extruded through a circular die to produce continuous cellulose tubing—this is the same general process as that for producing cellophane except that the product is in tubular form.

6. Since the early *1930's*, the thermoplastics polyvinochloride and polystyrene have been manufactured into various types of articles either by putting them "dry" into moulds or by dry extruding them from a die, in the "molten" state created by heat, and then setting them in the shapes so created.

7. In *1933* a process for making cellulose tubing from nitro-cellulose was brought to the United States from Germany. (This process was the predecessor of the Reichel and Craver patent referred to later. A series of such processes, of which the one brought to the United States in 1933 was the first, was employed in the United States commercially to make sausage casings from 1934 to 1962.)

8. About *1940*, commercial production of *nylon*, which is a thermoplastic, commenced—it consisted in dry extruding a melted nylon material through a spinnerette type of nozzle.

As already indicated, the balance of the evidence concerning the background material consists of certain foreign patents, which may be summarized as follows:

1. *July 14, 1936*—United States Patent 2,047,554, Ernst Fischer—inventor (hereinafter called the "Fischer patent").

[1] Cellulose—wood fibre—is not a thermoplastic. It is made into a thermoplastic—cellulose xanthate or viscose—by reacting it with xanthic acid. Viscose is an extremely viscous yellow-brownish liquid, which is extruded through a die into a coagulating bath that converts it into regenerated cellulose—that is cellulose in a different form from that with which the process started.

This is a process patent and relates to the manufacture of "hollow-shaped bodies" from a thermoplastic substance known as "polystyrene" and "like substances".

The disclosure tells us that the manufacture of shaped bodies from polystyrene (one of the polyvinol compounds) presented great difficulties in spite of its "thermoplasticity". It says that it was well known, at that time, that polystyrene could be "pressed", in a heated state, into desired shapes and that experiments had been carried out to work polystyrene in a manner similar to a well-known metal spraying method but that the shaped bodies so produced were brittle and inflexible at normal temperatures, which fact considerably restricted their "possibility of use".

It further tells us that it had already been proposed to render shaped bodies of polystyrene less brittle and more pliable by subjecting them during formation to a mechanical stress—particularly by causing them to elongate during formation. In this manner, it says, it was actually possible to manufacture "ribbons, filaments, section wires and the like" of less brittleness and sufficient pliability so that they could be utilized for a variety of purposes.

However, it says, no method had been known, before that time, "to continuously produce particularly thin-walled tubular bodies" from polystyrene, since the methods employed before that time in connection with the manufacture of shaped bodies of polystyrene only ensured production of "solid bodies".

The object of the Fischer invention, according to the disclosure, was to provide a method whereby hollow shaped bodies might be made "without losing the greater pliability aforementioned". The method, it says, is preferably carried out so that in forming a body of polystyrene its walls are also stretched "which reduces the brittleness and increases the pliability of the material".

By way of explanation, the disclosure tells us that the "stretching" of polystyrene does not merely change mechanically the cross-section of the material, but changes its internal structure.

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The process disclosed need not be described in detail. It is sufficient to say that it involves continuously extruding a molten thermoplastic in the form of a seamless tubing and continuously withdrawing the tubing from the point of extrusion. It also involves stretching the thermoplastic laterally by filling the tubing as it leaves the mouth of the die with compressed air. It also suggests, as a possiblity, cooling the thermoplastic tubing to room temperature by "a cooling tube".

2. *January 13, 1938*—German Patent 654,757 (hereinafter called the "first German patent").

This is a patent for the manufacture of pliable ribbons, sheets or tubes from polystyrene, etc. It is described as an addition to supplementary patent 654,299 patented in Germany as of November 26, 1933. The principal patent 653,250 became effective October 25, 1932.

The Specification of patent 654,757 discloses that the principal patent was for a method for the manufacture of ribbons and sheets from certain man made substances which are brittle by nature, as, for instance, polystyrene, "but are made flexible and pliable in every direction". "The method", according to the principal patent, consists in "stretching the substance lengthwise and crosswise after it has been pressed through a nozzle at an increased temperature". The method of the principal patent consisted in pressing the substance through a "rectangular nozzle" at a temperature of 150°C. and stretching the resulting ribbon in both directions by a special device.

Patent 654,757 discloses that pliable ribbons, sheets and tubes can be produced in a simpler and more effective manner by pressing the substance through a "circular nozzle" and by "pulling" the "resulting tube" over a stretching device. It tells us that the speed with which the tube is pulled over the stretching device must, according to the principal patent, be such that the tube can "be stretched simultaneously in both directions by the stretching device" and that the method, according to the invention in the first

German patent, consists of stretching polystyrene, etc., simultaneously in two directions "to increase the pliability of the substance".

3. *January 13, 1938*—German Patent 655,014 (hereinafter called the "second German patent").

This patent is referred to as an addition to the first German patent and the invention is said to consist in the improvement of the method and device in that patent, which it describes as a method and device for the manufacture of pliable ribbons from certain products and in particular polystyrene "by pressing the substance through a circular nozzle and then pulling it over a stretching device".

The Specification in the second German patent says that, with constant "pressure", the thickness of the wall of the tube or the thickness of the ribbon depends on

(*a*) the temperature,

(*b*) the friction and the diameter of the nozzle, and

(*c*) the degree of the stretch.

It explains that for various reasons the thickness will be different in different parts of the ribbon. (An important reason seems to have been that the stretching device over which the tubing was pulled was rectangular in shape.) It teaches that to produce ribbons of uniform thickness and pliability, a further improvement of the invention according to the first German patent consists in "the cooling of certain parts of the ribbons after they have left the circular nozzle", preferably by compressed air or other compressed gases blown upon the ribbon through adjustable nozzles, some of which should be movable so that they can be directed during the process towards the spots which require cooling. According to the disclosure, the nozzles may be affixed in great numbers around the ribbon and the force of the compressed gas can be adjusted in such a way as to produce a ribbon of uniform thickness and pliability.

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4. *October 24, 1939*—United States Patent 2,176,925—Frank H. Reichel and Augustus E. Craver inventors (hereinafter referred to as the "Reichel and Craver patent").

This invention related to flexible tubing and more particularly to flexible tubing of a type capable of use as artificial sausage casings.

The problem in the sausage making field was to get casings that were uniform as to size, expansibility, tensile strength, shape, appearance, etc. Reichel and Craver worked out their process to produce casings of such predetermined characteristics by taking advantage of the fact that certain materials when stretched (after they have been conditioned so as to adapt to stretching) and set in the stretched condition, became stronger than they were before being stretched in a way and to an extent that is related to the direction and the amount of the stretching. Their process consisted in

(*a*) dissolving or otherwise dispersing a cellulose derivation (preferably nitro-cellulose) in a liquid;

(*b*) shaping the solution in the form of a seamless tubing preferably by extruding it through an orifice into a bath;

(*c*) coagulating (i.e., converting into a soft solid) the tubing by having appropriate coagulating substances in the bath;

(*d*) conditioning the tubing for stretching either by having appropriate conditioning substances in the bath or otherwise;

(*e*) stretching the tubing longitudinally and transversely; and

(*f*) fixing the micellar structure of the tubing material in the condition caused by the stretching.

The disclosure says that, when employing thermoplastic tube-forming materials, it had been found that the stretching operations might be facilitated by the application of heat which renders the material more plastic and that the degree of stretch under a constant

force will be dependent upon the plasticity of the tubing which, in turn, is dependent upon its temperature. It also teaches that "Where heat has been employed the condition and/or for stretching the tubing, the stretched structure may be fixed by chilling the tubing, for example, by passing it through a bath of cold water or *through a stream of cold air or the like*". (The italics are mine.)

This disclosure also contemplates the predetermining of desired characteristics of the ultimate tubing by varying certain of the variables in the process. For example, it says, ". . . a finished tubing having substantially any desired strength and shrinkage characteristics within the limits of the material can be produced by suitably proportioning the ratio of the amount of longitudinal stretch to the amount of transverse stretch imparted to the tubing at the proper point in its manufacture".

When the operation of the Reichel and Craver process is described by reference to the preferred form of apparatus illustrated in the drawing accompanying the Specification, a clear picture is obtained of the production of a continuous tubing by extrusion of a plastic substance through an annular (circular) die and of the use of an air bubble and draw or nip rolls to stretch that continuous tubing in both directions.

5. *March 20, 1942*—Italian Patent 393,119 (hereinafter referred to as the "Italian Patent").

This patent states that it was known that thin-walled flexible tubes could be produced from organic thermoplastic substances by inflating thicker tubes in the plastic hot state with air or other gases and that a prerequisite for executing the process was that the substance be sufficiently tenacious in the heated state since "otherwise holes or cracks form in the flexible tube and the gas escapes". It also says that superpolyamides are generally of a low viscosity in the fused state and are therefore not suitable for the method but that it has been found that, contrary to all expectations, superpolyamides made in a particular way can be used to produce "technically unexceptional thin-walled flexible thicker tubes or flexible tubes in the

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plastic, hot state". It says that such superpolyamides are distinguished by their high viscosity in the fused state and gradually become plastic with increase in temperature.

The process as disclosed by this patent is described in part as follows:

> "the hot superpolyamide is plasticized . . . and extruded through a nozzle for tubes. In the centre of the nozzle there is a passage through which air, nitrogen or another gas is blown. The flexible tube is placed under high pressure at the start and is then expanded, and by varying the pressure of the gas and/or the size of the nozzle, flexible tubes of any diameter and thickness are obtained . . . The process may with advantage be made continuous by passing the flexible tube into a pair of rollers located far enough away from the nozzle to permit cooling of the layer of material. By means of this pair of rollers, the air is completely expelled . . ."

The disclosure says that the temperatures to be used in the extruding machine depends upon the "superpolyamide softening area" used and that, in producing specially thin foils, the temperatures used will be higher than for thick foils.

The evidence shows that the Reichel and Craver process was used commercially from 1938 until 1962. There is no information in the evidence as to whether any of the processes disclosed by the other patents was ever used commercially or at all.

In the early 1940's, the thermoplastic polyethylene came into use on a commercial scale. There is no clear evidence as to the process used in its manufacture when it first came into commercial use. It seems probable that a slot die process was employed.

On October 20, 1945, an application was filed for a United States patent for the Fuller process, which, it is apparent, was devised primarily for polyethylene. The application for the Canadian patent was not filed until September 11, 1948.

With some hesitation, I have come to the conclusion that the balance of probability is that the Fuller process was not

devised until after the grant of the Italian patent on March 20, 1942. The only evidence that bears on the point is that the first application for a patent of the Fuller process, as far as the evidence discloses, was made in October 1945. It was devised primarily for polyethylene which was just coming into commercial use in the early 1940's, and the plaintiff, who was interested in establishing an earlier date for the invention and was presumably in a better position to obtain information concerning the actual facts, brought forward no evidence whatsoever as to when the process was in fact devised.

In any event, the Italian patent is the only part of the background evidence adduced by the defendant that the plaintiff contended could not be considered and its contention was based on the very special reason that, while that patent would otherwise be information that, in accordance with the plaintiff's submission, the Court should deem to have been available to the ordinary skilled workman, the existence of a state of war between Canada and Italy changed the situation. As I indicated during argument, in the absence of any help from counsel as to what legal principle required the Court to deem both foreign and Canadian patents to have been available to the ordinary skilled workman when there is no evidence as to what information was in fact available to him, I have great difficulty in deciding whether a state of war creates an exception to the principle. However, as I understand the argument, it was based on the assumption that information concerning patents could not have reached Canada from Italy while there was a war on. This is a matter that should have been established by evidence. As far as appears from the evidence, information taught by an Italian patent could have passed by ordinary means of communication in technical circles from Italy to a neutral country and from the neutral country to Canada. I find that I must treat the Italian patent as falling in the same class as the other evidence of "prior art".

In any event, the Italian patent does not substantially alter the background picture and I should not have reached a conclusion different from that that I am about to express if I had accepted the submission that I cannot look at the Italian patent.

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The background against which I must judge whether the Fuller process has inventive ingenuity is, as I find it, that a skilled workman would have known, at the time when the Fuller process was devised,

(a) that thermoplastics had been manufactured into shapes by extruding them, at ordinary temperatures or after heating, through different shaped dies (slot, spinerette and circular) either in solution (wet) or not in solution (dry) depending upon the characteristics of the particular thermoplastic,

(b) that thermoplastics could be given determinable useful characteristics by varying amounts of stretching in either or both directions during the manufacturing process,

(c) that where a thermoplastic was formed by extrusion in a plastic state from a circular die in the shape of continuous tubing, air trapped in the tubing while still in a plastic state so as to form an air bubble ahead of rolls through which the tubing was being pulled at varying speeds, was a convenient and versatile method of attaining the amount of stretch required in either direction and of varying the diameter of the tubing and the thickness of the film, and

(d) that air cooling could be used on the outside of such tubing to accelerate the setting of the film.

In Appendix A to these reasons, I have set out the disclosure and the first claim (from the point of view of the problem of inventive ingenuity there is no material difference between the first claim and any of the other claims) and I have analyzed them in detail. As there indicated, the first claim may be broken down as follows:

The claim is, in a method of producing flattened tubing of predetermined desired characteristics, the steps which comprise

(1) continuously dry-extruding a molten thermoplastic in the form of a seamless tubing,

(2) continuously withdrawing the tubing from the point of extrusion,

(3) flattening the tubing at a point spaced from the point of extrusion,

(4) maintaining a substantially constant continuous isolated bubble of a gaseous medium in the section of the tubing extending between the point of extrusion and the point of flattening, the quantity of the gaseous medium constituting the bubble being such as to inflate the tubing while in the plastic formative state to a predetermined desired diameter at a point beyond the point of extrusion, and

(5) passing the tubing while in the plastic formative state through streams of a cooling gaseous medium in the vicinity of the point of extrusion and impinging circumferentially on the tubing in the plastic formative state to chill the tubing "to an extent that when the tubing has been inflated by said bubble to the said predetermined diameter it will be in a set condition",

"the rate of withdrawing the tubing, the degree of inflation of the tubing and the degree of chilling the tubing all being correlated in accordance with predetermined desired physical characteristics of the tubing."

Counsel for the plaintiff submitted that the "inventive step" in the Fuller patent over the prior art "lay in the discovery that cooling air directed circumferentially on the film near the point of extrusion could be used to control the rate of the cooling of the film, and that the correlation of this cooling rate with the degree of inflation . . . and the rate of withdrawal would permit the production of film of predetermined and controllable characteristics, from a wide variety of thermoplastics."

If this submission is taken literally, the "inventive step" is said to consist in the discovery of two things, namely, first, that "cooling air directed circumferentially on the film near the point of extrusion" could be used to control the rate of cooling of the film, and second, that the "correlation" of this cooling rate with the degree of inflation and the rate of withdrawal would permit the production of film of predetermined and controllable characteristics from a wide variety of thermoplastics.

So far as the first of these two discoveries is concerned, even if there was no help in the evidence, I should have been inclined to take judicial knowledge that there is no inventive step in discovering that "cooling air" can be used

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to control the rate of cooling of the film,[1] no matter where it is employed, and I fail to see any discovery of an inventive character in finding that air cooling can be used either at the point of extrusion (which is the first place where it can be applied) or circumferentially (the object at which it is directed being circular). In any event, air cooling to control the rate of cooling is taught by the second German patent, for a different purpose it is true, and the Reichel and Craver patent teaches that thermoplastic tubing may be "fixed" after it has been stretched by passing it through "a stream of cold air". Certainly, it requires no inventive genius to discover that the more air or the cooler the air that is applied the faster the thermoplastic will be cooled to a temperature at which it will be "set".

Turning to the second branch of counsel's "inventive step", namely, the discovery that the "correlation" of the cooling rate achieved by the cooling air with the degree of inflation and the rate of withdrawal would permit the production of film of predetermined characteristics, my first observation is that it does not appear to have been as clear to Fuller or the draftsman of his specification that this was his discovery. When he first described his invention in general terms, he referred to "setting" the expanding tubing with no indication of the means—which does not seem to attribute too much importance to air cooling. Indeed, as far as I have been able to find, there is no place in the disclosure where first importance is attached to air cooling, when the idea of varying the variables of the process to obtain desired characteristics in the product is being disclosed. In one place, it is expressed by reference to the "peripheral speed of the squeeze rolls" in combination with the other controlled variables. (That is certainly taught by the "prior

[1] The disclosure does not treat either "cooling" or "air cooling" as something new. It says that, in place of the "air cooling" coil, some of the other "known" cooling systems may be utilized. Compare *British Thomson-Houston Company Ltd. v Duram Ltd.*, (1918) 35 R.P.C. 161, per Lord Finlay L.C. at page 175: "There can be no subject-matter in the application to tungsten of the old process of working under heat, as this does not require any invention". See also *British Celanese Ltd. v. Courtaulds Ltd.*, (1935) 52 R.P.C. 171, per Lord Tomlin at page 195: "The employment of warm air as an evaporative medium was not novel and its employment in combination with the integers found in Clark was clearly obvious." The use of air cooling to cool a thermoplastic so as to set it is comparable to the use of heat to condition a metal for working it or the use of warm air as an evaporative medium.

art".) In another place, it is expressed by reference to correlating the other variables with the expansion of the tubing. In still another place, the reference is simply to the "variables in the process". In three other places, internal air pressure, the volume of "cooling air" or "cooling medium" and the diameter of the die are mentioned in that order.

Reading the disclosure as a whole as carefully as I can, it does not seem to me that the idea of correlation of variables in the process is limited to any particular variables. The basic idea is that there are a number of variables in the process each of which has its effect on the ultimate product and that they can be varied in many ways so as to get a desired result. Some suggestions are made as to what variables might be chosen for the purpose and the claims are stated in terms of specified variables. Nowhere, as far as I can find, however, does the disclosure suggest the "correlation" in quite the way put by counsel for the plaintiff. The claims do, it is true, refer to the rate of withdrawing the tubing, the degree of inflation of the tubing and the degree of chilling the tubing all being correlated but they neither place special emphasis on the degree of chilling nor express it as a correlation of the degree of cooling with the other two factors.

In any event, I cannot find any inventive ingenuity in the idea, upon which the Fuller process is based, that you achieve a particular width of product and a product that has been stretched laterally and longitudinally to the extent required to produce the thickness and the characteristics of film desired by appropriately varying the size of the air bubble, the speed of withdrawal of the tube and the rate of cooling or chilling.

In the first place, I find an almost direct application of that part of Lord Tomlin's judgment in *British Celanese Ld. v. Courtaulds, Ld.*[1], which reads as follows:

> It is accepted as sound law that a mere placing side by side of old integers so that each performs its own proper function independently of any of the others is not a patentable combination, but that where the old integers when placed together have some working interrelation producing a new or improved result then there is patentable subject-matter in the idea of the working inter-relation brought about by the collocation of the integers.
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> . . .

[1] (1935) 52 R.P.C. 171 at pages 193-4.

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In the truth and in fact there is no interrelated working between the integers in the sense that any one of the integers is doing something which it could not do without the presence of one or more or of the others. Each integer is in fact performing its own part and is not functionally dependent upon the presence of any other integer at all. I think therefore that the invention lacks subject-matter.

A variation of any one of the three integers claimed by the Fuller patent (namely, the degree of inflation of the tubing, the rate of withdrawal of the tubing or the rate of cooling of the tubing) has certain obvious effects on the ultimate product of the process whether it occurs alone or at the same time as a variation in one or both of the other "integers". If more than one is to be varied the effect of all the variations on the ultimate product must, of course, be taken into account. However, the variation of all three at the same time does not, as far as I can tell from the evidence, have a "working interrelation" producing "a new or improved result" in the sense that "one of the integers is doing something which it could not do without the presence of one or more of the others". Each variation in the process performs its own part and is not "functionally" dependent upon any other variation. It follows that "the invention lacks subject-matter".

Furthermore, if there would otherwise be inventive ingenuity in the combination idea in the Fuller patent, it was so little different from what has been done before as to be a mere obvious variation. The disclosure itself says that "Obviously" if one or more of the conditions which were maintained constant in the examples were varied one of the other variables would have to be "balanced" to compensate.[1]

[1] An alternative submission was made by counsel for the plaintiff that was, in effect, that, whereas the Italian patent taught that, as of that time, only some of the thermoplastics were suitable for the air bubble method because others were not sufficiently viscous in the fused state, the Fuller patent claims that the Fuller process is an air bubble method suitable for *all* thermoplastics and that (assuming that the attacks other than that for lack of inventive ingenuity fail) it must therefore be assumed that there is something in the Fuller process that overcomes the difficulty that had been previously encountered with thermoplastics that were of a low viscosity in the fused state. This something, counsel suggested, is the air cooling at the point of extrusion, which, he suggests, will have the result of making low viscosity thermoplastics sufficiently viscous so that the tubing will remain intact and contain the air bubble. What the Fuller patent claims, however, is not sufficient air cooling to make the particular thermoplastic viscous enough to withstand the air pressure but air cooling

Quite apart from the bases upon which counsel for the plaintiff asked the Court to find that the Fuller process involved inventive ingenuity, in my opinion, the balance of probability is that the Fuller process would have been the obvious answer to the ordinary skilled workman who, shortly after the inception of the commercial manufacture of polyethylene in the early 1940's by, for example, the slot die method, had been asked to find a better method of processing this new thermoplastic that could be used for making film of different widths, different thicknesses, and different characteristics, without the limitations of the slot die or other earlier method. (Compare the discussion of the relative advantages of the different methods in the reasons that I delivered at the end of the first part of the trial of this case.) The Fuller process for a thermoplastic such as polyethylene was in the path that was already being followed by persons charged with the task of devising processes for thermoplastics.[1] The ordinary skilled workman to whom the problem was put, if he had looked only at the process in the Reichel and Craver patent as exemplified by reference to the drawing attached to the disclosure, knowing (because it was already being used in the slot die process) that polyethylene could be conditioned for processing by heating alone, would only have had to make obvious adjustments to reach the Fuller process. He would

to chill the tubing "to an extent that when the tubing has been inflated by said bubble to the said predetermined diameter it will be in a set condition." Obviously this is air cooling for an entirely different purpose from that suggested by counsel and in many cases the two results—that contemplated by the claim and that suggested by counsel—could not be achieved by the same degree of air cooling. For the purpose of finding inventive ingenuity, I am not prepared to assume, merely by reason of a claim of a universal nature, that a process can be applied to achieve a result that, on the evidence, it is most improbable that it will achieve If there is a thermoplastic of such a low viscosity that it will not resist the pressure of an air bubble, I see nothing in the Fuller process that will, as a matter of course, overcome that defect in such material for use in the air bubble process.

[1] Compare *Penn v. Bibby*, (1866) L.R. 2 Ch. A. 127, per Lord Chelmsford L C. at page 136. See *Savage v. D. B. Harris & Sons*, (1896) 13 R P.C. 364, per Lopes L.J., at page 370: "The material question . . . is, whether the alleged discovery lies so much out of the track of what was known before as not naturally to suggest itself to a person thinking on the subject; it must not be the obvious or natural suggestion of what was previously known." This was applied in *Sharp & Dohme Inc. v. Boots Pure Drug Company, Ld.*, (1928) 45 R P.C. 153, by Sargant L J. at page 191

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heat the resin instead of putting it in solution before extrusion in the form of tubing. He would eliminate the stage of passing the tubing through the bath because the coagulating and conditioning necessary for the nitrocellulose in solution would obviously be unnecessary for the polyethylene heated so as to be in a viscous state. That would bring him to the air bubble stage of the Reichel and Craver process to follow immediately upon the extrusion from the annular die. (The plaintiff did not suggest any inventive ingenuity in this.) He then has in front of him the teaching of the Reichel and Graver disclosure that "where heat has been employed to condition and for stretching the tubing, the stretched structure may be fixed by chilling the tubing, for example, by passing it through a bath of cold water or through a stream of cold air or the like." I can detect no substantial difference between this and the teaching of the Fuller patent that the tubing is set by an air cooling system or other "known" cooling system. Finally the correlation of the variables in the process to obtain the desired characteristics in the product is a prominent feature of the Reichel and Craver process although it may be somewhat more fully developed by the Fuller patent. This hypothetical reconstruction of what an ordinary skilled workman could have taken from the Reichel and Craver patent could be developed at length by reference to the other "prior art". What I have said is sufficient to indicate why, in my view, on the evidence, there was no inventive ingenuity involved in the Fuller process.

At this point, it may be well to comment upon the somewhat unrealistic situation in respect of which the Court is being required to make a finding on the question of inventive ingenuity. The patent is, "*prima facie* valid" by virtue of section 48 of the *Patent Act*. The defendant must therefore bring evidence to show lack of inventive ingenuity. (In the ordinary course of events, the defendant is unlikely to have access to evidence concerning the actual situation that gave rise to the Fuller process being devised or to evidence of how it was actually devised.) He brought evidence (the admissibility of which was not challenged by the plaintiff) that is sufficient, considered by itself, for the Court to draw certain inferences although these inferences, if the whole truth were known, may or may not have any relation to reality. The plaintiff, who is more likely to have

access to evidence of the history of events leading up to the Fuller patent, has left the Court in the dark as to what actually happened. In these circumstances the Court must come to the best conclusion that it can, recognizing that its conclusions may be completely divorced from reality.

I am, therefore, having regard to my findings as to the background of information available to the ordinary skilled workman, of opinion that there was no inventive ingenuity involved in the devising of the Fuller process and I therefore conclude that it was not an "invention" within the meaning of the *Patent Act* and that the Fuller patent is for that reason invalid.[1]

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[1] I find here none of the circumstances that constrained the Court in other cases to find inventive ingenuity even where there were relatively simple adaptations from earlier processes or the prior art. There is no indication here of any problem that had remained unsolved although there was an obvious demand or need. "We have no history of the manner in which this invention came about." See *Longbottom v. Shaw,* (1891) 8 R.P.C. 333, per Lord Herschell at page 337. We do know that there was a thermoplastic, polyethylene, newly come on the market, that, very shortly thereafter, this process was devised for it and that commercial success followed. There is no evidence that the process is associated with notable commercial success in connection with thermoplastics generally. (In addition to polyethylene, it was used for "saran" and polyvinylchloride.) I find myself in substantially the same position in which Lord Herschell was when he said, in *Longbottom v. Shaw, supra,* at page 37

> My Lords, no doubt it is perfectly true, as the learned counsel for the Appellant has said, that an invention which comes to a man by a happy flash of inspiration or without any prolonged experiment or thought may be as good a subject-matter of a patent as one which has only been arrived at after long and difficult experiments. That I entirely agree with. But when we are coming to enquire into the question whether there really is an invention in any case, or whether it is merely such an adaptation as would be obvious to any one whose mind addressed itself to the subject, then the absence of any such evidence as I have indicated of either experiment or investigation or thought on the part of the patentee, or evidence that the mind of anybody else had been addressed to the subject, or that there had been attempts to remedy the defects by other methods,—I say the absence of such evidence appears to me to justify one in resting upon the opinion which one has formed that there is in this case no invention at all I quite agree that it is always easy to say a thing is obvious when it has been pointed out. I fully feel the force of that argument and the danger of hastily arriving at such a conclusion; and, as I have said, if I saw that although the minds of mechanicians had been directed to meeting a certain want, and various methods of doing so had been devised, those mechanicians had not arrived at the simple and the efficient one at which the patentee had arrived, I should be disposed to put aside my own view of the obviousness of the so-called invention

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A second ground of attack, as indicated above, was that, although the claims in the patent are that the process will work with all thermoplastics, it cannot, as a practical matter, be applied to nitro-cellulose, which is a thermoplastic.

Witnesses for both sides were in agreement that nitro-cellulose (otherwise known as "cellulose nitrate") is a thermoplastic (and the plaintiff did not controvert that fact), although it is not quite so clear that any witness knew, otherwise than by hearsay, that it had the characteristic, essential to its being a thermoplastic, of becoming malleable when heated. The reason for the absence of personal knowledge on this point is, as the witnesses agree, that nitro-cellulose is a very dangerous explosive and that no sensible person who knows its character would contemplate heating it in its ordinary state for the purpose of converting it into film or tubing.

The defendant on these facts contends, in effect,

(*a*) that the claims of the Fuller patent are for a process whereby tubing may be made from any thermoplastic,

(*b*) that tubing cannot, as a practical matter, be made by the Fuller process from nitro-cellulose,

(*c*) that a process to be a valid invention must be useful, and

(*d*) that, if it is not practically possible to use the Fuller process, as described in the disclosure, for processing all thermoplastics as claimed, the Fuller patent is invalid either because it claims too much or because the disclosure does not sufficiently describe the patented process.

In support of this submission, the defendant refers to the statement in the disclosure that "In general, the invention can be utilized with any thermoplastic material...", to the first step of the process as claimed by the claims, which, in

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and to come to the conclusion, notwithstanding my own impression on the subject, that those facts indicated that it was not so obvious as I myself should have thought. But in this case nothing of that sort is really to be found in the evidence, and therefore it appears to me that no more is shown than an adaptation of the well-known idea of utilizing a row of hooks attached to or forming part of a band of metal by applying them as they are required, the adaptation in the particular case being in a well-known manner, for a well-known purpose, and not involving, as it appears to me, any invention which can support a patent.

each case, consists of "dry-extruding a molten thermoplastic", and to the uncontroverted facts that nitro-cellulose is a thermoplastic and that it would be highly dangerous to utilize the Fuller process as described in the disclosure, and as claimed, with nitro-cellulose.

The plaintiff adduced evidence to show that, at least in theory, the Fuller process could be utilized with dry nitro-cellulose under very strict temperature controls and with special safeguards or by mixing it with a substance which would reduce its tendency to explode when heated—i.e., "a heat decomposition inhibitor". In connection with the latter possibility, reference is made to the statement in the disclosure that "The properties of the thermoplastic substance or composition can be modified as by the incorporation therein of suitable modifying agents such as... heat decomposition inhibitor..."[1] The plaintiff also submits, in effect, that the Specification should not be interpreted as disclosing or claiming a process to be utilized with all thermoplastics but only as disclosing and claiming a process to be utilized with those thermoplastics that are suitable for the manufacture of tubing by dry extrusion after heating and that, in any event, it should not be interpreted as claiming the process for use with a thermoplastic that no one in the industry would ever think of employing with such a process because of its well-known dangerous character.

Nitro-cellulose is a thermoplastic material from which tubing was, at the appropriate time, being manufactured by another process and there is no doubt that the claims in this patent extend to the use of the patented process with any thermoplastic substance.

If the disclosure and claims had been in terms for a process for dry-extruding nitro-cellulose, the patent would, having regard to the necessity of using special controls and safeguards or a heat decomposition inhibitor, have been clearly bad because either

(*a*) the patented process is regarded as being the process as described without the implied addition of such essen-

[1] I do not read this sentence as containing a direction as to how to use the process. It is merely an indication as to an optional variation in the process. The same statement is made about such things as "fillers" and "colouring agents".

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tial steps, in which event, it would not then be a useful process, or

(*b*) the patented process is regarded as consisting of the described steps plus the implied addition of such essential steps, in which event, the disclosure would not contain a correct and full description of the process nor would it clearly set forth the various steps in the process in such full terms as to enable any person skilled in the art to use it.

If, therefore, the Specification were so written as to describe the process as one exclusively for use with nitro-cellulose, the complete process would either be that actually described, in which event it would not be a useful process because it would be too dangerous to use as a practical matter[1] or the process would be regarded as involving certain essential steps that are not described, in which event there would have been a substantial failure to comply with section 36(1).[2] I cannot read the reference to the possibility of modifying the properties of the thermoplastics as an adequate indication that this is an essential part of the process in the case of nitro-cellulose.

As the Fuller patent would have been bad if it had been restricted to utilizing the process for nitro-cellulose, it cannot, in my view, be valid if, properly construed, it is to be regarded as claiming the process for use with all thermoplastics.[3]

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[1] Counsel for the plaintiff said during argument that "if this patent were directed only to nitro-cellulose, I would have great difficulty in supporting it on the argument and the evidence I am now putting..."

[2] Compare *Baldry v. McBain,* [1936] S.C.R. 120, per Duff C.J. at pages 123-4. There may be lack of compliance with section 36(1) even though the steps omitted are not such as to call for inventive ingenuity. See *King, Brown & Co. v. The Anglo-American Brush Corporation,* (1892) 9 R.P.C. 313, per Lord Watson at page 320, and *Savage v. D. B. Harris & Sons* (1896) 13 R.P.C. 364, per Lindley L.J. at pages 368-9.

[3] "It is well settled that, where the scope of a claim includes some method which is useless, the claim cannot be saved by showing that no skilled person would ever try to use that method." *Minerals Separation North American Corporation v. Noranda Mines Ld.,* (1952) 69 R.P.C. 81, per Lord Reid at page 95. See also *Vidal Dyes Syndicate Ld. v. Levinstein Ld.,* (1912) 29 R.P.C. 245 at pages 271-2, per Fletcher Moulton L.J., where he said:

> The law applicable to such a case forms the subject of a very celebrated decision of Lord Westbury when sitting as Lord Chancellor on appeal from the Vice-Chancellor in the case of *Simpson v. Holliday.* The point of law raised in that case was, to my mind, identical with the contention of the Defendants in the present case.

The Patent in issue in that case was held to describe two processes for obtaining the result, the one with, and the other without, the action of heat. It was admitted that one of them, namely, the cold process, was ineffective, but it was contended that any workman of ordinary knowledge and observation would reject the cold process and adopt the hot. In his judgment the Lord Chancellor said: "When it is said that an error in Specification, which any workman of ordinary skill and experience would perceive and correct, will not vitiate a Patent, it must be understood of errors which appear on the face of the Specification, or the Drawings it refers to, or which would be at once discovered and corrected in following out the instructions given for any process or manufacture; and the reason is, because such errors cannot possibly mislead. But that proposition is not a correct statement of the law, if applied to errors which are discoverable only by experiment and further inquiry. Neither is the proposition true of any erroneous statement in a Specification amounting to a false suggestion, even though the error would be at once observed by a workman possessed of ordinary knowledge of the subject. For example, if a Specification describes several processes, or several combinations of machinery, and affirms that each will produce a certain result, which is the object of the Patent, and some one of the processes or combinations is wholly ineffectual and useless, the Patent will be bad, although the mistake committed by the Patentee may be such as would be at once observed by an ordinary workman. I am of course speaking of cases where that process or machine which is inefficient is the invention or part of the invention that is claimed." An appeal was brought from the Lord Chancellor's judgment to the House of Lords, and the judgment was supported on all points relating to the Patent. Lord Chelmsford, who was Lord Chancellor when the appeal was heard, said:—"It was also said that there was a considerable body of evidence to show that skilled persons, to whom the Specification must be taken to be addressed, found no difficulty in working it out, and applied heat in the process as a matter of course. This, however, cannot have any effect upon the construction of the Specification. It merely proves that the description, though erroneous, is not likely to mislead skilled workmen. That the description may induce the necessity of experiments appears from the evidence of an experienced chemist, who says:—'If I found there was no action without heat, I should heat it immediately.' The construction of the Specification remaining untouched by the evidence, and the Court being informed that the invention which is claimed is incapable of producing the result intended, it had no other course to pursue than to pronounce the Patent to be void." Lord Cranworth, who was the other member of the Court, said as follows:—"There is no doubt in this case as to the construction of the Specification. It specifies two modes of obtaining the mixture which produces the dyes—one with, and the other without, the agency of heat. It was admitted, on the motion before Lord Westbury, and it was also admitted on the hearing of the appeal before your Lordships, that no practical result can be obtained without the heat. This clearly makes the Specification bad. It specifies two processes, whereas only one is practicable. It is no answer to say, as was said at the bar, that any practical workman would know that the cool process was bad, and

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Is the patent then to be regarded as claiming the process for use with all thermoplastics? On the one hand, there is the suggestion from the plaintiff that the Specification should be interpreted as referring only to thermosplastics that are suitable for the manufacture of tubing by dry extrusion after heating or, in any event, should not be interpreted as claiming the process for use with a thermoplastic, such as nitro-cellulose, that no one in the industry would ever think of employing with such a process because of its well known dangerous character. On the other hand, there is the problem of construing the language used in the claims.

The suggestion that the claim must be read so as to exclude nitro-cellulose because it is not suitable for the manufacture of tubing by dry extrusion after heating or because no one in the industry would ever think of employing nitro-cellulose with such a process because of its well known dangerous character, must, upon the authorities, be rejected. See *Vidal Dyes Syndicate Ld.*, (1912) 29 R.P.C. 245, per Fletcher Moulton, at pages 271-2, and *Norton and Gregory Ld. v. Jacobs,* (1937) 54 R.P.C. 271, at pages 276-7, where Greene, M.R., delivering the judgment of the Court of Appeal, said:

> Now if Claim I be read by itself and construed in accordance with the ordinary meaning of the language used, it is apparent that the use of any reducing agent falls within it. The character of the reducing agent to be used is not defined by reference to any particular quality or any particular result. If the matter stood there, the Claim would be unquestionably bad.

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so would adopt the other. It may be that in construing a Specification the Court may sometimes feel justified in understanding the language, not according to its ordinary meaning, but in the mode in which it would be understood by skilled workmen called upon to act according to its direction. But this does not warrant us in giving effect to a Specification claiming two things, one practicable, and the other impracticable, because a skilful workman would know that one of them could not be acted upon, and so would confine himself to the other. This would not be to construe a Specification according to the language of workmen, instead of according to our ordinary language, but to reject something claimed by the Patentee, because a workman would know that it was an impracticable claim." To my mind, this is decisive authority in the present case. Whether or not a skilled chemist would reject the suggestion to use sulphur alone with dinitronaphthols, it is, on the proper construction of the Specification, a part of the invention that is claimed and if, as is admitted, it will not succeed, the Patent is invalid.

But it is said (and this is the substantial part of the Appellants' argument) that the language of the Claim must be construed so as to exclude any reducing agent which a chemist of ordinary skill would know, with or without experiment, to be unsuitable in view of the result to be achieved. We are unable to accept this argument. The fact that a skilled chemist desiring to use the invention would reject certain reducing agents as being unsuitable is one thing; it is quite a different thing to say that a claim must in point of construction be cut down so as to exclude those reducing agents because a skilled chemist would not use them. To adopt the latter proposition would not be to construe the Specification but to amend it, and it would, in our opinion, be mere self-deception to hold otherwise. The duty of a patentee is to formulate his claim in such a way as to define with clarity the area of his monopoly; the claim is the solemn operative part of the Specification in which the patentee sets himself to achieve that purpose, and in construing it, it is of great importance not to lose sight of that fact. It is illegitimate to whittle away clear words in a claim by reading into them glosses and limitations extracted from the body of the Specification whose function is in its essence different from that of the claim. Each part of the document must be construed in the light of the function which is peculiarly its own. In the same way it is in our opinion illegitimate to whittle away the clear words of the claim—selected, as they must be taken to be, with the peculiar function of the claim in mind—by writing into them glosses and limitations based on the fact that a skilled chemist would avoid working in part of the area which the words in their ordinary meaning are wide enough to include. This does not mean that regard is not to be paid to the fact that the claim as well as the body of the specification is addressed to persons skilled in the art and must be construed accordingly. But the argument here goes far beyond this and, under the pretence of construing the claim, in reality seeks to reform it.

In *Henriksen v. Taller Ltd.*[1], Lord Reid, at page 442, summarized the decision in the *Norton & Gregory* case by saying: "The decision was that if a claim represents that any reducing agent can be used, and it turns out that some cannot, the claim cannot be saved because the addressee would know which could and which could not be used and would avoid using those which are ineffective."

I therefore turn to the question whether the claims in the Fuller patent must be taken, upon a fair reading of the words used, as referring to any thermoplastic. The use of the words "in general" in the statement in the disclosure that the invention can be used with any thermoplastic might be taken as qualifying the absoluteness of that statement. However, in the claims, where the things in respect of which "an exclusive property" is being claimed are to be stated "in explicit terms" (section 36(2)), there is no limitation on the thermoplastics with which the process is to be

[1] [1965] R.P.C. 434.

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used.[1] It is fundamental to the statutory scheme that the claims be clearly limited to the inventor's invention. If the claims in fact go beyond the invention the patent is invalid. See *B.V.D. Company Ltd. v. Canadian Celanese Ltd.*[2] Otherwise the patent could be used as a weapon to exclude others from a field in which the patentee has no property. I conclude that the Fuller patent is bad because the Specification claims what is not useful in a patentable sense. Alternatively, it is bad because it has failed to describe the patented process.

Having come to a conclusion that the Fuller patent is invalid on two separate grounds, it is unnecessary for me to deal with the third ground of attack. As, however, I have reached a conclusion on that question, and as my reasons for that conclusion may be of some aid in the event that I am in error in both the conclusions that I have already expressed I shall now set out my reasons for concluding that the third ground of attack is bad.

The third attack made on the validity of the patent is that the disclosure does not meet the requirements of section 36(1) of the *Patent Act* in that the instructions for the working of the patented process leave it to further experiment to determine how to work the process in respect of all applications of the process not covered by the examples

[1] As nearly as I can determine, on the evidence, the history of the matter is that, early in this century, there was a method for dry extruding nitro-cellulose for such things as propellants for artillery shells and, at a later time, it became apparent that by "wet" extrusion (i.e., by extruding it after putting it in solution) nitro-cellulose was more adaptable, "more easy to extrude", so the dry extrusion of nitro-cellulose was abandoned early in this century. On the other hand, methods for dry extruding specific thermoplastics or classes of thermoplastics had been developed or discovered at various times reaching back into the nineteenth century. Nevertheless, the wet extrusion of nitro-cellulose tubing continued as a very important branch of the thermoplastic industry at least until 1962. It is against this background that the Fuller patent comes along and claims the discovery of a method for *dry* extruding *all* thermoplastics. Presumably, other things being equal, there is a utility in "dry" extrusion over "wet" extrusion as there is an elimination of the step of putting the starting substance in solution, and, possibly, of other steps necessary to remove it from solution. Compare the relatively simple Fuller process with the much more complicated Reichel and Craver process. I cannot escape the conclusion that the Fuller patent must be read as claiming the discovery of a relatively simple process for the "dry" extrusion of all thermoplastics, in which the only conditioning required is heating.

[2] [1937] S.C.R. 221 at page 237.

given. This attack is based upon that part of section 36(1) that reads as follows:

> 36. (1) The applicant shall in the specification correctly and fully describe the invention and its operation or use as contemplated by the inventor, and set forth clearly the various steps in a process ... in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most closely connected, to ... use it; ..."

In appraising the validity of this attack, it is necessary to assume that both the other attacks have failed and to have in mind the essential nature of the patented process. It is a process involving many possible variables and is for the production of a product the characteristics of which will obviously vary as the different elements of the process are varied. Such things as

(*a*) the thermoplastic substance with which the process is used,

(*b*) the temperature of the "molten" thermoplastic when extruded,

(*c*) the size (diameter and width of opening) of the die from which it is extruded,

(*d*) the amount of air in the air bubble,

(*e*) the volume, temperature, etc., of the cooling air,

(*f*) the speed of nip rolls,

may be varied, each in relation to all others, and each variation will have a possible effect on the ultimate tubing in, for example, one or more of the following respects, viz.,

(*a*) the width of the flattened tubing,

(*b*) the thickness of the film constituting the tubing, and

(*c*) the tear strength or tensile strength in either direction of the film constituting the tubing.

This is made clear by such parts of the disclosure as the following:

> 1. "The squeeze rolls may be driven at a speed that stretches the tubing while in the plastic formative stage, thus affecting the physical properties of the tubing. Hence, the *peripheral speed* at the squeeze rolls is selected so that, *in combination with other controlled variables of the process,* tubing of predetermined characteristics is obtained."
>
> (The emphasis is mine.)

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2. "The quantity of the gaseous medium . . . is selected so that the extruded tubing, while still in the formative plastic stage, will be expanded to the diameter necessary to produce the predetermined desired flat width when the tubing is flattened by the squeeze rolls. The *expansion of the tubing* also affects the physical properties of the film constituting the tubing and therefore the *other variables in the process are correlated therewith* so as to produce a tubing of predetermined flat width and other predetermined characteristics."

(The emphasis is mine.)

3. "As will hereinafter become more apparent, the desired dimensions and physical properties of the tubing are predetermined and *the variables* in the process are adjusted to produce the desired results."

(The emphasis is mine.)

4. "It is to be noted that in the process hereinbefore generally described, *the internal air pressure, the volume of external air, and the diameter of the die,* are balanced against each other (all the other variables being maintained constant) as is necessary to produce tubing of predetermined characteristics."

(The emphasis is mine.)

5. "The invention provides a method whereby tubing of predetermined desired size and physical characteristics can be obtained by appropriately controlling and regulating the *variables in the process.* Since in most apparatus certain conditions may be maintained constant, the desired results can be obtained if all conditions are maintained constant except *the internal pressure, the volume of the cooling medium and the diameter of the die,* and such variables are balanced against each other while the conditions are maintained constant as is necessary to produce the predetermined desired results."

(The emphasis is mine.)

The defendant says, however, that such directions are not a sufficient compliance with section 36(1); he refers to judicial decisions where it has been said that it is not a sufficient description of an invention if the person who wants to use it must resort to experiment in order to fill in gaps in the description or instructions contained in the

disclosure and he refers to the following passages in the disclosure of the patent in suit:

> 1. "Each thermoplastic substance . . . possess certain properties which may make it necessary to determine, *by experiment*, the extent the variables have to be balanced in order to produce tubing of the desired result."
>
> (The emphasis is mine.)
>
> 2. "Such determination of the necessary conditions can in accordance with the teachings of the instant invention, be determined *by simple experiment*. In general, however, since in any apparatus certain features thereof can be maintained constant, the three variables (internal air pressure, volume of cooling air and diameter of the die) are the most easily varied and controlled."
>
> (The emphasis is mine.)

The answer to the question as to whether this attack succeeds must depend upon whether the defendant has discharged the onus of showing, as a matter of fact, that the instructions contained in the disclosure are *not* sufficient "to enable any person skilled in the art...to use" the patented process. It is improbable that there could ever be instructions as to the use of a new process which would completely eliminate the necessity of all trial and error and, in that sense, all experiment. The question is—Are the instructions sufficient to enable a person skilled in the particular art to use the process or must he refer some aspects back for further work in the laboratory or even for the exercise of inventive ingenuity? In my view, this is a matter upon which the Court requires evidence before it can conclude (unless the instructions are obviously adequate) that the instructions in the disclosure are not sufficient to enable a person skilled in the art to use the process and here there is no evidence upon which any such finding can be made. On the other hand, the principal expert witness for the defendant, upon cross-examination, gave evidence that he had no difficulty in understanding the operation of the procedure in the Fuller process after reading the United States patent which was for all practical purposes identical with the Fuller patent. In any event, if I had to decide the matter on the basis of my own view, unaided by evidence of any person skilled in the art, I

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should have concluded that the instructions are adequate. I should have thought that once a skilled machine operator had been taught as the disclosure teaches the idea that the various variables in the process can be varied in reasonably obvious ways to achieve different characteristics in the product it would become a part of the skill of the operator, which he would develop by experience, to know how to achieve such results. I cannot accept the defendant's submission, which was, in effect, that the inventor must supply the public with a table showing various combinations of variables in the process ("parameters") required to produce various typical products for each of the different thermoplastics. A similar argument was dealt with in a similar manner in *Ernest Scragg & Sons Ltd. v. Leesona Corpn.*[1] per Thorson P., at pages 746 *et seq.*

As, however, I have, on other grounds, reached the conclusion that the Fuller patent is invalid, there will be judgment dismissing the action. Having regard to the request made by counsel for the plaintiff for an opportunity to make submissions concerning costs, I shall not pronounce judgment until counsel for both parties have had such an opportunity. In the light of these reasons, the defendant may bring the matter before me at some time convenient to all concerned by way of a motion for judgment.

APPENDIX A

Each of the attacks on the validity of the Fuller patent involves some consideration and interpretation of the Specification in the patent. I therefore propose, in this Appendix, to examine that document in a general way. I do this for two reasons. First, it is necessary to examine the Specification in a general way so that, when considering a submission that relates to or is based upon a particular portion or portions of the document, such submission may be considered in the light of the part that the particular portion or portions play in the overall scheme of the Specification. Second, I must reach some conclusion as to the meaning of certain of the words and expressions used. For this purpose, I set out hereunder a copy of the Specification excluding all claims except the first.

[1] [1964] Ex. C.R. 649.

SPECIFICATION

BE IT KNOWN that EDWARD D. FULLER, a citizen of the United States of America, whose post office address is 6528 South Whipple Street, Chicago, State of Illinois, United States of America, having made an invention entitled

A METHOD OF MAKING FLATTENED THERMOPLASTIC TUBING OF PREDETERMINED DESIRED CHARACTERISTICS

the following is a full, clear and exact disclosure of the nature of said invention and of the best mode of realizing the advantages thereof.

B This invention relates to tubing and more particularly to a new and improved dry process for producing thin-walled continuous seamless tubing of predetermined characteristics from thermoplastic organic materials.

C An object of this invention is to provide a new and improved dry method of preparing thin-walled continuous seamless tubing from a melt of a thermoplastic organic material.

Another object of this invention is to provide a dry method of preparing thin-walled continuous seamless tubing of predetermined characteristics from a melt of a thermoplastic organic material.

Other and additional objects will become apparent hereinafter.

The objects of this invention are accomplished, in general, by dry extruding a thermoplastic organic material from a melt thereof through an annular die to form a seamless tubing, and, as the tubing is being drawn from the die and while it is in the formative plastic state, inflating the tubing to a predetermined diameter and setting the expanding tubing at approximately the point where said tubing has reached the desired final diameter.

The term "formative plastic state" is used herein to define that state of the plastic wherein the plastic is in the unset or partly set condition and can be permanently enlarged as by stretching.

The drawing of the tubing from the die is obtained by a pair of squeeze rolls which also serve to collapse the inflated tubing into the form of a ribbon, in which condition it is wound up on a wind-up reel. The squeeze rolls may be driven at a speed that stretches the tubing while in the plastic formative stage, thus affecting the physical properties of the tubing. Hence, the peripheral speed of the squeeze rolls is selected so that, in combination with the other controlled variables of the process, tubing of predetermined characteristics is obtained.

D The inflation of the tubing is obtained by a gaseous medium introduced into the interior of the tubing. The inflating medium is entrapped or confined between the nip of the draw rolls and the die through which the molten thermoplastic is extruded. As a result, the inflating medium comprises an isolated gaseous bubble which advances bodily, while remaining substantially constant in quantity, through the successive portions of the tubing withdrawn from the die by the draw rolls. The quantity of the gaseous medium constituting the entrapped or confined inflating medium (isolated bubble) is selected so that the extruded tubing, while still in the formative plastic stage, will be expanded to that diameter necessary to produce the predetermined desired flat width when the tubing is flattened by squeeze rolls. The expansion of the tubing also affects the physical properties of the film constituting the tubing and, therefore, the other variables in the process are correlated therewith so as to produce a tubing of predetermined flat width and other predetermined characteristics.

As will hereinafter be more fully explained, the final diameter of the tubing can be obtained in the vicinity of the die or in the vicinity of the draw rolls. In either embodiment, when the tubing in the formative plastic state has

been expanded to the desired diameter, the thermoplastic is set, i.e. converted to that state which resists and is not further expanded by the isolated gaseous bubble. It is to be noted that the amount of internal air pressure, produced by the isolated gaseous medium and required to stretch the tubing in the formative plastic state, is less than the amount of pressure required to stretch a set tubing. When the tubing is expanded by internal air pressure while in the formative plastic state, the tubing will permanently acquire that diameter to which it has been inflated.

D *Conc.*

In the preferred form of this invention, the tubing is converted from the formative plastic state to the set condition by directing and applying a controlled volume of an external air flow on and around the tubing while in the formative plastic state. The cooling by air of the tubing in the formative plastic state is regulated in accordance with volume and temperature of the air so that the inflation of the tubing while in the formative plastic state can be effected either near the lips of the die or near the draw rolls as desired. The control of the point of inflation of the tubing aids in controlling, within narrow tolerances, the flat width and wall thickness of the finished tubing. It also permits control of the structural characteristics of the tubing (orientation).

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In the manufacture of thermoplastic tubing by the process of this invention, the following dimensions and properties of the finished tubing are capable of variation and can be controlled:

1. Flat width of the tubing;
2. Thickness of the tubing;
3. Machine—direction properties; structural characteristics of the tubing (i.e., tear resistance, tensile strength, etc);
4. Transverse—direction properties; structural characteristics of the tubing (i e , tear resistance, tensile strength, etc).

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As will hereinafter become more apparent, the desired dimensions and physical properties of the tubing are predetermined and the variables in the process are adjusted to produce the desired results.

The process is not restricted to any particular apparatus. It, for example, can be carried out in an apparatus such as that shown in the accompanying drawings, wherein

Figure 1 is a diagrammatic side elevation (with the extruder in partial section) of an apparatus wherein the inflation of the tubing to the desired diameter is obtained in the vicinity of the die; and

Figure 2 is a diagrammatic side elevation of an apparatus similar to that shown in Figure 1, but wherein the inflation of the tubing to the desired diameter is obtained in the vicinity of the squeeze rolls.

Referring now to the drawings wherein like reference numerals disclose like parts, the reference numeral 10 designates an extruder provided at one end thereof with a feed hopper 12 which feeds the selected thermoplastic into the screw chamber 14 of the extruder. An electric vibrator 16 of known construction cooperates with the hopper 12 to accelerate the feed of the thermoplastic material into the extruder. In the screw chamber 14 there is positioned a single-threaded pitch screw 18 which, upon rotation, advances the thermoplastic through the extruder. The screw 18 is rotated in the known manner by means not shown. The extruder is provided with a jacketed chamber 20 through which a heating medium is circulated. The extruder thus far described is one known type of National Thermoplastic Extruders manufactured and sold by the National Rubber Machinery Corporation of Akron, Ohio.

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As the thermoplastic material is fed by the screw 18 through the extruder previously explained, it is molten and in such condition is fed into a 90°

elbow 22 bolted to the head 24 of the extruder. A die 26 is secured in any appropriate manner to the outlet end of the elbow 22 and the molten thermoplastic passes thereinto.

The die 26 is provided with an annular orifice 28 from which the molten mass emerges in the air as a hot gummy-like viscous thermoplastic tubing 30. The die 26 is provided with a central orifice 32 which is connected to an air supply 34 whereby air is introduced interiorly of the tubing to inflate the same. The air supply 34 is provided with a valve, not shown, so that when the desired quantity of air has been introduced within the tubing further supply thereof can be prevented. In the event the quantity of the air decreases, as for example by leakage or otherwise, the requisite quantity of air can be added by proper manipulation of the valve.

The inflated tubing 30 is drawn upwardly and passes interiorly of a helical hollow coil 36, each spiral of which has a multiplicity of predetermined spaced perforations 38 of appropriate size. Cooling air is supplied to the coil 36 from both ends 37 thereof and it passes therefrom through the perforations 38 on to the exterior surface of the tubing. The stream of cooling air serves to chill or set the expanding plastic tube at approximately the point in its upward travel where it has reached the desired final diameter. In general, the tubing reaches its final diameter an inch or so above the final cooling orifice. Thereafter, the tubing which passes through the atmosphere of the room in which the apparatus is located is not subjected to any further expansion during the rest of its travel.

The inflated tubing is drawn from the die 26 in a substantially vertical direction through the cooling coil 36 and thence through the circumambient atmosphere by a pair of rotating squeeze rolls 42 and 44 which also serve to collapse the tubing passing therebetween into a flattened ribbon-like material. The flattened tubing, designated by the reference numeral 46, passes over the roll 44 and is wound up on a wind-up reel 48 driven by a torque motor (not shown). Intermediate the squeeze roll 44 and the wind-up reel 48, guide rolls 50 and 52 serve to direct the flattened tubing 46 from the squeeze roll 44 to the wind-up reel 48.

G
Cont.

The inflating air is introduced in an amount such as is necessary to expand or inflate the tubing while in the formative plastic state to a predetermined desired final diameter. After such a quantity of air has been introduced into the system, the valve controlling further supply is cut off and the air is sealed within the section of the tubing extending between the nip of the squeeze rolls 42 and 44 and the molten thermoplastic in the annular orifice 28. As the molten thermoplastic is extruded from the die orifice in the form of a seamless tubing, it is drawn vertically upwardly by the squeeze rolls 42 and 44. As soon as the molten thermoplastic leaves the die orifice, it is subjected to the inflating medium which expands the tubing to the desired predetermined diameter. While the tubing is being expanded, it is passed interiorly of the spirals of the coil 36 and the cooling medium supplied thereby impinges on substantially the entire exterior surface of the tubing in the formative plastic state exposed thereto. The quantity of the cooling air, the temperature thereof, and the pressure thereof, are such that the thermoplastic material will be converted from the formative plastic state to a set condition at the time when the tubing has been inflated to the predetermined desired diameter and which, in Figure 1, is in the neighborhood of approximately 1 inch above the uppermost spiral of the coil 36.

In Figure 1, the cooling coil 36 is positioned close to the die 26 and the expansion of the tubing while in the formative plastic state to the pre-determined desired diameter is secured quickly. After the final diameter has been obtained, the thermoplastic constituting the tubing being in a set condition, the tubing is not subjected to any further expansion or drawing.

Though it is preferred to secure the expansion of the tubing to the pre-determined desired diameter in the vicinity of the die as previously explained, the invention is not restricted thereto. Alternatively, the expansion of the tubing to the desired final diameter can be obtained anywhere between the face of the die and the nip of the draw rolls, and Figure 2 illustrates an embodiment wherein the tubing is expanded to the predetermined desired final diameter in the vicinity of the squeeze rolls 42 and 44. This is obtained by utilizing such a quantity of air and of such pressure and temperature as will
G partially (surface only) but not wholly cool (set) the extruded tubing. The
Conc. tubing will thus be capable of further expansion even though some cooling has been done. The formative plastic tubing will, all things being equal, tend to expand most easily at its thinnest point. Since the tubing is being drawn by the squeeze rolls 42 and 44, it is also acquiring a machine direction, linear expansion as it is being pulled upwardly, the film becoming thinner and thinner as it is drawn toward the squeeze rolls. The film thus reaches its least (and final) thickness just before contact with the draw rolls. The result is that the air pressure within the formative plastic tube expands the tubing at a point in the vicinity of the squeeze rolls since at that point it is the thinnest.

In carrying out the process of this invention, the selected thermoplastic is introduced into the extruder and the feed screw rotated at a certain speed whereby the thermoplastic in the molten state is extruded through the annular orifice of an appropriately selected die The extruded material which is in the form of seamless tubing is then passed between the nip of the squeeze rolls. Air is introduced into the portion of the tubing extending between the die and nip of the draw rolls in the amount required to inflate the tubing to the desired diameter. This is determined by increasing or decreasing the amount of air as is indicated upon measurement of the flat width of the collapsed tubing. The quantity of the cooling air, depending on the place in the upward path of
H travel of the tubing where the tubing is to be set, is next determined. The amount of cooling air, while it is fairly constant for a particular set of conditions, is subject to change in accordance with changes in the following variables:

1. Speed of upward travel of the extruded tubing;
2. Air temperature of (external) cooling air;
3. Humidity of external cooling air;
4. Room temperature;
5. Temperature of the extruded material;
6. Specific heat of the thermoplastic.

It is to be noted that in the process hereinbefore generally described, the internal air pressure, the volume of external air, and the diameter of the die, are balanced against each other (all the other variables being maintained constant) as is necessary to produce tubing of predetermined characteristics.

The details and manner of practicing the invention will be apparent from the following specific examples, it being understood that these examples, it being understood that these examples are merely illustrative embodiments of the invention and that the scope of the invention is not restricted thereto.

J *EXAMPLE I*

To produce a tubing 8" in flat width and 0.003" in (wall) thickness, whose tensile strength in the machine direction is approximately equal to its tensile strength in the transverse direction, and whose tear resistance in the machine direction is approximately equal to its tear resistance in the transverse direction.

Molten polyethylene was extruded in an apparatus of the type shown in Figure 1 at the rate of 17.5 pounds per hour through a die having an annular orifice of .018" and 2-½" in diameter (between the inner lip thereof), the temperature of the polyethylene at the lips being 270°-290°F. The extruded tubing was withdrawn upwardly in a vertical direction from the die at the rate of 15' per minute by the draw rolls positioned 20" above the die. Sufficient air necessary to inflate the tubing while in the plastic formative state to a final diameter of 5.1" which, upon flattening, will produce a flat width of 8", was introduced interiorly of the tubing through the air inlet 34. When this quantity of air had been introduced, the supply thereof was cut off and the air within the tubing comprised an isolated bubble which was sealed in the tubing between the top of the die and the nip of the squeeze rolls. As soon as the tubing was withdrawn from the die, the gaseous bubble began to inflate the tubing. The tubing was drawn through the zone of action of the cooling coil 36 which was positioned in close proximity to the die so that the air in the lowermost spiral thereof impinged on the tubing when the latter was approximately 1" from the die. A large amount of air at room temperature (26°C), such as at least 122,000 cubic inches per minute, was applied by the coil 36 to the outer circumference of the upwardly advancing tubing at the approximate point in its upward travel where it was desired to set the tubing and thus prevent further expansion. The tubing, which started to expand by reason of the internally applied air as soon as it left the lips of the die, was expanded to its final desired diameter within 9 or 10", or so, of its upward travel, and the stream of external cooling air set the expanding tube at approximately the point in its upward travel where it reached its final diameter.

J *Cont.*

In general, the tubing reached its final diameter an inch or so above the final cooling holes.

After the tubing had passed out of the zone of action of the cooling air, it passed through an unconfined circumambient atmosphere which, in this example, was the atmosphere of a room.

EXAMPLE II

To produce a tubing 8" in flat width and 0.003" in (wall) thickness whose tensile strength in the machine direction is higher than its tensile strength in the transverse direction and whose tear resistance in the transverse direction is greater than its tear resistance in the machine direction.

The procedure and conditions are the same as those described in Example I, except that a smaller amount of room temperature (26°C.) air, such as less than 40,000 cubic inches per minute, was applied by the coil 36 to the outer circumference of the upwardly advancing tubing.

This quantity of air did not wholly set the extruded tubing but only a part (surface only) thereof. Thus, the tubing was still in the formative plastic state and capable of further easy expansion even though some cooling had taken place.

All things being equal, a tubing in the formative plastic state tends to expand at its thinnest point. As the tubing was being drawn by the squeeze rolls, it was acquiring a machine direction linear expansion, the film becoming thinner and thinner as it was drawn upwardly. The film reached its least (and final) thickness just before contact with the draw rolls, at which point the air pressure of the confined bubble expanded the tube to the predetermined desired diameter.

EXAMPLE III

To produce a tubing 8" in flat width and 0.003" in (wall) thickness whose tensile strength in the transverse direction is higher than its tensile strength in the machine direction and whose tear resistance in the machine direction is greater than its tear resistance in the transverse direction.

The procedure and conditions are the same as those described in Example I, except that a die having an annular orifice 0.018" wide and being 1" in diameter (between the inner lips) was utilized.

It is apparent that this procedure is substantially the method of Example I in all particulars except that, due to the utilization of a smaller die, the tubing is expanded to a greater degree whereby the desired properties are obtained.

J *Conc.*

In the examples, the relative humidity of the cooling air was 71% and the air volumes were of free air, i.e. air at atmospheric pressure.

The pressure of the air at the cooling coil affects the volume of air emerging therefrom, and this is used to obtain the volume of cooling air desired. In general, the pressure at the cooling coil is within the range of from 1 to 10 pounds per square inch, gauge pressure. If additional cooling air is desired, the pressure is increased and vice versa. Conventional pressure regulators are used for this purpose. In practice, compressed air is supplied to the cooling coil from a suitable source of supply where it is maintained under a pressure higher than that required at the cooling coil, such as 80 pounds per square inch, gauge pressure, which pressure is reduced and regulated by conventional pressure regulators to supply the air at the cooling coil at the desired pressure.

Though the specific examples describe the invention in connection with the production of seamless tubing of predetermined desired characteristics from polyethylene, it is to be understood that the invention is not restricted thereto. In general, the invention can be utilized with any thermoplastic material and mixture of synthetic rubbers with thermoplastic materials. Each thermoplastic substance or composition possesses certain properties which may make it necessary to determine, by experiment, the extent the variables have to be balanced in order to produce tubing of the desired results. This may be especially so with regard to the quantity of cooling air, since the temperature at the lips of the die may be different with different thermoplastic substances or compositions. Hereinafter, is set forth a list of illustrative thermoplastic materials which can be used in this invention, the temperatures of the melt at the lips of the die being also given:

K

Material	Temperature of melt at lips of die (°F.)
Cellulose acetate	360 – 380
Cellulose acetate butyrate	350 – 360
Ethyl cellulose	400 – 420
Methyl methacrylate polymer	470 – 490
Nylon (extrusion or molding grade)	475 – 525
Polystyrene	470 – 490
Polyvinyl formal—acetate butyral	300 – 340
Copolymers of vinyl chloride and vinyl acetate (Vinylite)	330 – 340
Polyvinyl chloride (Geon)	350 – 370
Copolymers of vinyl chloride and vinylidene chloride (Saran)	360 – 370

Though the results can be obtained when the temperature of the thermoplastic at the lips of the die is as above given, the temperature of the lips can be 85° higher than the melting point of the plastic used but not greater than 525°F.

K

Conc.

The properties of the thermoplastic substance or composition can be modified as by the incorporation therein of suitable modifying agents, such as plasticizers, fillers, coloring agents, heat decomposition inhibitor, anti-oxidant, etc.

In the examples, the cooling coil was positioned about 1" from the face of the die and extended upward for approximately 6" to 7". However, the cooling coil can be positioned as close as possible to the die or spaced therefrom even as much as 3". The total height of the cooling coil or spirals is not restricted to any dimension. The total height is determined by the quantity of cooling air to be supplied, and the quantity of cooling air in turn depends on the specific thermoplastic being extruded.

L

In the examples, the internal air pressure, the volume of the cooling air of any appropriate temperature, and the diameter of the die, were balanced against each other to produce tubing of the predetermined desired characteristics while all the other conditions, such as, for example, screw speed, temperature of extrusion, speed of squeeze rolls, room temperature, width of die orifice, humidity of cooling air, etc, were maintained constant. Obviously, if one or more of the conditions which were maintained constant in the examples were varied, the internal air pressure, the volume of the cooling air and the diameter of the die, would have to be further balanced to compensate for such variations. Such determination of the necessary conditions can, in accordance with the teachings of the instant invention, be determined by simple experiment. In general, however, since in any apparatus certain features thereof can be maintained constant, the three variables (internal air pressure, volume of cooling air and diameter of the die) are the most easily varied and controlled.

M

The invention has been described in connection with an inflating medium consisting of air. Since air is relatively cheap and available, it is preferred. However, any other gaseous medium which does not exert any deleterious effect on the tubing being produced can be used.

N

In the invention as hereinbefore specifically described, air at room temperature constituted the cooling medium. However, the invention is not restricted to such specific room temperature air, since the air can be previously chilled to a temperature lower than room temperature. Likewise, in place of air, either at room temperature or at a temperature lower than room temperature, other gaseous media which do not exert any deleterious effect on the tubing can be utilized. Furthermore, in place of the air cooling coil, some of the other known cooling systems may be utilized.

O

The invention herein described is particularly suitable for the production of thin-walled continuous tubing. Through, as shown by the examples, tubing having a wall thickness of 0.003" can be produced, tubing having a wall thickness as low as 0.0005" and as high as 0.020" or higher has also been produced.

P

Q

In general, the width of the die orifice is not material. It should be of a width to provide the molten material in sufficient amount to produce the predetermined sized tubing.

The diameter of the die between the lips thereof is such that the tubing in the plastic formative stage can be expanded to a diameter of from 2 to 5 time the diameter of the die.

R

Though the method has been herein described in connection with expanding the extruded tubing while in the formative plastic state to a diameter greater than the diameter of the die, the invention is not restricted thereto. The method can be utilized in the production of tubing of predetermined characteristics and of a diameter less than the diameter of the die. This is obtained by increasing the speed of the squeeze rolls and utilizing only sufficient internal air pressure to hold the tubing in the inflated condition at the desired diameter, it being understood, of course, that the tubing in the formative plastic state is subjected to cooling as herein described.

S

In the preferred embodiment of the invention, the tubing is extruded in an upward direction. Though this is the preferred embodiment, the principles of the invention can also be utilized for extruding horizontally or downwardly.

T

The invention provides a method whereby tubing of predetermined desired size and physical characteristics can be obtained by appropriately controlling and regulating the variables in the process. Since in most apparatus certain conditions may be maintained constant, the desired results can be obtained if all conditions are maintained constant except the internal pressure, the volume of the cooling medium and the diameter of the die, and such variables are balanced against each other while the conditions are maintained constant as is necessary to produce the predetermined desired results.

U

Since it is obvious that various changes and modifications may be made in the above description without departing from the nature or spirit thereof, this invention is not restricted thereto except as set forth in the appended claims.

I claim:

1. In a method of producing flattened tubing of predetermined desired characteristics, the steps which comprise continuously dry-extruding a molten thermoplastic in the form of a seamless tubing, continuously withdrawing the tubing from the point of extrusion, flattening the tubing at a point spaced from the point of extrusion, maintaining a substantially constant continuous isolated bubble of a gaseous medium in the section of the tubing extending between the point of extrusion and the point of flattening, the quantity of the gaseous medium constituting said bubble being such as to inflate the tubing while in the formative plastic state to a predetermined desired diameter at a point beyond the point of extrusion, said predetermined diameter being different from that of the tubing at the point of extrusion, and passing the tubing while in the plastic formative state through streams of a cooling gaseous medium in the vicinity of the point of extrusion and impinging circumferentially on said tubing in the plastic formative state to chill the tubing to an extent that when the tubing has been inflated by said bubble to the said predetermined diameter it will be in a set condition, the rate of withdrawing the tubing, the degree of inflation of the tubing and the degree of chilling the tubing all being correlated in accordance with predetermined desired physical characteristics of the tubing.

I have divided the part of the Specification preceding the claims, which part I shall hereafter refer to as "the disclosure", into portions which I have lettered for convenience of reference in my preliminary analysis.

Before attempting to analyze the Specification, it is well to get in mind the provisions of the *Patent Act* that have most to do with determining the contents of that document. For the purposes of the *Patent Act* an "invention" is *inter alia* a new and useful "process". By virtue of section 28(1) an "inventor" of an "invention" that meets certain conditions, on presentation to the Commissioner of Patents of a petition (called "the application"), and on compliance with the other requirements of the Act, may obtain a patent granting to him "an exclusive property in such invention". Section 35 requires that the application contain "the title or name of the invention" and that it be accompanied by "a specification...of the invention". Section 36 contains the statutory directions concerning the Specification. It reads in part:

> 36. (1) The applicant shall in the specification correctly and fully describe the invention and its operation or use as contemplated by the inventor, and set forth clearly the various steps in a process,...in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most closely connected, to...use it;...in the case of a process he shall explain the necessary sequence, if any, of the various steps, so as to distinguish the invention from other inventions; he shall particularly indicate and distinctly claim the part, improvement or combination which he claims as his invention.
>
> (2) The specification shall end with a claim or claims stating distinctly and in explicit terms the things or combinations that the applicant regards as new and in which he claims an exclusive property or privilege.

Section 46 requires that a patent, when granted, shall contain "the title or name of the invention" with "a reference to the specification" and shall grant to the patentee the exclusive right "of...using..." the said "invention".

The following is my analysis of the Specification from a general point of view.

The invention is entitled (A) "Method of Making Flattened Thermoplastic Tubing of Predetermined Desired Characteristics". The invention, being a method of making something, is within the word "process" in the statutory definition of "invention".

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The first paragraph of the disclosure (B) discloses what the "invention" to be described "relates to"—i.e., the subject matter of the "invention". It shows that the subject matter of this patented process is "tubing" and more particularly a new and improved "dry process" for producing "thin-walled continuous seamless tubing of predetermined characteristics from thermoplastic organic materials".

The second, third and fourth paragraphs of the disclosure (C) discuss the "objects" of the "invention", which, as I have already indicated, is a "process". In the first place it is said that it is an object of the invention to provide a new and improved "dry method" of preparing thin-walled continuous seamless tubing "from a 'melt' of a thermoplastic organic material". What is said to be "Another object" is to provide such a method of preparing tubing of that description "of predetermined characteristics" from a "melt". The Specification then tells that "other and additional objects will become apparent hereinafter". What it seems to come to, at least at this stage of the reading of the disclosure, is that the object of the invention is to provide a method of preparing a certain type of continuous tubing from a "melt" of a thermoplastic organic material in such a way as to cause the tubing to have such characteristics as may from time to time be desired.

The next portion of the disclosure (D) consists of five paragraphs that tell how "in general" the objects of the invention are accomplished. The first paragraph of this portion (D) contains an almost cryptic description of the patented process. Each of the remaining four paragraphs of portion (D) expands on different aspects of the information contained in the first paragraph. The five paragraphs taken together, however, constitute no more than a description of the patented process in "general" terms.

The first paragraph of this portion (D) tells that the objects of the invention are achieved "in general"

(*a*) by dry extruding a thermoplastic organic material from a melt thereof through an annular die to form a seamless tubing,

(*b*) as the tubing is being drawn from the die and while it is in the "formative plastic state", inflating the tubing to a predetermined diameter, and

(c) setting the expanding tubing at approximately the point where said tubing has reached the desired final diameter.

The second paragraph defines "formative plastic state", for the purpose of this description, to mean "that state of the plastic wherein the plastic is in the unset or partly set condition and can be permanently enlarged as by stretching."

The third paragraph of this portion (D) explains that the drawing of the tubing from the die is obtained by a pair of "squeeze rolls" which also serve to collapse the inflated tubing into the form of a ribbon so that it can be wound on a reel. It tells that the squeeze rolls may be driven at a speed that stretches the tubing while in "the formative plastic stage", thus affecting the physical properties of the tubing. Hence, it explains, "the peripheral speed of the squeeze rolls" is selected so that "in combination with other controlled variables of the process, tubing of predetermined characteristics is obtained".

The fourth paragraph of this portion (D) discusses the "inflation of the tubing", which, so it says, is obtained by a "gaseous medium introduced into the interior of the tubing". Just how this works is explained by the following part of the paragraph:

> The inflating medium is entrapped or confined between the nip of the draw rolls and the die through which the molten thermo-plastic is extruded. As a result, the inflating medium comprises an isolated gaseous bubble which advances bodily, while remaining substantially constant in quantity, through the successive portions of the tubing withdrawn from the die by the draw rolls.

The paragraph goes on to explain that the quantity of the gas constituting this "isolated bubble" is selected so that the extruded tubing, while still in the formative plastic stage, will be expanded to the diameter necessary to produce "the predetermined desired flat width when the tubing is flattened by the squeeze rolls". In other words, having decided to produce tubing having a certain width when flattened, sufficient gas is inserted in the continuous tubing to produce a bubble of the required diameter. This paragraph ends by explaining that the expansion of the tubing also affects the "physical properties of the film constituting the tubing" and says that, therefore, "the other variables in

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the process are correlated therewith" so as to produce a tubing "of predetermined flat width and other predetermined characteristics".

The fifth and final paragraph of this portion (D) gives some information concerning the "setting" of the tubing. Noting that later in the Specification there will be a fuller explanation, it says that the final diameter of the tubing can be obtained in the vicinity of the die or in the vicinity of the draw rolls. ("Draw rolls" is obviously another name for "squeeze rolls".) Whichever of these alternatives is chosen, when the tubing in the formative state has been expanded to the "desired diameter", it is "set". (That means that it is solidified, that is to say, "converted to that state which resists and is not further expanded by the isolated gaseous bubble".) This paragraph also explains that, "When the tubing is expanded by internal air pressure while in the formative plastic state, the tubing will permanently acquire that diameter to which it has been inflated".

The next portion (E) tells us something about "the preferred form of this invention", which, to me, signifies that what this paragraph talks about is only one possible form of the patented process, but it is the one recommended by the inventor above all other possible forms of it. What it says is that, in "the preferred form" of the process, the tubing is converted from the formative plastic state to the set condition by applying a controlled volume of "an external air flow" on and around the tubing while in the formative plastic state. It tells us further that this "cooling" by air of the tubing in the plastic state is regulated (i.e., as to volume and temperature) so that "the inflation of the tubing while in the formative plastic state can be effected either near the lips of the die or near the draw rolls as desired". It says that controlling the point of inflation aids in controlling the flat width, wall thickness and structural characteristics of the finished tubing.

The next portion (F) details the dimensions and properties of the finished tubing made by the patented process that can be varied and controlled (e.g., flat width, thickness, tear resistance, tensile strength) and tells us that, in the process, having determined what particular dimensions and characteristics are desired in the tubing to be produced, "the variables in the process are adjusted to determine the desired results".

The Specification then tells us (G) that the patented process is not restricted to any particular apparatus and describes a way in which it can be carried out by reference to the drawings that are attached to the Specification.

The next portion of the disclosure (H) indicates some of the variables in the process (e.g., the thermoplastic, the speed of the feed screw in the extruder, the die, the amount of air inside the tube and the quantity of the cooling air) and explains in general terms how to determine the amount of air to put inside the tube and the quantity of cooling air to be applied to the outside of the tube. Having done that, it says that it is to be noted that, "in the process hereinbefore generally described, the internal air pressure, the volume of external air, and the diameter of the die, are balanced against each other (all the other variables being maintained constant) as is necessary to produce tubing of predetermined characteristics".

The next portion of the disclosure (J) describes specific "examples" as being "illustrative embodiments" of the process to indicate the "details and manner of practising" it. All three examples are examples of making tubing from polyethylene. In each of the three examples the tubing made was 8″ in flat width and 0.003″ in thickness. In the first example, the tensile strength in each direction is approximately equal. In the second, the tensile strength in the machine direction is higher than the tensile strength in the transverse direction and in the third the tensile strength in the transverse direction is higher than the tensile strength in the machine direction.

The next portion (K) tells that, while all the examples were related to the production of tubing from polyethylene, the invention is not restricted to that material. It says that, "In general, the invention can be utilized with any thermoplastic material and mixture of synthetic rubbers with thermoplastic materials". It then warns that "Each thermoplastic substance...possesses certain properties which may make it necessary to determine, by experiment, the extent the variables have to be balanced in order to produce tubing of the desired results". It says that this may be especially so with regard to the quantity of cooling air, since the temperature at the lips of the die may be different with different thermoplastic substances and it gives a list of "illustrative thermoplastic materials" which "can be used

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in this invention" with information as to appropriate temperatures of the melt at the lips of the die for each of them. While still on the subject of the use of thermoplastic materials other than polyethylene, this portion (K) tells us that "The properties of the thermoplastic substance...can be modified as by the incorporation therein of suitable modifying agents such as plasticizers, fillers, colouring agents, heat decomposition inhibitor, antioxidant, etc."

The next nine portions of the disclosure each consists of one paragraph and each contains statements describing some aspect of the patented invention. For example,

(1) Portion L deals with the position and size of the cooling coil.

(2) Portion M discusses the way in which the variables in the process may be most easily varied and controlled to obtain the desired results.

(3) Portion N says, in effect, that any gaseous medium that does not adversely affect the tubing may be used in place of air to create the air bubble.

(4) Portion O says that either room temperature or cooled air can be used as the cooling medium and that, in place of the air cooling coil, "some of the other known cooling systems" may be utilized.

(5) Portion T again deals with the controlling and regulating of the variables in the process to get tubing of the desired size and physical characteristics.

(6) The final portion U says that "Since it is obvious that various changes and modifications may be made in the above description without departing from the nature or spirit thereof, this invention is not restricted thereto except as set forth in the appended claims".

That completes my analysis of the disclosure part of the Specification.

As I read the first claim (it has not been seriously contended that, from the point of view of the attacks on validity, there is any relevant difference between the first claim and the other claims upon which the plaintiff relies), it may be set up as follows:

The claim is, in a method of producing flattened tubing of predetermined desired characteristics, the steps which comprise

(1) continuously dry-extruding a molten thermoplastic in the form of a seamless tubing,

(2) continuously withdrawing the tubing from the point of extrusion,

(3) flattening the tubing at a point spaced from the point of extrusion,

(4) maintaining a substantially constant continuous isolated bubble of a gaseous medium in the section of the tubing extending between the point of extrusion and the point of flattening, the quantity of the gaseous medium constituting the bubble being such as to inflate the tubing while in the plastic formative state to a predetermined desired diameter at a point beyond the point of extrusion, and

(5) passing the tubing while in the plastic formative state through streams of a cooling gaseous medium in the vicinity of the point of extrusion and impinging circumferentially on the tubing in the plastic formative state to chill the tubing "to an extent that when the tubing has been inflated by said bubble to the said predetermined diameter it will be in a set condition",

"the rate of withdrawing the tubing, the degree of inflation of the tubing and the degree of chilling the tubing all being correlated in accordance with predetermined desired physical characteristics of the tubing."

That completes my preliminary analysis of the structure of the Specification. The other subject for this Appendix is to consider the sense in which certain words and phrases are used in the Specification. These are

(1) "thermoplastic",

(2) "dry",

(3) "Melt" and "molten",

(4) "squeeze rolls" and "draw rolls",

(5) "set" and "setting".

Much evidence was given as to the meaning of the word "thermoplastic" but there was no controversy as to its meaning. It was common ground that it refers to a certain class of substances each of which has the characteristic that a piece of it is solid at normal temperatures, when heated becomes plastic or malleable so that its shape can be

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changed, and when then cooled becomes solid again, retaining the shape given to it when it was plastic and the further characteristic that such a series of steps may be repeated in respect of the same piece over and over again.

The word "dry", according to the evidence, is used in relation to a substance in this Specification, and other documentary evidence, to indicate that it has not been dissolved in a solvent.

Submissions were made that the words "melt" and "molten" are so used in the Specification as to cause ambiguity and uncertainty. In their dictionary sense, both words refer to a substance that has been converted from a solid to a liquid state. If that is the meaning in which the words are used in the Specification, the instructions in the Specification are nonsensical. In my view, however, when the Specification is read as a whole, it is quite clear that the words are used to indicate a plastic or viscous state of the thermoplastic substance referred to when it has been heated sufficiently to be moulded but before it has been heated sufficiently to be actually liquified. If one first looks at the portion of the disclosure that I have marked "D", it will be seen that the process is described as extruding a thermoplastic material from a "melt" thereof through an annular die to form a tube. Stopping there, if one extruded a liquid through a circular opening, one would not get a "tube" because a liquid does not retain a shape when not in a container. (Consider what happens to water "extruded" from an ordinary lawn hose.) Certainly one does not get a "tube" of the kind contemplated. The description then refers to the "tube" being "drawn" from the die while it is in the "formative plastic state". (The expression "formative plastic state", it will be remembered, is defined by the document to mean that state of the "plastic" wherein the plastic is in the unset or partly set condition and "can be permanently enlarged as by stretching".) Clearly, the description makes no sense unless the word "melt" refers to the material in a plastic and not in a liquid state. Confirmation of this is to be found in portion G of the disclosure where the document, in the course of describing the working of the process by reference to the drawings, says that "The die 26 is provided with an annular orifice 28 from which the molten mass emerges in the air as a hot gummy-like viscous thermoplastic tubing". Confirmation is also to

be found in the evidence of the plaintiff's witness Haines on cross-examination where, speaking of the word "melt", he said, "the term is usually used in the trade" and "it is in a state that it can be formed. It is softer than it was when you put it in the extruder."

"Squeeze rolls" and "draw rolls" are two different expressions meaning the same thing, namely, the pair of contiguous rolls (operating on the same principle as the old-fashioned clothes wringer) into which the tube passes after it is set.

"Set", or "setting", refers to the cooling of the thermoplastic substance from the plastic state to the solid state.

Edmonton
1966
Apr. 26, 27
Apr. 27

BETWEEN:

HARRY GRAVES CURLETT .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Second mortgage loans—Receipt of bonuses and discounts—Whether income—Sale of portfolio of second mortgages—Whether price includes bonuses or discounts—Whether taxable.

Appellant was the controlling shareholder of a financial company which during the years 1958 to 1962 made loans on first mortgages of real property. As the amount of loans was limited by a provincial statute, the appellant, in order to provide the borrowers with additional funds, advanced them his own money on second mortgages, each of which provided for a bonus or discount. In the years 1958 to 1962 appellant received payments on account of such bonuses and discounts.

In 1961 appellant sold all of his second mortgages (having a face value of approximately $300,000) for $111,036, which coincidentally was the amount he had originally advanced on them although payments of $28,896 had been made thereon by the borrowers. The Minister assessed appellant to income tax on $28,896 as being bonus or discount received by him at the time of the sale.

Held, appellant was in the money-lending business until the sale of his second mortgages and the payments received by him on account of bonus or discount were taxable income and not accretions of capital. On the other hand, the $28,896 was part of the price received in a *bona fide* realization sale as a going concern of all the assets of his money-lending business and in consequence was not taxable income.

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Cf. *Ted Davy Finance Co. v. M.N.R.* [1965][1] Ex. C.R. 20: *Dominion Dairies Ltd. v. M.N.R.* [1966] Ex. C.R. 397.

Income tax—Charitable donation—Income Tax Act, s. 27(1)(a)—Payments made to charitable organization for specific purposes—Whether deductible.

In the years 1957 to 1961 appellant paid $3,900 to the Salvation Army to assist certain persons whom he pointed out and the money was used by the Salvation Army for the welfare of those persons although it was under no compulsion or direction from appellant to do so.

Held, appellant was entitled to a deduction of the $3,900 under s. 27(1)(*a*) of the *Income Tax Act* in computing his income for the relevant years.

APPEAL under the *Income Tax Act*.

A. F. Moir, Q.C. for appellant.

T. E. Jackson for respondent.

GIBSON J.:—The appellant appeals from assessments made against him respecting the years 1958 to 1962 inclusive, by which he was made liable for income tax (*a*) on certain bonuses or discounts received in second mortgage transactions during those years; (*b*) on the receipt by him of $28,896.71 in a transaction with Associated Investors of Canada Limited; and (*c*) on certain monies paid out in 1958, 1959 and 1960, which were claimed by him as deductions from income under s. 27(1) of the *Income Tax Act* as charitable donations, but denied as such by the respondent.

During the years 1958 to 1962 the appellant owned the equity shares and controlled Associated Investors of Canada Limited. That company engaged publicly in the business of selling annuities, investments, contracts and pensions, among other things. It received part of its capital to carry on its business from the public. It invested its capital in government bonds and in real estate mortgages to earn its income. In carrying on its business it was subject to certain Province of Alberta legislation. One provision of such legislation prescribed that the maximum loan on the security of a first mortgage on real estate that such a company as Associated Investors of Canada Limited was permitted to make to a borrower could not exceed 60 per cent, (later changed to 66⅔ per cent during the relevant years), of the appraised value of the same.

During those years that company made a very substantial number of first mortgage loans on real estate and, in order to enable the borrowers to borrow substantially greater sums than 60 per cent of appraised value, in each of these transactions the appellant advanced monies on the security of a second mortgage on the same real estate, in each of which mortgages there was provided a substantial bonus or discount in respect to the principal sum payable.

The evidence is that in the respective years the monies representing such bonuses or discounts received by the appellant were as follows: in the year 1958, $2,560,82; in the year 1959, $6,732.31; in the year 1960, $8,084.19; in the year 1961, $4,156.16; and in the year 1962, $1,026.87.

In my view, during these years on this evidence the appellant patently was in the money-lending business and these discounts or bonuses received by him were taxable income and not accretions to capital. (See *Scott v. The Minister of National Revenue*[1].)

In 1961, however, the appellant went completely out of the money-lending business. He sold his whole portfolio of second mortgages to Associated Investors of Canada Limited. The total balance of principal owing on these mortgages in his portfolio at that time was $300,327.60. The sale price for them was $111,036.73. The appellant had actually originally advanced this latter sum on these mortgages, but this sum has no other significance because if all the payments on these mortgages made by the borrowers and received by the appellant up to the date of this sale were deducted from this sum and if nothing was deducted from the bonus or discount account, so to speak, of these mortgages, then there would have still been owing to the appellant at the date of this sale the principal sum of $82,140.02.

The difference between this latter sum and $111,036.73, namely $28,896.71, the respondent submits is a partial realization of the bonus or discount sums incorporated in the said face values of the balance of principal owing on total of these second mortgages at the date of the sale, namely $300,327.60, and is indistinguishable from the discounts or bonuses referred to earlier in these reasons and is therefore taxable income.

[1] [1963] S.C.R. 223.

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On the facts of this case, I am of the opinion that the said sum of $28,896.71 was not a receipt by the appellant of any part of the discounts or bonuses incorporated in the principal sums payable under these said second mortgages. Instead, it was part of the purchase monies received by him in a *bona fide* realization sale to Associated Investors of Canada Limited of all the assets of his substantial money-lending business as a going concern. As a consequence, no part of the sum of $111,036.73 was taxable income of the appellant. (Compare *Ted Davy Finance Company Limited v. The Minister of National Revenue*[1] and *Dominion Dairies Limited v. The Minister of National Revenue*[2].)

The third issue on this appeal concerns payments of $300 in each of the years 1958, 1959 and 1960, and of $3,000 in 1961 made by the appellant to The Salvation Army at Edmonton, Alberta, and claimed by him as deductions from income as charitable donations. On this issue, Major William A. J. Hostey of The Salvation Army, Edmonton, gave evidence. He stated that the appellant had pointed out two cases of persons who were in need of help, and after investigation he was of opinion that their needs were within the concept of the general welfare work of The Salvation Army, that the appellant paid these monies to The Salvation Army to help these persons and that though under no compulsion or no direction from the appellant to do so, The Salvation Army did in fact use these monies for the welfare needs of these persons who were suggested by the appellant. I accept the evidence of Major Hostey and I am of opinion that the appellant in law paid these monies to The Salvation Army and therefore was entitled to deduct these monies in computing his taxable income for the said relevant years, pursuant to s. 27(1) of the *Income Tax Act*.

The appeals therefore are allowed in part. The appellant is entitled to his costs of these appeals.

[1] [1965] 1 Ex. C.R. 20. [2] [1966] Ex. C.R. 397.

Ottawa 1966 Feb. 1

Ottawa Feb. 18

BETWEEN:

E. I. DU PONT DE NEMOURS AND COMPANY and DUPONT OF CANADA LIMITED ..... PLAINTIFFS;

AND

MONTECATINI-SOCIETA GENERALE PER L'INDUSTRIA MINERARIA E CHIMICA ..... DEFENDANT.

Patents—Action to declare a patent invalid or void—Patent Act, s 62—Status of Plaintiffs—Whether "interested persons"—Overlapping claims—No allegation of infringement—Absence of male fide.

The first plaintiff, which owned a Canadian patent, and the second plaintiff, which purchased from the first and sold products manufactured according to such patent's teachings, brought action to declare defendant's patent invalid or void. Defendant moved to dismiss the action on the ground that plaintiffs had no status to maintain the action because they were not "interested persons" within the meaning of s. 62 of the *Patent Act*, R.S.C. 1952, c. 209.

The relevant allegations of the statement of claim were that the first plaintiff was prejudicially affected in that defendant's patent contained claims which included within their scope products which were within the scope of the claims of plaintiff's patent, and that the second plaintiff was prejudicially affected in its trading right and interest in that the subject matter of the two patents overlapped.

Held, dismissing defendant's motion, plaintiffs were "interested persons" within the meaning of s. 62(1) of the *Patent Act* notwithstanding that they did not allege infringement, actual or contemplated, of defendant's patent. The words "interested persons" is s. 62(1) have a wide meaning. There was nothing in the material before the court to indicate *male fide* on the part of plaintiffs in bringing their action. *Bergeron v. DeKermor Electric Heating Co.* [1926] S.C.R. 72 per Duff J. at pp. 74 and 75; *Refrigerating Equipment Ltd. v. Drummond et al.* [1930] Ex. C.R. 154, per Maclean P. at p. 157; *Hall v. B. & W. Inc.* [1952] Ex. C.R. 347, per Thorson P. at pp. 348-9;

Application for Revocation of White's Patent [1957] R.P.C. 405, per Lloyd-Jacob, J. at p. 406; *International Minerals & Chemical Corp. v. Potash Co. of America* (1965) 47 at D.L.R. (2d) 324 per Thorson P. considered.

MOTION by defendant to dismiss or stay plaintiffs' claim.

G. F. Henderson, Q.C. for plaintiffs.

D. G. Wright for defendant.

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GIBSON J.:—This is a motion by the defendant for an Order dismissing the plaintiffs' claim or perpetually staying the same on the ground that the plaintiffs have no status to maintain this action because they are not interested persons with the meaning of s. 62(1) of the *Patent Act*, R.S.C. 1952, c. 209 as amended, or in the alternative for an Order striking out the amended Statement of Claim; or in the alternative for an Order requiring the plaintiffs to furnish further particulars; and for other relief.

Section 62(1) of the *Patent Act* reads as follows:

62. (1) A patent or any claim in a patent may be declared invalid or void by the Exchequer Court at the instance of the Attorney General of Canada or at the instance of any interested person.

The Statement of Claim of the plaintiffs has been amended three times. It was originally filed on February 8, 1962; it was amended by praecipe April 20, 1965; it was further amended pursuant to an Order dated September 10, 1965; and it was amended again October 26, 1965 pursuant to an Order of the same date.

The relevant paragraphs of the Statement of Claim are paragraphs 4a, 4b, 4c and 4d. They read as follows:

4a. The Plaintiff, E. I. Du Pont de Nemours and Company, is the owner of Canadian Patent 573,755 issued 7th April, 1959 entitled "Interpolymers of Olefins and Non-Conjugated Diene Hydrocarbons".

4b. The Plaintiff, E. I. Du Pont de Nemours and Company's rights under its Canadian Patent 573,755 are prejudicially affected by reason that Canadian Patent 680,494 in suit contains claims which include within their scope products included within the scope of the claims of the Plaintiff's Canadian Patent 573,755.

4c. The Plaintiff, Dupont of Canada Limited, sells throughout Canada elastomeric polymers manufactured from olefins and non-conjugated dienes by the Plaintiff, E I. Du Pont de Nemours and Company, according to the teaching of Canadian Patent 573,755 and United States Patent 2,933,480 of E. I. Du Pont de Nemours and Company.

4d. The subject matter claimed in Canadian Letters Patent 680,494 to Montecatini overlaps the subject matter claimed in United States Patent 2,933,480 and Canadian Patent 573,755 of E. I. Du Pont de Nemours and Company and prejudicially affects the trading right and trading interest of Dupont of Canada Limited in Canada.

The defendant demanded further particulars of this pleading on November 8, 1964 as follows:

1. Particulars of in what respects, if any, the rights of the plaintiff, E. I. Du Pont de Nemours and Company are prejudicially affected by reason that Canadian Patent 680,494 in suit, contains claims which include within their scope products included within the scope of the claims of the said plaintiff's Canadian Patent 573,755 as alleged in paragraph 4b of the said amended statement of claim.

2. Particulars of the trading right and trading interest of Dupont of Canada Limited in Canada referred to in paragraph 4d of the said amended statement of claim.

3. Particulars of in what respects, if any, the said trading right and trading interest of Dupont of Canada Limited in Canada is prejudicially affected by reason that the subject matter claimed in Canadian Letters Patent 680,494 overlaps the subject matter claimed in United States Patent 2,933,480 and Canadian Patent 573,755 as alleged in paragraph 4d of the amended statement of claim.

The plaintiffs replied to this demand of particulars on December 7, 1965 as follows:

1. In response to the demand made under paragraph 2 the Plaintiff, Du Pont of Canada Limited says that Du Pont of Canada Limited purchases from E.I. Du Pont de Nemours and Company elastomeric polymers manufactured from olefins and non-conjugated dienes in accordance with the teachings of Canadian Patent 573,755 and United States Patent 2,933,480 of E.I. Du Pont de Nemours and Company and Du Pont of Canada Limited sells said elastomeric polymers throughout Canada.

2. In response to the demand made under paragraph 3 the Plaintiff, Du Pont of Canada Limited says that Du Pont of Canada Limited does not have freedom to manufacture use or sell all of the products taught or claimed within the full scope of Canadian Patent 573,755 and United States Patent 2,933,480 in the face of the Defendant's Canadian Patent.

Counsel for the plaintiffs takes the position that the pleadings and particulars of the plaintiffs as they now stand are adequate pleadings to qualify the plaintiffs as interested persons within the meaning of s. 62(1) of the *Patent Act* so as to entitle them to maintain this action to declare invalid or void the defendant's patent.

The defendant submits that the plaintiffs are not interested persons within the meaning of s. 62(1) of the *Patent Act*; that since the plaintiffs do not plead that any act either of manufacture or sale that they do or that they contemplate or propose to do will infringe the patent of the defendant, that at the present time there is no real issue raised by the Statement of Claim but only a hypothetical one, and the Court should refuse to hear a case based on a hypothetical question in accordance with the usual practice of the Court; that the plaintiffs' plea that the defendant's patent overlaps their patent also does not give them the status to maintain this action because every improvement on a patented invention overlaps the original invention in respect of which the former is an improvement. (See in reference thereto s. 34 of the *Patent Act*).

In brief, the defendant says that the plaintiffs have not established any interest sufficient to maintain an action and

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the plaintiffs must spell out in detail the particular interest they have in getting rid of the defendant's patent, and until they do so they have not the status of interested persons.

The plaintiffs submit that you do not have to admit you infringe to be an "interested person" within the meaning of s. 62(1) of the *Patent Act*; where one is not able to sell all the products he desires then such a person has a trading and manufacturing interest which is sufficient for the purpose of s. 62(1); and where a patent cannot be exploited fully because of the presence of a subsequent patent, that is a sufficient interest to give status to qualify as such "an interested person".

In my opinion the words "interested person" in s. 62(1) of the *Patent Act* have a wide meaning.

In *Bergeron v. De Kermor Electric Heating Co.*[1] at pages 74 and 75, Duff J. (as he then was), in defining these words in reference to the facts of that case said:

> . . .At the time of the trial, it is unquestioned that the appellant had a status to impeach the respondent company's patent, in virtue of the patent granted after the commencement of the action. . . .The appellant, admittedly, is and was when the action was commenced, *engaged in the design and manufacture of electric steam generators or water heaters,* and a trader in articles similar to the alleged invention which is the subject of the patents attacked. It is not suggested, and could not be suggested, in face of the correspondence in evidence, that the application (which, as already mentioned, had been granted before the trial) was a merely frivolous one or that it was presented *male fide* for the purpose of acquiring a colourable standing to impugn the respondent company's patent. Indisputably, the existence of the patents attacked was calculated directly to affect the appellant prejudicially in his business as a manufacturer and trader, and both in the prosecution of his application and in respect of the protection to be afforded him by his patent if his application for a patent should be successful. In these circumstances, there seems little room for doubt that the appellant possessed a sufficient "interest", within the meaning of rule 16, to qualify him to maintain the action, and the appeal should therefore be allowed. . .

In *Refrigerating Equipment Ltd. v. Drummond et al.*[2] at page 157, Maclean P. said:

> At the trial, the defendants urged that the plaintiff was without status to institute these proceedings. It will be convenient here to dispose of this point. By sec. 25 of the Exchequer Court Act, the Exchequer Court has jurisdiction, in actions to impeach or annul a patent; and by rule 16 of the Exchequer Court Rules, such action may be instituted by a statement of claim filed by any person interested. I think the plaintiff is a party interested. It is pleaded and not denied, that the plaintiff and the

[1] [1926] S.C.R. 72.

[2] [1930] Ex. C.R. 154.

defendants are manufacturing and selling to the public, what is practically the same thing, refrigerating apparatuses. If, as the plaintiff alleges, Canadian Folger was described in the three United States Folger patents, and other publications, more than two years prior to the application for letters patent for Folger in Canada, then Canadian Folger is invalid; and if the plaintiff believes it to be invalid, then, in the circumstances of this case, it is a person interested. Where an individual is using an invention, in respect of which another person claims to have a patent, which the unlicensed user believes to be invalid; or where a person is desirous of using anything described in a patent, but which patent he has reason to believe is void, then he has such an interest as to qualify him to initiate proceedings to annul such letters patent. I think therefore that the plaintiff is possessed of sufficient interest to qualify it to institute this action.

In *Hall v. B. & W. Inc.*[1] at pages 348 and 349 Thorson P. said:

The United States action, which has been pending for several years, involves the interpretation and construction of a contract, dated September 15, 1944, between Jesse E. Hall and Kenneth A. Wright and also the question of the rights of the parties to the inventions of Hall and Wright in foreign countries and to file applications for patents in foreign countries and one of the grounds stated in the notice of motion for the stay was that the present action involves in many respects a duplication of the determination of rights which are now in process of determination before the United States District Court and that such action may result in it appearing that the plainiff in the present action has no rights in the inventions and applications referred to in the statement of claim and is therefore not an interested party within the meaning of section 60 (1) of the The Patent Act, in which case it would not have the necessary status to bring the action. I am satisfied that there is no substance in this submission and that the plaintiff is sufficiently "interested" to enable it to sue. It is not necessary that it should be entitled to the invention or application claimed by it. It is enough to show, as it has sufficiently done by the affidavit of Thomas E. Schofield, that it was engaged in dealing with the same kind of thing as the defendant and was in competition with it. It would not matter, therefore, whether the United States District Court action might result in some one other than the plaintiff being found entitled to the invention and application claimed by it: vide *Bergeron v. The De Kermor Electric Heating Co. Ltd.; Refrigerating Equipment Ltd. v. Waltham System Incorp.*

In *Application for Revocation of White's Patent*[2] at page 406, Lloyd-Jacob J. said in reference to the English statutory words:

Sub-para. (2), with its further sub-divisions, is in effect a request for particulars as to the nature of the manufacture carried out by the Petitioners and as to whether or not that is alleged to be an infringement of the patent. I think that request proceeds upon an erroneous belief that a mere allegation of a trading interest within the general field covered by the Letters Patent is not sufficient. I know of no authority which would justify me in proceeding upon the basis that only an admitted infringer

[1] [1952] Ex. C.R. 347.
[2] [1957] R.P.C. 405.

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can in fact petition, either in the sense that he is already engaged in a manufacture which constitutes an infringement, or alternatively that he is anxious to embark upon a manufacture which constitutes infringement. Indeed, it is plain that the right to petition for revocation is not limited to actual or potential infringers, because the grave embarrassment that would be caused to trade and industry by the presence of a Patent subsisting is clear enough, most particularly in cases where the document is so ambiguous that it is quite impossible for anybody, including the Court, to tell whether or not a manufacture carried on by a petitioner is or is not an infringement. Accordingly, I take the view that I am not entitled to impose upon an unwilling party the obligation to deliver the particulars therein referred to.

In support of the view that the words "interested person" have a wide meaning it is inducive to note that the Supreme Court of Canada in *International Minerals & Chemical Corp. v. Potash Company of America*[1] upheld a decision of Thorson P. that a third party be admitted to conflict proceedings under s. 45(8)(*b*), as such third party had sufficient interest to give him the status to be a proper party to the proceedings in that if the Court in those proceedings should grant to one of the parties to the conflict the exclusive right to use the process which the intervening third party had been using for years it would "affect the legal right" of the intervening third party "to continue to carry on its business". Cartwright J. at pages 330-31 put the matter this way:

> The second argument of the appellant is that the order under appeal is outside the jurisdiction to add parties conferred on the Exchequer Court by the applicable Rules of Practice. By virtue of R. 42 of the Exchequer Court Rules the practice as to adding parties is governed by Rule 11 of Order 16 of the Rules of the Supreme Court of Judicature in England, which reads as follows:
>
> > "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned,

[1] (1965) 47 D.L.R. (2d) 324

> or in such manner as may be prescribed by any special Order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

In support of this argument the appellant relies chiefly on the judgment of Devlin, J., as he then was, in *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357, in which the construction and scope of O. 16, r. 11 are fully considered.

After quoting the Rule Devlin, J., says that there are two views about its scope and that authority can be cited for both. One, the wider, is that the Rule gives a wide power to the Court to join any party who has a claim which relates to the subject-matter of the action; the other, and narrower, is that the power given by the Rule is hedged about with limitations which are to be found in the decided cases and which do not merely set out principles on which the Court's discretion should be exercised but place limits on its jurisdiction. At p. 363 of the report Devlin, J., quotes, as an accurate statement of the narrower view of the application of the Rule, the following portion of a note in the White Book (1955 ed., p. 232):

> "Generally in common law and Chancery matters a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue... Generally speaking, intervention can only be insisted upon in three classes of case, namely: (A) In a representative action where the intervener is one of a class whom plaintiff claims to represent, but who denies that the plaintiff does in fact represent him; (B) Where the proprietary rights of the intervener are directly affected by the proceedings, and (C) In actions claiming the specific performance of contracts where third persons have an interest in the question of the manner in which the contract should be performed."

After an elaborate review of the relevant authorities Devlin, J., expresses the view that the narrower construction of the Rule should be adopted. To decide whether a particular case falls within class (B) in the passage from the White Book, quoted above, Devlin, J., proposes the following test p. 386: "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?" On the material before him in the *Amon* case Devlin, J., held that this question should be answered in the affirmative and accordingly allowed the intervention.

In order to decide the present appeal I do not find it necessary to choose between the wider and the narrower view as to the scope of the Rule and I refrain from doing so. On the material before us I am satisfied that in this case the question formulated by Devlin, J., should be answered in the affirmative. The order for which Duval is asking in the action is that it be declared that it is entitled to the issue of a patent which, if granted, will confer upon it the exclusive right of using the flotation process which PCA has been using for years and proposes to use in the development of its deposits of potash ores in Saskatchewan. The order sought would, in my opinion, affect the legal right of PCA to continue to carry on its business. It is true that if the intervention were not allowed the question of the validity of any patent to which Duval might be declared entitled would not as against PCA be *res judicata* and

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could be put in question under either s. 61 or s. 62 of the *Patent Act*, but until the patent was successfully impeached the right of PCA set out above would be affected. To allow the present action to proceed to judgment without the intervention of PCA, leaving it to its rights under the sections mentioned, would be to countenance the multiplicity of proceedings which it was one of the objects of the Rule to avoid.

There is nothing in the material filed on this motion from which it could be inferred that the plaintiffs commenced and are carrying on this lawsuit *male fide* for any reason, and specifically not for example as was indirectly suggested in argument, for the purpose of causing the defendant to lose its patent by default because the defendant did not wish to engage for any reason of its own in a costly lawsuit. What precisely is the plaintiffs' purpose in carrying on this lawsuit is not immediately apparent on the face of the proceedings to date in this matter. But this circumstance does not affect the issue to be determined on this motion.

In the result, therefore, I am of the opinion that on the present state of the pleadings the plaintiffs have the status to maintain this action as interested persons within the meaning of s. 62(1) of the *Patent Act*.

The motion is dismissed with costs.

Vancouver 1966 Apr. 26 Apr. 29

BETWEEN:

ROBERT M. RANDALL .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Income tax—Managing horse race meetings in U.S.A.—Whether "business" or "employment"—Whether living and travelling expenses deductible—Income Tax Act, ss. 12(1)(a), 12(1)(h), 139(1)(e).

Appellant, a resident of North Vancouver, entered into a contract to manage the business of a company which carried on horse race meetings in Portland, Oregon in return for a share of the profits and reasonable expenses. In 1958 he declared income therefrom of over $17,000 but sought to deduct the sum of $5,241 as his expenses in travelling from Vancouver to Portland and his living expenses there. The Minister would allow only $1,200 of the amount claimed.

Held, while the provision of services under the contract was a "business" and not an "employment" within the meaning of s. 139(1)(e) of the *Income Tax Act*, the expenses claimed did not arise in the perfor-

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mance of the contract but were purely personal and therefore barred from deduction by s. 12(1)(*a*) as not being incurred "for the purpose of gaining income from a business". Further, the expenses in question although incurred away from appellant's home were not deductible under s. 12(1)(*h*): that enactment required that they also be incurred "in the course of carrying on his business".

Samson v. M.N.R. [1943] Ex. C.R. 17, per Thorson P. at p. 32; *Royal Trust Co. v. M.N.R.* [1957] 9 D.L.R. (2d) 28, per Thorson P. at p. 39; *Mahaffy v. M.N.R.* [1946] S.C.R. 450, per Rinfret C.J. at p. 453, applied.

APPEAL from decision of Tax Appeal Board.

David A. Freeman for appellant.

Bruce Verchere for respondent.

SHEPPARD D.J.:—This appeal is from the judgment of the Tax Appeal Board affirming the disallowance by the Minister of National Revenue from the 1958 return of travelling and living expenses of the appellant.

On the 20th March, 1957, the appellant who resides in North Vancouver and his brother, John Garfield Randall, entered into an agreement with the Portland Turf Association, an incorporated company, to manage the business affairs and transactions of the Association arising out of the horse race meetings at Portland, Oregon, for a share of the profits and reasonable expenses (Ex. A3). In 1958 the appellant declared an income therefrom of $17,626.71 and claimed to deduct the sum of $5,241.53 as his expenses in travelling from Vancouver, B.C. to Portland, Oregon and his living expenses at Portland while attending race meetings. The Minister of National Revenue allowed him $1,200.00 but disallowed the remainer. An appeal by the appellant was dismissed by the Tax Appeal Board and the appellant now contends that those expenses should be allowed under Section 12(1)(*h*) of the *Income Tax Act*.

That contention of the appellant raises the questions:

(1) whether the allowance of those expenses has been excluded by Section 12(1)(*a*) and,

(2) if not so excluded whether the deduction of the expenses is allowed elsewhere: *Royal Trust Co. v. Minister of National Revenue*[1].

Here the appellant contends that the deduction is authorized by section 12(1)(*h*).

[1] (1957) 9 D.L.R. (2d) 28.

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The first question is whether the appellant was in "business": both sections 12(1)(*a*) and 12(1)(*h*) require that. The appellant and his brother as officers of a company, were associated in conducting racing in Exhibition Park, Vancouver and at Sandown Park, Vancouver Island. Under the agreement of the 20th March, 1957 (Ex. A3) the appellant and his brother jointly undertook to provide their experienced services for which the Association promised to pay them jointly the agreed amounts. The providing those services by the appellant and his brother is a business within the definition thereof in *Maurice Samson v. Minister of National Revenue*[1] where the President at page 32 said:

> It has, of course, a more extensive meaning than that which is given to the word "trade". In *Smith v. Anderson* (1880) 15 Ch. D. 247 at 258, Jessel M.R., after citing certain dictionary definitions of "business", said
>
> > "Anything which occupies the time and attention and labour of a man for the purpose of profit is business."
>
> and in *Erichson v. Last* (1881) 4 Tax. Cases, 422 at 427, Cotton L.J said:
>
> > "When a person habitually does a thing which is capable of producing a profit for the purpose of producing a profit, he is carrying on a trade or business."
>
> The definition of the word "business" in *Smith v. Anderson* (*supra*) was approved and adopted by Osler J. in *Rideau Club v. City of Ottawa* (1908) 15 O.L.R. 118 at 122 and by Godfrey J. in *Shaw v. McNay* [1939] O.R. 368 at 371 where the word "business" was also described as "a word of large and indefinite import".

and the appellant was therefore within the statutory meaning of business in section 139(1)(*e*) unless excluded as "an office or employment".

It is not contended that the agreement (Ex. A3) creates an office, it is contended that the agreement is an "employment" by the Association and that the appellant was a servant or agent of the Association and therefore not engaged in business within section 139(1)(*e*). The relationship of the appellant to the Association was not that of master and servant as the Association had not that requisite control: *Bain v. Central Vermont Railway Co.*[2] The agreement (Ex. A3) exceeds the relationship of principal and agent but in any event that relationship does not preclude the agent being engaged in carrying on a business as may be seen in the case of factors, real estate agents and partnerships. Here the joint services of the appellant and his brother pursuant to a promise to pay them jointly has

[1] [1943] Ex. C.R. 17.

[2] [1921] 2 A.C. 412; 25 Halsbury (3rd Ed.) p. 447.

set up a joint fund. That appears to be a partnership but in any event is "a business" within section 12(1)(*a*) and "carrying on business" within section 12(1)(*h*).

The further question is whether the deduction of the expenses has been excluded by section 12(1)(*a*) which reads as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

In *Royal Trust Co. v. Minister of National Revenue, supra,* at page 39 the President said:

> The essential limitation in the exception expressed in s. 12(1)(*a*) is that the outlay or expense should have been made by the taxpayer "for the purpose" of gaining or producing income "from the business". It is the purpose of the outlay or expense that is emphasized but the purpose must be that of gaining or producing income "from the business" in which the taxpayer is engaged.

The obligation of the appellant under the agreement (Ex. A3) was to:

> Manage the business affairs and transactions of the Association arising out of the conducting and holding of horse race meetings...and will devote such time, labour skill and attention to such employment as may be necessary.

Hence the appellant's travelling to Portland, Oregon and his expenses of living there were not the performance of any undertaking in the agreement but on the contrary, were purely personal to him and outside the agreement. It follows that such expenses not being the performance by him of any undertaking in the agreement, were not "for the purpose of gaining or producing income from the business". Therefore their deduction was precluded by section 12(1)(*a*).

The expenses were not a deduction authorized by section 12(1)(*h*) which reads as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*h*) personal or living expenses of the taxpayer except travelling expenses (including the entire amount expended for meals and lodging) incurred by the taxpayer while away from home in the course of carrying on his business,

The appellant contends that the words "in the course of carrying on his business" should be taken to modify the nearest antecedent, that is "away from home". Therefore

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that these were personal or living expenses of the taxpayer while away from home in the course of carrying on his business at Portland and therefore should be allowed. However, the construction contended for by the appellant would be unreasonable as authorizing personal or living expenses however extravagant, provided always that the taxpayer was away from home and in the course of carrying on his business. Such construction is contrary to the "rule of construction of taxing statutes". *Rex and Provincial Treasurer of Alberta v. C.N.R.*[1] The words "in the course of carrying on his business" (section 12(1)(*h*)) must be read as modifying "incurred", and such construction has been adopted in statutes in *pari materia*. In the *Bahamas General Trust Company et al v. The Provincial Treasurer of Alberta*[2], the question was whether the expenses of an officer travelling from the Orient, where he was on holiday, to Montreal to attend a director's meeting were deductible under Section 5 which reads:

5. (1) "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions.

* * *

(*f*) Travelling expenses, including the entire amount expended for meals and lodging, while away from home in the pursuit of a trade or business.

There O'Connor J. at page 53 said:

Then were the expenses here "expended...while away from home in the pursuit of a trade or business?" I hold they were not. James Ramsey was not away from Edmonton in pursuit of his trade or business as a director of the C.N.R. In my view, the section refers to expenses such as those of a commercial traveller.

In *Mahaffy v. The Minister of National Revenue*[3] the question was whether a member of the Legislative Assembly of Alberta was entitled to his travelling and living expenses in attending the Legislature, under section 5(1)(*f*) of the *Income War Tax Act* which read:

5. (1) "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

* * *

(*f*) Travelling expenses, including the entire amount expended for meals and lodging, while away from home in the pursuit of a trade or business;

[1] [1921] 1 W.W.R. 1178, affirmed [1923] A.C. 714.
[2] [1942] 1 W.W.R. 46.
[3] [1946] S.C.R. 450.

Rinfret C.J. in delivering the judgment of the majority said at p. 453:

> The occupation of Members of Provincial Legislative Councils and Assemblies is neither a trade nor a business. The travelling expenses there mentioned are in the nature, for example, of expenses of commercial travellers. *Bahamas General Trust Company et al. v. Provincial Treasurer of Alberta* [1942] 1 W.W.R. 46, at 53; *Ricketts v. Colquhoun* [1925] 1 K.B. 725, at 731 approved in the judgment of Lord Blanesburgh in the House of Lords in the same case [1926] A C. 8.
>
> In our view, this is sufficient to eliminate subsection (*f*) of paragraph (1) of section (5) of the Act as supporting the appellant's contention.

and Rand J. said at p. 455:

> The question is whether the items deducted are travelling expenses "in the pursuit of a trade or business"; or
>
> "disbursement or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income."
>
> and in my opinion they are neither. Whether or not attending a session of a Legislative Assembly can be deemed "business" which I think extremely doubtful, certainly making the extra trips and lodging in a hotel in Edmonton cannot be looked upon as "in the pursuit" of it. That expression had been judicially interpreted to mean "in the process of earning" the income: *Minister of National Revenue v. Dominion Natural Gas Co.* [1941] S.C.R. 19. The sessional allowance is specifically for attendance by members at the legislative proceedings: it has no relation to any time or place or activity outside of that. The "pursuit" of a business contemplates only the time and place which embrace the range of those activities. To treat the travelling expenses here as within that range would enable employees generally who must, in a practical sense, take a street car or bus or train to reach their work to claim these daily expenses as deductions. Employees are paid for what they do while "at work"; and the legislators receive the allowance for their participation in the sessional deliberations: up to those boundaries, each class is on its own.

It follows that the words of section 12(1)(*h*) "in the course of carrying on his business" must be taken to modify "incurred" and hence require that the expenditure be "incurred by the taxpayer in the course of carrying on his business", and therefore exclude a deduction of the expenses in question which are not "in the process of earning the income" as not a performance of any undertaking in the agreement. The Tax Appeal Board has properly excluded like expenses in *George Frederick Drewry v. The Minister of National Revenue*[1] as excluded by section 12(1)(*a*) and also in *Edna Simmons Hersey v. The Minister of National Revenue*[2] as excluded by section 12(1)(*a*) and also by section 12(1)(*h*).

This appeal is dismissed.

[1] (1952) 7 Tax A.B.C. 248.

[2] (1954) 9 Tax A B.C. 380

Montreal 1966 May 5, 6 May 6

BETWEEN:

CANADA STEAMSHIP LINES LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Repairs to ship—Whether current expense or capital outlay—Replacement of damaged floors and walls of holds—Replacement of boilers—Income Tax Act, s. 12(1)(b).

Jurisdiction—Desirability of consistency of decisions of court—Stare decisis not applicable.

The replacement of damaged boards and plates in the floors and walls of the holds of appellants' ships *held* to be a repair and the cost thereof a current expense, and not a capital outlay merely because the replacements required were extensive and their cost substantial.

While a ship's boiler might be regarded as an integral part of a capital asset, to wit the ship, rather than a distinct capital asset in itself, and the cost of its replacement therefore a current expense, *held*, in view of *contra* decisions of this court and the desirability that the decisions of the court be consistent, the cost of replacing the boiler was a capital outlay.

Thompson Construction (Chemong) Ltd. v. M.N.R. [1957] Ex. C.R. 96; *M.N.R. v. Vancouver Tug Boat Co. Ltd.* [1957] Ex. C.R. 160, followed.

APPEAL under *Income Tax Act*.

Charles Gavsie, Q.C. and *J. Claude Couture, Q.C.* for appellant.

P. R. D. MacKell and *Paul Boivin, Q.C.* for respondent.

JACKETT P.:—These appeals are from the assessments of the appellant under the *Income Tax Act* for the 1956 and 1957 taxation years. The only question to be decided in the appeals is whether certain expenditures made during the years in question on ships operated by the appellant in the course of its business of operating ships for the transportation of goods are outlays of capital the deduction of which, as such, is prohibited by section 12(1)(*b*) of the *Income Tax Act* or are expenditures for the repair of capital assets used in the business which are deductible in the computation of profit from the business in accordance with ordinary business or commercial principles and the deduction of which is not prohibited by section 12(1)(*b*).

The expenditures fall into two classes:

(*a*) the expense of replacing what are, in effect, floors and walls of cargo-carrying holds in certain ships and of incidental work in respect of the apparatus or members whereby such floors and walls were joined to the outside surface or "skin" of the ship—such work having been made necessary by the wear and tear arising out of the loading, carrying and unloading of cargoes; and

(*b*) the expense incurred in the replacement of boilers in one of the ships.

So far as the first class of expenditures is concerned, I do not, myself, have much difficulty in reaching the conclusion that these expenditures are deductible. In effect, the ship has a double bottom—an outside layer and an inside layer separated by appropriate structural members. If one or more plates constituting a part of the outside layer require to be replaced because they have been stove in or otherwise damaged, so long as the damage is not so extensive that the ship must be regarded as having been virtually destroyed and as having, in effect, ceased, from a businessman's point of view, to exist as a ship, their replacement is, I should have thought, the most typical kind of ship repair. Where the inside layer of the ship's bottom, which also serves as the floor for the ship's cargo-carrying holds, has to be replaced, in whole or in part, by reason of wear and tear and of damage caused by the cargo carried in the ship, it seems clear to me that the expense falls in the same class as the expenses of replacement of portions of the outside skin. So long as the ship survives as a ship and damaged plates are being replaced by sound plates, I have no doubt that the ship is being repaired and it is a deductible current expense. (I exclude, of course, a possible replacement by something so different in kind from the thing replaced that it constitutes a change in the character—an upgrading—of the thing upon which the money is expended instead of being a mere repair.)

What I have said with reference to the replacement of all or part of the floors of the holds, which serve as the inner layer of the ship's bottom, applies in principle to the walls of the holds which are related to the sides of the ship in the same way as the floors of the hold are related to the ship's bottom.

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The Minister's argument against the conclusion that I have just expressed may, as I understand it, be summarized as follows: The expenditures are in respect of the replacement of a substantial part of the ship's holds, which are of "signal" importance in the operation of a cargo-carrying ship, and the cost of the replacement is substantial when compared with the value of the ship and the cost of repairs done to the ship in other years; such expenditures should, therefore, be regarded as being for capital repairs or renewals and not as being for current repairs. I have tried unsuccessfully to appreciate the full significance of the Minister's submission. I have not, however, been able to escape the conclusion that a replacement of a worn or damaged board or plate that is an integral part of an asset used in a business is a repair and that the costs of repairs are current expenses and not outlays of capital.[1] I cannot accept the view that the cost of repairs ceases to be current expenses and becomes outlays of capital merely because the repairs required are very extensive or because their cost is substantial. There is, of course, in other types of cases, a problem as to whether the thing replaced is, from the relevant point of view, an integral part of a larger asset or a distinct capital asset, that must be, from a businessman's point of view, treated separately. In deciding a problem of this kind, the amount of the expenditure for replacement in relation to the cost of the larger asset and in relation to past expenditures for repairs of the larger asset may well be significant. This was the type of problem dealt with in the cases to which I will refer later in these reasons.

With reference to the expenditures in replacing the boilers in one of the appellant's ships, I have more difficulty. I understand, although I have had no very clear evidence on the matter, that the boilers are one unit of some three or four units constituting the plant and apparatus whereby power is created and applied to propelling the ship through the water. My understanding is that they are a self-contained unit that operates so as to produce steam under high

[1]Even if repairs are neglected so long that they temporarily prevent the continuance of the business, they are deductible "when the expenditure is made" and not "when in the prudent carrying on of the business it ought to be made". Compare *The Naval Colliery Co. Ltd. v. The Commissioners of Inland Revenue*, [H.L.] [1928] 12 T.C. 1017 per Lord Buckmaster at page 1048.

pressure, which is the source of the power that is communicated to other plant or machinery employed to propel the ship. I also understand that removal of these boilers and replacement of them by others was a major task involving removal of a part of the exterior of the ship to create a hole through which the old boilers could be removed from the ship and the new boilers brought into the ship.

The matter must be decided, as I see it, on an interpretation of section 12(1)(*b*):

> 12.(1) In computing income, no deduction shall be made in respect of
>
> . . .
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,
>
> . . .

Things used in a business to earn the income—land, buildings, plant, machinery, motor vehicles, ships—are capital assets. Money laid out to acquire such assets constitutes an outlay of capital. By the same token, money laid out to upgrade such an asset—to make it something different in kind from what is was—is an outlay of capital. On the other hand, an expenditure for the purpose of repairing the physical effects of use of such an asset in the business—whether resulting from wear and tear or accident—is not an outlay of capital. It is a current expense.

The problem arises here because, depending on one's conception of the facts, an expenditure made in replacing the boilers of a ship when they have worn out may be regarded as

(*a*) being nothing more than an expenditure for the repair of the ship by replacing a worn out part, or

(*b*) the acquisition of a new piece of plant or machinery to replace an old piece of plant or machinery which has an existence separate and distinct from the ship even though it is used in the ship and as part of the equipment by which the ship is propelled.

In the case of ordinary plant or machinery in a factory or a machine shop, I should have thought that there is no doubt that each engine and each machine is a capital asset quite separate and distinct from the building in which it is installed and in which it is used. The cost of acquisition of

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such an asset is, I should have thought, an outlay of capital. On the other hand, in the case of a ship, the function of which involves movement, I should have thought that it was a tenable or arguable view that the equipment or machinery required to effect such movement is, from a businessman's point of view, an integral part of the ship as a capital asset. If this were the right view, I should have thought that it would follow that the cost of the replacement of the whole of the propulsion machinery or of some unit thereof would be a current expense even though the thing replaced were an asset that, by itself, was an engine or machine that could be installed in a factory as a distinct and separate capital asset. I do not, however, feel free to consider whether I should adopt that approach in disposing of the present problem having regard to two previous decisions of this Court. I refer to *Thompson Construction (Chemong) Limited v. Minister of National Revenue*[1] and *Minister of National Revenue v. Vancouver Tug Boat Company, Limited*[2]. In each of these cases the result would have been different if the power plant, whereby the structure in which it was installed was moved from place to place, had been regarded as being merely an integral part of that structure. I think I am bound to approach the matter in the same way as the similar problem was approached in each of these cases until such time, if any, as a different course is indicated by a higher Court. When I say bound, I do not mean that I am bound by any strict rule of *stare decisis* but by my own view as to the desirability of having the decisions of this Court follow a consistent course as far as possible.

According to the evidence, some of the expenditures that have been disallowed as having to do with the replacement of the boilers were in relation to ordinary repairs.

The appeal is allowed and the assessments are referred back for re-assessment so as to allow the expenditures which are the subject matter of the appeals except those expenditures which were incurred in connection with, or as a necessary incident of, replacing the boilers in the S.S. *Renvoyle* in 1956.

The appellant is to have its costs of the appeal.

[1] [1957] Ex. C.R. 96.

[2] [1957] Ex. C.R. 160.

BETWEEN:

NEW ST. JAMES LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Victoria 1966
May 10
May 19

Income tax—Assessment for loss year—Subsequent years assessed on different basis—Four years lapse from first assessment—Whether loss reassessable—Income Tax Act, s. 46(4).

In assessing appellant for 1955 the Minister allowed a deduction of the full amount spent by appellant in that year on repairs to a building which appellant held under a five-year lease, treating the expenditure as rent paid. In result appellant had a substantial loss in 1955 for income tax purposes. In his assessments of appellant for the four years 1956 to 1959 the expenditure on repairs in 1955 was treated as made on account of a leasehold interest and a deduction of one-fifth of the amount was allowed for each of those years. As more than four years had elapsed between the original assessment for 1955 and the assessments for the later years appellant contended that s. 46(4) of the *Income Tax Act* precluded the Minister from recomputing appellant's 1955 loss in the assessments for the following years.

Held, dismissing the appeal, only the 1955 assessment was affected by the four year limitation of s. 46(4). The assessments for 1956 to 1959 were not affected by s. 46(4).

Income tax—Contract for services—Payment of amount stipulated—Subsequent reduction of amount—Whether rebate deductible.

Appellant agreed to render certain services for an associated company for $2,500 a year and included this amount in computing its income for each of the years 1955 and 1956. In 1957 it was decided that the amount should be retroactively reduced to $500 a year and in its 1957 return appellant claimed a deduction of $4,000 as a rebate.

Held, on appeal from the Tax Appeal Board (*No. 692 v. M.N.R.* 23 Tax A.B.C. 421), as no consideration was given for the rebate it was an incomplete gift, invalid, and not an outlay or expense and therefore not deductible.

APPEAL from decision of the Tax Appeal Board.

Edwin A. Popham for appellant.

D. G. H. Bowman for respondent.

SHEPPARD D.J.:—In this appeal the appellant, New St. James Limited, contends:

(1) that by virtue of Section 46(4) of the *Income Tax Act*, R.S.C. 1952, c. 148 (enacted S. of C. 1960, c. 43, s. 15) the Minister in making assessments for subsequent taxation years is bound by any findings, the basis for his assessment of 1955, and

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(2) that the rebate alleged made in 1957 should be allowed as an expense,

and in a cross-appeal the Minister contends that the portion of the judgment of the Tax Appeal Board allowing a rebate of $2,000 be reversed and the assessment of the Minister be restored.

As to the appellant's contention that by virtue of Section 46(4) of the *Income Tax Act* the Minister is bound by any findings in his assessment for the year 1955 in making assessments for the years 1956 to 1959 inclusive, the facts follow.

At material times the Olympic Properties Limited has owned a hotel in Victoria, British Columbia and has leased it to the appellant. In 1955 the appellant made certain repairs and improvements which the Minister assessed as a rent received by the Olympic Properties Limited and allowed the equivalent amount to the appellant as a rental expense. A notice of assessment and later a notice that no tax was payable for 1955 were sent by the Minister to the appellant.

In March 1960 the Tax Appeal Board on appeal by Olympic Properties Limited (*No. 692 v. M.N.R.*[1].) held that the repairs and improvements were not an additional rent to Olympic Properties Limited, but the Minister made no further reassessment of the appellant for 1955. After the expiry of four years within section 46(4) the Minister made an assessment of the appellant for the taxation years 1956 to 1959 inclusive in which he treated the outlays for repairs and improvements as an allowable capital expenditure and reduced the amount to the actual costs of the outlays.

The appellant contends that under section 46(4) of the *Income Tax Act,* the Minister is bound to accept as an actual loss the amount found in the assessment for the 1955 period. The parties hereto have agreed:

...that the sole issue to be decided on this appeal is whether the Minister of National Revenue is entitled, in reassessing for the 1956, 1957, 1958 and 1959 taxation years and for the purpose of computing the Appellant's taxable income for those years to recompute the Appellant's loss for 1955 on the basis that the sums of $34,541.93 and $1,193.36 referred to above are not deductible in 1955 as rent, but rather, are part of the capital cost to the Appellant of a leasehold interest within the meaning of Class 13 of Schedule B to the Income Tax Regulations, notwithstanding the fact that

[1] 23 Tax A.B.C. 421.

at the date of such reassessment for the 1956, 1957, 1958 and 1959 taxation years four years had elapsed from the date of the original Notice of Assessment for 1955.

Hence the question on appeal is whether or not in assessing for 1956 to 1959 inclusive, the Minister was precluded by Section 46(4) of the *Income Tax Act* from inquiring into the actual loss in respect of which the allowance should be made and in finding that not a rental expense but a capital expenditure.

The appellant stands wholly on the effect of Section 46(4) of which the relevant part reads as follows:

Sec. 46

(4) The Minister may at any time assess tax, interest or penalties under this Part or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the taxation year, and may

(*a*) at any time, if the taxpayer or person filing the return

(i) ...

(ii) has filed with the Minister a waiver in prescribed form within 4 years from the day of mailing of a notice of an original assessment or of a notification that no tax is payable for a taxation year, and

(*b*) within 4 years from the day referred to in subparagraph (ii) of paragraph (*a*), in any other case,

re-assess or make additional assessments, or assess tax, interest or penalties under this Part, as the circumstances require.

The limitation of section 46(4) only applies when four years have elapsed after the designated notice or notification and that has occurred only in respect of the 1955 taxation year.

Hence section 46(4) imposes no restriction as to any year other than 1955 and therefore not to the subsequent years 1956 to 1959 inclusive to which the four years have not elapsed and the limitation of section 46(4) cannot apply. For these subsequent years section 46(4), having no application, does not preclude an assessment being made in accordance with the provisions of this Statute, including sections 139(1)(*x*) and 32(5). That requires the loss for the years 1956 to 1959 inclusive being taken as provided by the Statute, not as implied in the assessment for the year 1955.

As to the rebate the facts follow.

The Olympic Properties Limited and the appellant agreed that the appellant would perform certain services for the Olympic Company, including paying municipal taxes, keeping records and incidental services, and that the

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Olympic Company would pay for such services the sum of $2,500 each year. Those amounts for the years 1955 and 1956 were treated as an expense of the Olympic Company and as income of the appellant.

In 1957 the appellant purported to reduce the annual charge of $2,500 to $500 and to make the reduction retroactive to 1955. That rebate was made by the appellant debiting its surplus account for 1957 with the rebate of $4,000. In computing its income for 1957 the appellant sought to deduct $4,000 ($2,000 for 1955 and for 1956). The sum of $4,000 was in fact never paid to Olympic Properties Limited.

Watt, the chartered accountant for the companies, testified that Bergman, the controlling shareholder of both companies, decided in 1957 that the amount should be $500 for 1955 and subsequent years and corresponding entries were made in the books of the two companies. In its return for 1957, the appellant sought to charge the sum of $4,000 as an expense and that was disallowed by the Minister. On appeal the Tax Appeal Board held:

> As to 1955, this year is not in appeal before me, however, I do allow a deduction of $2,000 in respect of the appellant's 1956 taxation year.

The appellant contends that the rebate of $4,000 should be allowed as an expense in the taxation year 1957 and the Minister in his cross-appeal contends that the rebate for the year 1956 be disallowed and his assessment be restored. The contention of the Minister should succeed.

Olympic Properties Limited gave no consideration for the rebate, hence it is a gift. The alleged rebate is an incomplete gift and therefore is invalid and not an outlay or expense. In *Milroy v. Lord*,[1] Turner L.J. at p. 274 (1189) said:

> I take the law of this Court to be well settled, that in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.

Richards v. Delbridge[2].

Upon performing the agreed services in each year, an obligation to pay the appellant $2,500 would vest in the Olympic Company. Before payment that obligation being a

[1] 4 DeG., F. & J. 264 (45 E.R. 1185).
[2] (1874) L R. 18 Eq. 11; 18 Hals. (3rd) 396, para. 755.

chose in action could be discharged by release, but after the contract has been executed by payment or by debiting rent or other monies payable to the Olympic Company, the gift of a rebate would require delivery of monies to the Olympic Company, but not by a mere promise to pay.

In this instance there is no evidence of the release of the obligation nor of delivery of the money. The alleged rebate was carried out by the appellant making a debit entry in its surplus account for the taxation year ending September 30, 1959, which entry is as follows: "Administration costs previously charged to Olympic Properties Limited now rebated—$4,000." That entry could imply an intention to pay that sum or even a promise to pay, but it is without consideration and being without consideration the promise has no binding effect: *Eastman v. Pratchett*[1], Lord Abinger, C.B. at p. 808 (149 E.R. 1302 at p. 1307). It follows that the alleged rebate is ineffective and neither an outlay nor an expense.

The Minister further contends that the alleged rebate, although paid, would not be an outlay or expense "for the purpose of gaining income", and therefore its deduction was prohibited by section 12(1)(*a*) of the *Income Tax Act*. The appellant contends that the purpose of the rebate was to obtain the goodwill of Olympic Properties Limited as a merchant with a customer. In this instance, by reason of Bergman having control of both companies, and his directing the alleged rebate, that contention would mean that Bergman in effect was making the rebate to himself in order to purchase his own goodwill towards himself. Assuming the rebate had been paid by the appellant to Olympic Properties Limited such a purpose for the rebates is not proven, nor is it credible. Therefore the rebate should not be allowed as an expense or outlay, and the judgment of the Tax Appeal Board should be varied accordingly.

In the result, the appeal by the appellant is dismissed, the cross-appeal by the Minister allowed, and the assessment by the Minister for the taxation years 1956, 1957, 1958 and 1959 is restored.

[1] (1834) 1 Cr. M. & R. 798.

Ottawa 1966

Mar. 24, 25

Apr. 15

BETWEEN:

JACK PORTER ..... APPELLANT;

AND

DON THE BEACHCOMBER ..... RESPONDENT.

Trade Marks—Application to expunge—Trade Marks Act, s. 44(3)—Trade Marks in respect to services—Services performed in U.S.A.—Trade Mark advertised in Canada—Whether "use in Canada"—Absence of special circumstances—Appeal from Registrar's decision.

In response to a request by the Registrar of Trade Marks under s. 44 of the *Trade Marks Act* the owner of the registered trade mark "Don the Beachcomber" furnished an affidavit deposing that the trade mark was used in Canada in advertising food and restaurant services in California. The Registrar decided that the trade mark ought not to be expunged.

Held, the trade mark was not in use in Canada within the meaning of s. 44(3) of the *Trade Marks Act,* and in the absence of evidence of special circumstances to excuse its non-use registration of the trade mark should be expunged.

On the proper construction of s 44(3) of the *Trade Marks Act,* a trade mark in respect of services is not in use in Canada if it is merely used or displayed in advertising the services in Canada: the services must also be performed in Canada.

[*Trade Marks Act,* S. of C. 1952-53, c. 49, secs. 2(*t*), 2(*v*), 4(2), 5, 16, 29, 44 referred to.]

APPLICATION to expunge trade mark.

David W. Scott for appellant.

Russel S. Smart for respondent.

THURLOW J.:—This is an appeal under s. 55 of the *Trade Marks Act*[1] from a decision of the Registrar of Trade Marks whereby, following a notice given by him pursuant to s. 44(1) of the Act at the instance of the appellant and consideration by him of the affidavit filed on behalf of the respondent in response thereto as well as representations made on behalf of both parties, he decided to allow the respondent's registration under number 117,694 of the mark DON THE BEACHCOMBER to remain on the register.

Section 44 of the Act provides as follows:

44. (1) The Registrar may at any time and, at the written request made after three years from the date of the registration by any person who pays the prescribed fee shall, unless he sees good reason to the

[1] S. of C. 1952-1953, c. 49.

contrary, give notice to the registered owner requiring him to furnish within three months an affidavit or statutory declaration showing with respect to each of the wares or services specified in the registration, whether the trade mark is in use in Canada and, if not, the date when it was last so in use and the reason for the absence of such use since such date.

(2) The Registrar shall not receive any evidence other than such affidavit or statutory declaration, but may hear representations made by or on behalf of the registered owner of the trade mark or by or on behalf of the person at whose request the notice was given.

(3) Where, by reason of the evidence furnished to him or the failure to furnish such evidence, it appears to the Registrar that the trade mark, either with respect to all of the wares or services specified in the registration or with respect to any of such wares or services, is not in use in Canada and that the absence of use has not been due to special circumstances that excuse such absence of use, the registration of such trade mark is liable to be expunged or amended accordingly.

(4) When the Registrar reaches a decision as to whether or not the registration of the trade mark ought to be expunged or amended, he shall give notice of his decision with the reasons therefor to the registered owner of the trade mark and to the person at whose request the notice was given.

(5) The Registrar shall act in accordance with his decision if no appeal therefrom is taken within the time limited by this Act or, if an appeal is taken, shall act in accordance with the final judgment given in such appeal.

While the material which may be considered by the Registrar in reaching his decision is restricted as provided in s. 44(2) on appeal to this Court the matter is governed by s. 55(5)[1] which provides that:

55. ...

(5) On the appeal evidence in addition to that adduced before the Registrar may be adduced and the Court may exercise any discretion vested in the Registrar.

On the present appeal the issue to be determined was stated by the parties as being whether the Registrar in the circumstance appearing from the agreed statement of facts properly exercised the discretion conferred upon him by s. 44(3) of the Act in deciding to allow the respondent's registration to remain on the register and the agreed statement of facts, whether or not it comprises precisely the same material as that considered by the Registrar, therefore constitutes the material upon which the appeal must be determined.

The agreed statement of facts discloses that the application for registration in question was made on September 4, 1959 by Cora Sund Casparis of Hollywood, California,

[1] See also *Re Wolfville Holland Bakery Ltd.* (1965) 42 C.P.R. 88.

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U.S.A. on the basis of the trade mark having been "made known" in Canada in April 1943 and on the basis of the registration of it which the applicant had obtained in the United States on February 7, 1950. The application stated that the trade mark had been "made known" in Canada in association with the serving of food and beverages in restaurants by reason of its having been used in the United States in association with such services and by reason of the advertising of such services in association with the trade mark in printed publications in the ordinary course among potential dealers in or users of such services and that by reason of such advertising the trade mark had become well known in Canada. Registration of the mark in Canada was granted on April 22, 1960. An assignment of the trade mark to the respondent, a California corporation, dated October 25, 1961 was registered on August 12, 1964.

On April 2, 1964 the Registrar, at the written request of the appellant under s. 44(1), requested the owner of the mark to satisfy him by affidavit or statutory declaration that the trade mark was in use in Canada within the meaning of the *Trade Marks Act* and on July 10, 1964 solicitors for the respondent filed an affidavit sworn by Raymond M. Fine and dated June 30, 1964 which stated:

> That such trade mark is in use in Canada as evidenced by the attached specimen advertisements and was so in use in Canada on April 2, 1964, the date of the Section 44 notice.

This was followed by reproductions of two block advertisements of food and restaurant services available at an address in Hollywood in both of which advertisements the words DON THE BEACHCOMBER appeared in type larger and bolder than the rest of the script and were followed by the symbol ® .

It is agreed that there was no evidence furnished to the Registrar as to actual performance in Canada of the services to which the registration relates.

Following a hearing at which both the appellant and the respondent were represented the Registrar informed the parties of his decision by a letter dated December 24, 1964 the body of which read as follows:

> Re: "BEACHCOMBER"
>
> Following the hearing on December 15, 1964, I have considered the representations made by both parties.
>
> Having regard to all the circumstances my decision is to allow registration No. 117,694, "DON THE BEACHCOMBER" to remain on the register.

On the hearing of the appeal it was conceded by counsel for the respondent, (quite properly, in my opinion, for I think it is clear in any event) that there was no material before the Registrar upon which he could properly conclude that services of the kind in respect of which the trade mark is registered were being physically performed in Canada in association with the trade mark at the material time and that the appeal turns on whether it was open to the Registrar to regard advertising in Canada of the trade mark in respect of the services without physical performance of the services in Canada as use of the trade mark in Canada for the purposes of s. 44(3). It was not suggested that anything in the material before the Court indicates special circumstances which might excuse absence of use in Canada and thus justify retention of the registration of the trade mark under s. 44(3) notwithstanding the absence of such use in Canada.

What has to be decided in the present appeal is thus whether advertising in Canada of the trade mark without physical performance in Canada of the services in respect of which it was registered was use of the trade mark in Canada within the meaning of the statute. In support of his position that such advertising in Canada coupled with performance of the services in the United States was sufficient to constitute use of the mark in Canada counsel for the respondent relied on the words "in use" in s. 44(3) and the definition of "use" in s. 2(*v*) coupled with the provision of s. 4(2) of the Act.

Sections 2(*v*) and 4(2) read as follows:

2. (*v*) "use" in relation to a trade mark, means any use that by section 4 is deemed to be a use in association with wares or services;

4. (2) A trade mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of such services.

Counsel's position was that because of the definition of "use" in s. 2(*v*) and of the provision of s. 4(2) therein referred to the words "in use" in s. 44(3) as applied to this case, are to be read as meaning "used or displayed in the advertising of such services", that the affidavit of Raymond M. Fine showed that the mark was in use in Canada within the meaning of the definition by reason of its being displayed in advertising in Canada of the services performed by the respondent in the United States and that with this

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affidavit before him it was plainly open to the Registrar to conclude that it did not appear that the trade mark was "not in use in Canada" within the meaning of s. 44(3).

I do not think this submission can prevail. In my view the suggested incorporation of expressions from s. 4(2) into s. 44(3) produces an interpretation which does not give full effect to the words used in either of these subsections. What s. 44(3) refers to is not merely use of the trade mark but use of it in Canada. The expression "trade mark" is defined in s. 2(*t*), in so far as the definition deals with marks in respect of services, as meaning a mark that is used or to be used to distinguish services performed by one person, or according to a standard, from services performed by others, or not according to the standard. By s. 2(*v*) "use" in relation to a trade mark in respect of services means a use that by s. 4(2) is deemed to be a use in association with services and in order to be deemed to be used in association with services under s. 4(2) the trade mark must be used or displayed in the performance or advertising of the services. Two elements are thus required to constitute "use" as defined in s. 2(*v*) viz., (i) services to be distinguished by the trade mark; and (ii) use or display of the trade mark in the performance or advertising of the services. As a matter of construction of the words of the statute, apart from other considerations, the expression "in use in Canada" in s. 44(3) appears to me to mean the carrying out in Canada of both elements required to constitute "use" and that the carrying out of only one of them in Canada does not amount to "use in Canada" of the trade mark.

While this conclusion as to the meaning of s. 44(3) is based simply on a reading of the expressions used in the statute the same conclusion is indicated as well by approaching the problem of interpretation of the subsection on the assumption that the essential attributes of trade marks in respect of wares would also be required in trade marks in respect of services and for this reason would require that the services in respect of which a trade mark is registered be services that are performed in Canada in the course of the registrant's trade.

There are three features of the statute which appear to me to justify the making of this assumption. One is that while the legal concept of a trade mark in respect of services is of statutory origin and is recognized, so far as I am

aware, for the first time in Canadian law in this statute, s. 2(*t*) deals with the meaning of the expression "trade mark" both in respect of wares and in respect of services in a single definition. The same is true of the definitions in s-ss. 2(*a*), 2(*g*) and 2(*m*). And elsewhere as well in the statute there are numerous references to trade marks in respect of "wares or services" while reference to trade marks in respect of wares alone or services alone are comparatively few. The second is that the provisions of ss. 5, 16 and 29 with respect to trade marks which have been used in a country of the Union and "made known" in Canada become ineffectual and useless in respect of service trade marks since the mere making known of the mark in Canada by advertising in respect of services performed elsewhere (whether or not the mark had thereby become "well known" in Canada within the meaning of s. 5) would, in the interpretation contended for by the respondent, constitute use of the mark in Canada. The third feature is that s. 29(*c*)[1] becomes not merely ineffective but also incapable of application to trade marks in respect of services if advertising of the trade mark in Canada coupled with performance of the services elsewhere is sufficient to constitute use of the trade mark in Canada. The provisions of ss. 5, 16 and 29 however have consistency with the scheme of the statute and scope for application in respect of service trade marks that have been "made known" in Canada if the requirement that a trade mark in respect of wares be used in association with the wares on the market of the country in which it is to be protected applies as well to trade marks in respect of services. Accordingly, apart from what I think is the proper interpretation of the words used in s-ss. 44(3), 2(*v*) and 4(2) by themselves, consideration of the features of the statute which I have mentioned would lead me to the same conclusion.

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[1] 29. An applicant for the registration of a trade mark shall file with the Registrar an application containing

(*c*) in the case of a trade mark that has not been used in Canada but is made known in Canada, the name of a country of the Union in which it has been used by the applicant or his named predecessors in title, if any, and the date from and the manner in which the applicant or such predecessors have made it known in Canada in association with each of the general classes of wares or services described in the application.

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I shall therefore hold that "use in Canada" of a trade mark in respect of services is not established by mere advertising of the trade mark in Canada coupled with performance of the services elsewhere but requires that the services be performed in Canada and that the trade mark be used or displayed in the performance or advertising in Canada of such services.

It follows from what I have said that the information contained in the affidavit of Mr. Fine that the respondent's trade mark was at the material time in use in Canada by reason of its being advertised in Canada was not capable of serving as a basis for a finding by the Registrar that the trade mark was "in use in Canada" within the meaning of that expression in s-s. 44(3) of the Act, and that the situation is thus one in which there has been a failure to furnish evidence of use of the trade mark in Canada in response to the Registrar's demand. The situation, as I view it, is also one in which, having regard to the requirement of the notice to the registered owner of the trade mark under s-s. 44(1) to show by affidavit or statutory declaration whether the trade mark was in use in Canada and to the filing of an affidavit in which no more was said as to use than the statement which I have quoted, coupled with the admitted fact that there was no evidence furnished to the Registrar as to actual performance in Canada of the services to which the respondent's registration relate, the proper inference appears to be that the trade mark was "not in use in Canada" within the meaning of s-s. 44(3).

The registration was therefore "liable to be expunged" unless special circumstances excusing such absence of use appeared. On the facts as presented there was no evidence of such special circumstances excusing the absence of use in the period of about four years during which the trade mark had been registered. Nor was there evidence that the respondent had plans for rendering services in Canada in the future in association with the mark or had in fact made the trade mark well known in Canada within the meaning of s. 5 so as to entitle the respondent, under s. 16, to registration and its benefits on that basis and at the same time to render it impossible for anyone else to acquire under s. 16 a right to have it, or a mark confusing with it, registered. While I express no opinion on the point, if it is conceivable that such evidence, if persuasive, could have justified the

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Registrar, in the exercise of his discretion, in declining to exercise his power under s-s. 44(3) to expunge the registration even though he was satisfied that the trade mark was not in use in Canada and that no special circumstances excusing such absence of use existed, the situation in the present case is that no such evidence appears to have been offered. On the whole therefore I am of the opinion that the registration should have been expunged and that the registrar's decision to allow it to remain on the register should not be sustained.

The appeal will be allowed with costs and an order will go expunging the registration in question.

BRITISH COLUMBIA ADMIRALTY DISTRICT

Victoria
1965
Nov. 1
Nov. 3

BETWEEN:

ELLIE CHERNYSH .... PLAINTIFF;

AND

STRAITS TOWING LTD. .....DEFENDANT.

Shipping—Fishing motor vessel swamped, caused by wrong manoeuvre—Plaintiff's gross negligence—No basis in law for claim for damages against defendant—Action dismissed.

Plaintiff, an independent gill net fisherman, owner of the M.V. *Copperhead* claimed damages from defendant arising out of the sinking of his vessel alleged to have been caused by the defendant's tug *Johnstone Straits* and her tow barge *Water Skidder,* about 10.30 a m , on the 17th of August, 1964, in the Fraser River waters of British Columbia.

It was the plaintiff's intention to run his vessel off the bar of the Port of Steveston to engage for a short time in gill net fishing. He proceeded with his vessel up river on the south side of the channel and saw not far away the defendant's tug towing on a tow line, about 250 feet in length, a laden log barge, and trailing astern of the barge was a polypropylene recovery line of 150 feet in length marked on the after end by a reddish colored plastic buoy of 14 inches in diameter.

Notwithstanding the position of the defendant's vessel, the plaintiff then caused his vessel to manoeuvre and subsequently to cross under the stern of the said log barge. And, in the process of doing so, the propeller of the plaintiff's vessel fouled the said polypropylene recovery line trailing astern the log barge, with the result that the *Copperhead* was swung around, towed upstream stern first for a short time and swamped.

At the time this incident occurred the weather conditions were excellent.

The findings in the evidence were that at the material time, the plaintiff saw the said red buoy first and then the emergency line and then

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when his vessel got close, an attempt was made by the plaintiff to lift the said emergency line and cause his vessel to pass over it in safety, but the said emergency line became entangled in his vessel's propeller. The plaintiff made the attempt to lift the emergency line before and not after it became entangled in his vessel's propeller.

Held: There was no basis in law for the plaintiff's claim in this action for damages against the defendant. The plaintiff was the author of his own misfortune.

2. It was therefore unnecessary to decide whether the maintenance of the trailing of this emergency line from the barge in these navigable waters, with similar conditions of traffic constituted an actionable nuisance, private or public, in favour of the plaintiff, or actionable negligence.

3. That this action is dismissed.

ACTION FOR DAMAGES arising out of the sinking of the plaintiff's vessel.

Timothy P. Cameron for plaintiff.

W. Forbes for defendant.

GIBSON J.:—In this action the plaintiff, an independent gill net fisherman, as owner of the M.V. *Copperhead*, claims damages from the defendant arising out of the sinking of his said vessel alleged to have been caused by the defendant's tug *Johnstone Straits* and her tow barge *Water Skidder* about 10.30 a.m. on the 17th day of August, 1964, in the Fraser River waters of British Columbia.

The plaintiff's M.V. *Copperhead* is a gill net vessel about 22 feet in length, 7 feet in beam, single screw, with a small wheelhouse about midships. It had left the port of Steveston about 8.00 a.m. on the 17th August, 1964, with only the plaintiff aboard and proceeded to the area in the Fraser River known as the Albion (marked blue on Exhibit 1, being a chart of the Fraser River area, filed) where the plaintiff engaged for a short time in gill net fishing. About 9.30 a.m., while he was picking up his second set, he was joined by another gill net fisherman, William Leonard Coulson, who had been netting in his own vessel prior thereto. At that time, the plaintiff said it was his intention to run his said vessel off the bar at Steveston to make a third set at about a point marked "D" on said Exhibit 1. To do so he proceeded with the *Copperhead* up river on the south side of the channel. On his port side then, and also bound upriver, was the defendant's tug *Johnstone Straits*

towing on a tow line, about 250 feet in length, a laden log barge *Water Skidder* and trailing astern of the barge *Water Skidder* was a polypropylene recovery line approximately 150 feet in length and about $1\frac{1}{4}$ inches in diameter, marked on the after end by a reddish colored plastic buoy approximately 14 inches in diameter. The plaintiff then caused the *Copperhead* to manoeuvre and subsequently to cross under the stern of the said log barge *Water Skidder* and in the process of doing so the propeller of the plaintiff's said vessel fouled the said polypropylene recovery line trailing astern the said log barge *Water Skidder*, with the result that the *Copperhead* was swung around, towed upstream stern first for a short time and swamped, causing damage to the plaintiff.

The defendant's *Johnstone Straits* is a 1400 h.p. diesel tug of 126 feet in length and 27 feet in beam, and its tow barge *Water Skidder* is approximately 280 feet in length and 60 feet in beam; and the latter was carrying at the material time about one million board feet of cedar logs. The polypropylene recovery line trailing astern the *Water Skidder* was about 150 feet in length, and, as stated, at its after end was a reddish plastic buoy about 14 inches in diameter.

At the time this incident occurred the weather conditions were excellent. There was no rain or fog and the water in the river was calm.

In the evidence two diametrically opposed versions were given by the plaintiff's and the defendant's witnesses as to how the propeller of the vessel *Copperhead* fouled the said polypropylene recovery line which at the material time was trailing astern the said log barge *Water Skidder*.

The plaintiff gave evidence himself, and also called as a witness the said William Leonard Coulson.

William Leonard Coulson who, as stated, had come aboard the *Copperhead* at about 9.30 a.m. said that the plaintiff at the material time swung the *Copperhead* to port to go around astern the log barge towed by the tug in order to make a set in the north part of the river. He said that he was in the wheelhouse when the plaintiff, steering from the stern, manoeuvred the *Copperhead* to port by swinging the said vessel around, going down river first and then around the said tow barge at the stern; and that he started to run

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up behind the tow barge when the motor in the *Copperhead* quit. At that moment he looked down and saw the said recovery line trailing from the log barge, and he called to the plaintiff who threw him a knife and he tried to cut the recovery line, but it had already fouled the propeller. The *Copperhead* he said was then about 125 feet astern the barge *Water Skidder*. He said the propeller became entangled in the said recovery line before he saw the recovery line or the red buoy which was attached to the end of it. He said when he attempted to cut the recovery line the *Copperhead* swung around and was pulled upstream astern and then it swamped. Just prior to it swamping he jumped into the river while the plaintiff put on a life ring and stayed with the *Copperhead* until it did swamp. In cross-examination he admitted that there was nothing which would have prevented him at the material time from seeing the recovery line and the buoy attached to it. He denied that he made any attempt to pick up by way of pike pole, or any other type of pole, this red buoy attached to the recovery line prior to the time the propeller of the *Copperhead* became fouled in it.

The plaintiff stated that at the material time he was steering the *Copperhead* from the stern of the vessel and that Coulson was in the wheelhouse, and when he first saw the recovery line from the barge it had already fouled the propeller of his vessel. He said that prior thereto he had caused the *Copperhead,* which had been running upriver starboard of the tow barge, to reverse itself and to go down river and then cross astern about 175 feet from the barge and then run up river when its engine quit and thereafter its propeller fouled the said emergency line. He stated he threw the knife to Coulson for the purpose of permitting him to attempt to cut the recovery line and that he started up his motor again and attempted, by opening the throttle, to disentangle his propeller from the said recovery line, but was unsuccessful. At that time he said his vessel was being pulled astern and shortly thereafter it swamped. He marked on the chart, Exhibit 1, with the letter "E" the place where his vessel's propeller was fouled, being near R.24, one of the markers marking the starboard side of the channel up river.

On discovery the plaintiff marked a chart of the said waters in red, showing the course which the *Copperhead*

made going up river and turning to port and reversing to go back and astern the barge *Water Skidder*, and this course so marked and his answers on discovery describing same differed materially from the answers given at the trial concerning this same matter. The chart marked on discovery was filed as Exhibit 2 at this trial.

The plaintiff also said that he told the R.C.M.P. investigating constable, Douglas Gerald Doige, that he first saw the recovery line from the barge only after it had fouled the propeller of his vessel.

The plaintiff also said there were a lot of gill netters in the channel at the material time who had put out floats from their gill nets, which floats were similar to the float on the end of the said emergency line, and that he had no difficulty seeing these gill net floats.

The defendant, among other witnesses, called Captain William James Gilmour, the Master in charge of Federal Public Works Department Dredge No. 322, who has held a Master's Unlimited Home Trade Certificate No. 1616 since 1946, Captain Herman George Knudson, Assistant Dredge Master on said Federal Public Works Dredge No. 322, who had been employed for 44 years in these waters, and Constable Douglas Gerald Doige of the R.C.M.P.

These three defence witnesses are clearly independent witnesses in the true legal sense and their evidence as to what happened I accept as true. Captain Gilmour and Captain Knudson both said that from the said Dredge No. 322, which was stationed opposite No. 23 port buoy going up river, as shown on the chart, Exhibit 1, they clearly observed the ship *Copperhead* when about half a mile away until it completed its manoeuvre and its propeller became fouled in the said emergency line trailed from the log barge *Water Skidder*. They both stated that the *Copperhead* manoeuvred across stream on two occasions, when some distance down river from the *Water Skidder* and from the red buoy attached to the said emergency line. Then Captain Gilmour said the *Copperhead* made three "passes" across stream close to the said red buoy on the last of which occasions its propeller became fouled by the emergency line. Captain Knudson corroborated these three "passes" made by the *Copperhead* but differs in one respect in that he states the *Copperhead* made the three passes by running up stream to the red buoy attached to the said emergency

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line, and falling back on the first two occasions, but becoming fouled on the third occasion. In this connection this would seem to tie in with the plaintiff's story that his engine stopped just before or at about the same time as the propeller of his vessel became fouled. Both Captain Gilmour and Captain Knudson said that they saw a person on top of the wheelhouse of the *Copperhead* with a pike pole or some other type of pole attempting on these three occasions when "passes" were made to snare the buoy. This person obviously was William Leonard Coulson. Both these witnesses then explained how, after the *Copperhead* got into difficulty, they signalled the wheelhouse of the tug *Johnstone Straits* informing them of the swamping of the *Copperhead* and its plight, and the action they took within a few minutes in going to rescue the *Copperhead* and disengaging it from the said emergency line and towing it to the dock at Steveston.

Constable Douglas Gerald Doige of the R.C.M.P. stated he interviewed the plaintiff on the 19th August, 1965, at the dock at Steveston where the plaintiff was doing certain remedial work to his vessel. He interviewed the plaintiff in connection with an investigation made of a complaint that there was, at the material time this incident occurred, an attempted theft of this red buoy attached to this said emergency line. Constable Doige said that the plaintiff told him that at the material time the plaintiff saw the said red buoy first and then the emergency line and then when his vessel got close an attempt was made to lift the said emergency line and cause his vessel *Copperhead* to pass over it in safety, but the said emergency line became entangled in his propeller. On cross-examination Constable Doige was invited to and confirmed unequivocally that the plaintiff told him that the attempt made to lift the emergency line was made before and not after it became entangled in his vessel's propeller; and he was then asked and he told that he recorded this conversation in his notebook within ten or fifteen minutes of the time the plaintiff related it to him.

On this evidence adduced by the defendant, which as stated I accept as true, it is patent that there is no basis in law for the plaintiff's claim in this action for damages against the defendant. He was the author of his own misfortune.

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It is unnecessary, therefore, to consider whether, in other circumstances, the maintenance of the trailing of this emergency line from the barge *Water Skidder* in these navigable waters, with similar conditions of traffic, when the trailing of such emergency line was unnecessary, resulted in constituting an actionable nuisance, private or public, in favour of the plaintiff; or whether it was in law negligent of the defendant, among other things, not to have caused this emergency line to have been pulled in, in these navigable waters on which there was heavy traffic, when, on the evidence, it served no useful purpose in these waters, or whether it was negligent of the defendant not to have more adequately warned third parties of the presence of this emergency line if the same were not pulled in.

The action is dismissed with costs.

ENTRE:

SA MAJESTÉ LA REINE .....DEMANDERESSE;

ET

J. L. MELANSON .....DÉFENDEUR.

Montréal 1965 le 13 déc. et 1966 le 11 janv.

Ottawa 1966 le 31 janv.

Information—Réclamation par la demanderesse au défendeur, membre de la Gendarmerie Royale du Canada, de $1,979.73, ajouté à la retenue de ses contributions à la caisse de retraite—Libéré sous conditions—Loi sur la Gendarmerie Royale du Canada, S. du C. 1959, c. 54, art. 13(2)—Arrêté ministériel P.C. 1960-379—Règlement 166 des Règles et Ordonnances de la Gendarmerie Royale du Canada, (a) et (b) en vigueur le 1er avril 1960—Règlement 1915 (1)(4) valide du 16 août 1961 au 29 février 1964 donnant au Commissaire les pouvoirs de revision— «Instructional and Educational Courses», art. 189(1)(2) en vigueur le 1er avril 1960—«Memorandum of Undertaking» du 9 janvier 1963 déclaré nul et de nul effet—Définition de «la crainte ou la violence» sous les articles 994 et 995 du Code Civil de Québec—Action déboutée avec dépens.

Le sous-procureur général du Canada, de la part de Sa Majesté la Reine, réclame du défendeur Melanson le paiement d'une somme de $1,979.73, qui vient s'ajouter à la retenue de ses prestations à la caisse de retraite, soit $2,285.90, formant un total de $4,265.63.

Melanson, maintenant âgé de 36 ans, s'enrôla dans la Gendarmerie Royale du Canada, le 21 janvier 1952, à 22 ans, et continua son service jusqu'au 15 janvier 1963, soit pendant onze ans.

En 1957, Melanson reçut l'ordre de suivre un cours de droit à l'Université McGill, ce qu'il fit pendant trois ans, soit du 30 septembre 1957 au 5 mai 1960, et obtint le degré de bachelier en droit. Sa solde régulière et le coût de sa scolarité universitaire lui furent payés durant cette période, moins l'impôt fédéral et provincial.

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Presque vingt mois après ses études légales, le 28 décembre 1961, Melanson contracta un autre engagement de cinq ans, à partir du 21 janvier 1962, avec la Gendarmerie Royale du Canada, conformément à l'art. 13(2) de la *Loi sur la Gendarmerie Royale du Canada*, S.C. 1959, c. 54. Neuf mois plus tard, cependant, Melanson s'enrôla dans la Sûreté Provinciale du Québec, à des conditions plus avantageuses. Cette décision est à l'origine du litige actuel.

Le 15 octobre 1962, Melanson obtint son congé du Surintendant de la Division «C» de la Gendarmerie Royale, à Montréal, selon les conditions portées au Règlement 166 des Règles et Ordonnances de la Gendarmerie Royale du Canada, en vigueur depuis le 1er avril 1960, conformément à l'arrêté ministériel PC-1960-379.

En vertu du Règlement 166, Melanson ne se croyait astreint qu'au seul paiement d'un dédit de $5 par mois pour chacun des 49 mois résiduaires de son engagement quinquennal, i.e., à un remboursement de $245.

Le Commissaire Harvison de la Gendarmerie Royale du Canada, se prévalant de la juridiction qui lui est accordée selon le Règlement 166, en vigueur depuis le 1er avril 1960, refusa d'accepter le congé de Melanson et annula la décision du commandant local qui, néanmoins, n'avait pas outrepassé ses pouvoirs, bien que sa décision demeurât susceptible de revision par le commissaire, selon le règlement 1915, valide du 16 août 1961 au 29 février 1964.

Melanson fut alors avisé qu'il s'exposait à être arrêté comme déserteur s'il quittait le service sans se plier aux conditions exigées par le commissaire Harvison. Son commandant l'assigna à comparaître devant lui le 16 novembre 1962, lui réitéra les exigences formulées dans le message du Commissaire Harvison ci-haut mentionné, insistant sur les sanctions portées contre la désertion par les règlements de la Gendarmerie Royale et le Code Criminel.

Le 9 janvier 1963, sous la menace desdites sanctions, Melanson signa, sous protêt, en présence de son commandant et d'un sergent d'état major, le document institulé «Memorandum of Undertaking» abandonnant ainsi à la Gendarmerie Royale ses contributions à la caisse de retraite, $2,285 90, et promettant de payer $1,979.73 par versements mensuels de $32 83. Melanson a alors déclaré qu'on ne lui avait jamais demandé auparavant de signer un tel engagement.

Cette soumission entachée de contrainte valut à Melanson son congé.

Il est significatif, tout d'abord, que dans le document «Remarks of Board and Commissioner», en date du 15 janvier 1963, il est spécifié que Melanson a obtenu son congé en payant la somme de $245, dûment déposée au crédit du Receveur général du Canada, dont quittance.

Jugé, le règlement 189 n'existait pas en 1957 quand Melanson reçut ordre d'entreprendre des études de droit. Ce règlement ne reçut effet et vigueur que le 1er avril 1960, c'est-à-dire trois ans plus tard.

2. On a voulu soumettre tardivement, *ex post facto,* un membre de la Gendarmerie Royale à l'ordonnance 189 de 1961, au lieu de s'en tenir à l'ordonnance 166 de 1957, en transposant les dernières lignes du règlement 166 dans le règlement 189 en vigueur seulement depuis le 1er avril 1960.

3. Les autorités de la Gendarmerie Royale du Canada ont fait erreur en tentant de vouloir lire sous le règlement 166 le dispositif du règlement 189.

4. L'alinéa (*b*) du règlement 166 impose à un membre démissionnaire de la Gendarmerie Royale une indemnité forfaitaire de $5 par mois jusqu'à l'expiration normale de son engagement.

5. Melanson fut menacé d'arrestation pour désertion s'il refusait de signer le «Memorandum of Undertaking» et aussi de représailles s'il ne renonçait pas à sa requête de congé. L'acquiescement de Melanson fut donné sous contrainte.

6 Les articles 994 et 995 du *Code Civil de Québec* édictent:

> 994 La violence ou la crainte est une cause de nullité.
>
> 995. La crainte produite par violence ou autrement doit être une crainte raisonnable et présente d'un mal sérieux.
>
> On a égard, en cette matière, à l'âge, au sexe, au caractère, et à la condition des personnes.

7. Deux constatations s'imposent:

a) la première est qu'on a prétendu obtenir tardivement de Melanson un engagement d'une portée considérable afin de l'astreindre à un règlement inexistant lors du fait qui a provoqué le litige.

b) dès que l'autorité suprême acquiesçait au congédiement du caporal Melanson, celui-ci, selon le règlement 166, n'était redevable que d'une indemnité de $5 par mois pour chaque mois de son engagement inachevé, soit $245, qu'il a dûment versés.

8. La Cour déclare nulle et du nul effet la pièce D-6, «Memorandum of Undertaking» datée le 9 janvier 1963, et rejetant l'information de la demanderesse, enjoint à celle-ci de rembourser au défendeur, dans un délai de 15 jours de la date du jugement (31 janvier 1966) ses contributions à la caisse de retraite au total de $2,285 90, avec tous dépens contre la demanderesse.

INFORMATION du sous-procureur général du Canada, de la part de Sa Majesté la Reine, pour le compte du Canada, en recouvrement de la somme de $1,979.73 du défendeur, en sus de la rétention de prestations à la caisse de retraite au montant de $2,285.90.

Paul Ollivier, c.r. et *Gaspard Côté* pour la demanderesse.

J. L. Melanson agit pour lui-même.

DUMOULIN J.:—Le Sous-Procureur général du Canada, «de la part de Sa Majesté de Reine», réclame du défendeur, le paiement d'une somme de $1,979.73 qui s'ajoute à la retenue d'un premier montant de $2,285.90, formant un total de $4,265.63.

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Voici les faits à l'origine du litige.

Le défendeur, Joseph Léonard Melanson, présentement âgé de 36 ans, s'enrôla dans la Gendarmerie Royale du Canada, le 21 janvier 1952, alors qu'il n'avait que 22 ans, et demeura au service de cette organisation constabulaire jusqu'au 15 janvier 1963, soit un stage de 11 ans.

En 1957, Melanson reçut ordre de suivre les cours de droit à l'Université McGill de Montréal, ce qu'il fit pendant trois années, du 30 septembre 1957 au 5 mai 1960, obtenant le degré de bachelier en droit. Le coût de la scolarité universitaire, $1,500, et sa solde régulière durant cette période, une somme de $8,449.08, lui furent payés par la Gendarmerie Royale. La récapitulation de ces deux montants s'élève au chiffre de $9,267.58, moins l'impôt fédéral et provincial.

Le 28 décembre 1961, presque 20 mois après la fin de ses études légales, le défendeur contracta un autre engagement de cinq ans à partir du 21 janvier 1962, conformément à l'art. 13(2) de la *Loi sur la Gendarmerie Royale,* S.C. 1959, c. 54. Ce document, pièce D-1, se lit en partie comme suit:

I, Reg. No. 17469, Joseph Leonard Melanson do hereby undertake to re-engage, enlist and serve in the Royal Canadian Mounted Police for five years from 21-1-62 and to be discharged at the expiration thereof, subject to the exigencies of the service, and do hereby declare myself subject to all the provisions of the Royal Canadian Mounted Police Act, Chapter 54, Revised Statutes of Canada 1959, and any Acts amending the same; and to all regulations and orders made by virtue of the said Acts, or any of them, . . .

Quelque 9 mois plus tard, Melanson décida d'accepter l'offre de conditions plus avantageuses que lui firent les autorités de la Police provinciale du Québec, décision qui, on le conçoit, est la cause du litige actuel.

Le 15 octobre 1962, par lettre adressée au surintendant R. J. Bélec, officier commandant de la division «C» de la Gendarmerie Royale à Montréal, (cf. pièce D-2) le défendeur sollicita son congé à la date du 16 novembre 1962, selon les conditions portées au règlement 166 des Règles et Ordonnances de la Gendarmerie Royale du Canada, en vigueur depuis le 1er avril 1960, conformément à l'arrêté ministériel P.C. 1960-379.

Il importe de citer au texte cet article 166:

166. Where a member other than an officer requests to be discharged from the force prior to the termination of his term of engagement and the

Commissioner considers that such discharge would not affect the efficiency of the force, the Commissioner may order the discharge of that member by purchase

(a) where the member has six months service or less, on payment of one hundred and twenty-five dollars; or

(b) where the member has over six months service, on payment of five dollars for each month or portion thereof of the unexpired term of his engagement, but in no case less than one hundred and twenty-five dollars

and on repayment of such expenses incurred on that member's behalf as the Commissioner may direct.

Il est manifeste que le défendeur se croyait astreint au seul paiement d'un dédit de $5 par mois pour chacun des 49 mois à venir de son engagement quinquennal, c'est-à-dire au remboursement d'une somme de $245.

Il advint, cependant, que le commissaire Harvison de la Gendarmerie Royale, ne fit pas à cette proposition un accueil aussi favorable, comme il appert à la pièce D-3, une lettre qu'il écrivit, le 14 novembre 1962, à l'intention du commandant de la division «C» à Montréal. En voici la teneur:

November 14, 1962.

The Officer Commanding
"C" Division,
R.C.M.Police,
MONTREAL, P.Q.

Re: 17469, Cpl. MELANSON, J.L.—Application for Discharge by Purchase

I refer to your minute to application of Corporal Melanson dated October 15th, 1962, in which he has indicated his desire to obtain his discharge from the Force by purchase.

2. This N.C.O. was one of those members who were privileged to obtain legal training at public expense on the understanding that he was committed to a career in the Force and consequently there is no desire to have Corporal Melanson sever his connection with the Force. Should he purchase his discharge, he may be informed that this will be approved on payment of $4,575.39, as shown on the attached computation. On November 16th, 1962, he will have a credit amounting to $2,440 16 in the R.C.M.Police Superannuation Fund.

3. Kindly advise me as soon as possible with respect to the intentions of this N.C O.

C.W. Harvison,
Commissioner

P.S.
Regulation 166 should be
brought to the attention
of Corporal Melanson.

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Cette communication du commissaire Harvison annulait une décision du commandant local, le surintendant R. J. Bélec, qui, le 31 octobre 1962, accordait dans les termes ci-après relatés, le congédiement demandé par le caporal Melanson. Il s'agit de la pièce M-1:

Montreal, October 31st, 1962.

The Officer i/c C.I.B.
R.C.M. Police, Montreal.

Re: 17469, Cpl. MELANSON, J.L.

1. Further to the Assistant C.I.B. Officer's minute dated 16-10-62 under same file heading, kindly be advised that it is intended to have Cpl. MELANSON's discharge effected on November 15th 1962; consequently, this N.C.O. is to return his complete kit to the Q.M. Stores on that date and is to contact the N.C.O. i/c Orderly Room to finalize his discharge arrangements.

R. J. Bélec, Supt.
Commanding "C" Division

Cpl. Melanson, RCMP—MONTREAL POST
1. FORWARDED for your information and compliance.
S.U.I.
Mtl. 1 NOV 62

J. B. Giroux, S/Sgt.
CIB COORDINATING NCO

Le consentement du surintendant Bélec à la requête du défendeur n'outrepassait pas les pouvoirs de cet officier, bien que sa décision demeurât susceptible de révision par le commissaire, selon le règlement 1915, valide du 16 août 1961 au 29 février 1964. Les paragraphes pertinents sont le premier et le quatrième ci-après relatés:

1915. (1) Officers Commanding Divisions are authorized to approve applications for discharge by purchase subject to final confirmation by the Commissioner.

. . .

(4) Unless advised to the contrary promptly, Division Officers Commanding may assume that such requests have been confirmed and "pay on discharge" is to be requested.

Apparemment, l'intention du caporal Melanson de permuter à l'emploi de la Police provinciale s'était aussitôt ébruitée, car il serait difficile d'expliquer autrement une lettre de l'assistant-commissaire de la Gendarmerie Royale, M. F. A. Lindsay, datée le 9 octobre 1962, pièce M-4, à l'adresse, toujours, de l'officier commandant de la division «C» de Montréal. La suscription de cette pièce «University Courses—General», comme aussi chaque ligne du texte, démontre sans conteste qu'elle exige l'application tardive

de l'article 189 des Règlements de la Gendarmerie Royale qui n'avait de force opérante que depuis le 1er avril 1960, jour de sa sanction par le Gouverneur général.

A ce point, il convient de reproduire cette lettre, pièce M-4, et l'article 189:

October 9, 1962.

CONFIDENTIAL:

The O C. "C" DIV. RCMP, MONTREAL, QUE.

RE: University Courses—General

It has recently come to attention that Reg. No. 17469, Cpl. Melanson, J L. of your command who was provided with university education at public expense apparently, either through a misinterpretation of policy or an oversight, has not completed the undertaking required by Regulation 189 and C.S O. 1095.

2. Occasionally we are required to produce these agreements for the Department of Justice or Treasury Board and, needless to say, it could prove most embarrassing if we were unable to do so. Under the circumstances, will you please arrange to have the required signed undertaking obtained from this member and forwarded with the least possible delay.

3. Since this N C.O. graduated in 1960 the wording of the undertaking at C.S.O. 1095 is not completely applicable and the following agreement is to be used in this case:—

"In consequence of my completion of university studies at an institution of learning at the expense of the Government of Canada I hereby agree to re-engage as and when required, and to serve in the Force for a period of five years from the date of my graduation which was on. . .19. . ."

M F A Lindsay, A/Comm'r
Director
Administration and Organization

Article 189:

Instructional and Educational Courses.

189. (1) Every member selected to attend a university, school, college or other place, to undertake at public expense a course of studies or instruction of more than six months' duration shall, before commencing the course, sign an honourable undertaking agreeing to continue to serve in the force for the duration of the course afforded him and for five years thereafter.

(2) Where a member defaults in an undertaking described in subsection (1), or otherwise induces his discharge from the force by his own conduct or actions, he may be required to pay all, or such portion as the Commissioner may direct, of the amounts paid from public funds in respect of his attendance at the course including transportation and travelling expenses for himself and family, pay and allowances paid to him, tuition fees and any other coincident expenses.

Informé des conditions posées par le commissaire Harvison, Melanson répondit dans un assez long document, daté le 17 décembre 1962, pièce D-4, où l'habitude, par

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ailleurs excellente, du respect disciplinaire, laisse toutefois transpercer son désaccord et le désir de protester. Les exigences du commissaire, c'est Melanson qui l'écrit, lui imposaient d'accepter les conditions onéreuses d'un remboursement de $4,265.63 ou l'alternative d'essuyer un refus.

Je consignerai, ici, l'admission catégorique du procureur de la demanderesse que Melanson ne fut jamais requis de signer l'engagement prévu à l'article 189 antérieurement au mois de décembre 1962.

Avant d'examiner les autres pièces du dossier, il convient d'aborder l'étude de la preuve orale entendue à l'enquête, et de faire clairement apparaître les conjonctures et circonstances qui induisirent le défendeur à souscrire la pièce D-6 d'où cette information procède.

Le premier témoin assigné par la demanderesse fut Joseph Adrien Thivierge, âgé de 55 ans, qui cumule actuellement les fonctions de surintendant et commandant de la Gendarmerie Royale, division «C», district de Montréal.

Le commandant Thivierge rapporte que la demande de congé soumise, le 15 octobre 1962, par le caporal J. L. Melanson, reçut l'approbation du commandant Bélec mais fut désavouée, le 2 novembre 1962, par un «Telex» du commissaire Harvison. Ce télégramme fut suivi d'une lettre de cet officier supérieur dès le 14 novembre 1962, pièces M-3 et M-6.

Le témoin assista à une entrevue, le lendemain ou le surlendemain, entre Bélec et Melanson, au cours de laquelle l'attention du défendeur fut attirée au règlement 166. Melanson refusa d'obtempérer aux termes imposés par le commissaire Harvison, insistant sur la faculté que lui assurait le règlement 166 d'obtenir un congé contre paiement d'un dédit mensuel de $5. Le surintendant Thivierge admet que le commandant Bélec déclara alors au défendeur qu'il s'exposait à être arrêté comme déserteur s'il quittait le service sans se plier aux conditions exigées par le commissaire.

«Le 8 janvier 1963», continue ce même témoin, «Ottawa nous faisait parvenir un «Memorandum of Undertaking» (ce sera la pièce D-6) que Melanson signa en ma présence et celle du sergent d'état major Robitaille. J'ai fait venir le caporal Melanson à mon bureau, je lui ai présenté ce document pour signature; il éleva quelques protestations au

sujet des sommes énormes qu'on lui réclamait alors qu'on ne lui avait jamais demandé de signer un pareil document auparavant. Je ne lui fis aucune menace, adoptant un rôle d'absolue neutralité.»

Le second témoin fut nul autre que l'ancien commandant de la division montréalaise, René-Jean Bélec. Cet officier déclare que, informé du cours de droit suivi par le caporal Melanson, il avait quand même approuvé sans conditions sa demande de licenciement, mais que, sur réception du désaveu de Harvison, il assigna le défendeur à comparaître devant lui, le 16 novembre 1962, lui réitéra les exigences formulées dans le message de Harvison, insistant sur les sanctions portées contre la désertion par les règlements de la Gendarmerie Royale et le Code criminel. Bélec ajoute qu'il avait avisé, avec un de ses subordonnés, aux mesures d'arrestation à prendre si le caporal Melanson ne se rapportait pas à son poste, le lundi suivant, comme il en avait manifesté l'intention.

Le sergent Charles Filion de la Gendarmerie Royale, division de Montréal, a préparé la formule, pièce D-7, intitulée «Board of Officers», qui est le document officiel de congé. «Je suis absolument convaincu», dit-il, «que Melanson a signé cette formule sous protêt, spécialement la partie apparaissant à la page 3 de la pièce D-7 libellée «Claims for Pay, etc.». Il a déclaré qu'il protestait en parole mais signait afin d'obtenir son congé.»

Le défendeur se fit entendre et témoigna de façon plus précise des faits et des griefs soulevés dans sa plaidoirie écrite. Il rapporte substantiellement qu'en 1957, après six ans au service de la Gendarmerie Royale, il reçut instructions des quartiers généraux d'Ottawa, et cela sans aucune demande préalable de sa part, de s'inscrire à la Faculté de droit de l'Université McGill, dès le début de l'année universitaire à l'automne. Il ne fut nullement question alors, ni pendant la durée de son stage scolaire, de signer un engagement à l'occasion de cette nouvelle affectation. Melanson laisse entendre qu'il n'aurait pas accepté de s'engager à l'avance pour une période de huit ans, mais là n'est pas le nœud de l'affaire. Qu'il eût consenti ou pas n'a rien à voir, en l'occurrence, quand il est admis de part et d'autre qu'il n'a contracté aucune obligation spécifique en temps utile.

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Le témoin conclut en attirant l'attention de la Cour au paragraphe 5 d'une communication de l'inspecteur A. N. Cart, à l'adresse du commandant Bélec, datée le 16 novembre 1962, et produite au dossier sous la cote M-2. Selon le témoin, et il ne fut pas contredit, ces lignes laissaient présager, dans l'éventualité même d'une continuation de service, un recours à des représailles sous le couvert d'un poste de moindre importance. Il se trouvait ainsi encerclé dans un dilemme peu enviable. S'il déférait à l'injonction du commissaire, il assumait une dette de $4,265.63. Si, au contraire, il tentait de quitter les rangs de la Gendarmerie en invoquant le règlement 166, c'est-à-dire après paiement d'une indemnité de $245, il se rendait passible d'arrestation immédiate pour désertion, incident désagréable en toutes circonstances, et particulièrement dans le cas du défendeur qui entendait se joindre à l'effectif de la Police provinciale. Enfin, s'il renonçait à ce dernier projet, il devait redouter d'encourir la rancune de ses supérieurs que la pièce M-2 insinuait, et de subir, en quelque sorte, une diminution de rang.

C'est dans ces conditions que Melanson dut se résoudre à tracer son nom au bas du document intitulé «Memorandum of Undertaking», le 9 janvier 1963. Par cette pièce, cotée D-6, le défendeur abandonnait à la demanderesse ses contributions au fonds de retraite, $2,285.90, et promettait de payer un reliquat de $1,979.73 par versements mensuels de $32.83, une indemnité globale de $4,265.63.

Cette soumission forcée, je ne saurais qualifier autrement le geste du défendeur, lui valut son congé, attesté par les pièces D-7 et D-8, cette dernière à l'entête «Discharge».

Il est significatif, toutefois, qu'à la troisième page du document D-7, sous l'intitulé «Remarks of Board and Commissioner», en date du 15 janvier 1963, il est spécifié que le caporal Melanson a obtenu son congé en payant la somme de $245, dûment déposée au crédit du Receveur général du Canada, dont quittance. Les signataires de cette pièce sont le surintendant R. J. Bélec et l'inspecteur A. M. Cart. Quel que soit le mobile qui ait inspiré cette déclaration inexacte, il est certain qu'elle ne concorde guère avec la pièce D-6 (Memorandum of Undertaking) qui, celle-là, stipule un remboursement de $4,265.63.

Retenons particulièrement le second paragraphe de cette convention présumée; il se lit:

I hereby state that while a member of the Royal Canadian Mounted Police, I attended McGill University and obtained a Bachelor of Civil Law degree, during which time I received my full salary as a member of the Royal Canadian Mounted Police and my tuition for the courses leading to the said degree was paid from public funds.

Il est indéniable que ce passage fait une référence explicite au règlement 189, précédemment cité, des Règles et Ordonnances de la Gendarmerie Royale. Or, nous avons vu que ce règlement n'existait pas en 1957 quand Melanson reçut ordre d'entreprendre des études légales, et ne reçut effet et vigueur que le 1er avril 1960.

L'assistant commissaire F. A. Lindsay représente donc incorrectement la situation quand il prétend, dans sa lettre du 9 octobre 1962 (cf. M-4), que ce fut par suite d'un oubli ou d'une interprétation erronée des règlements qu'on n'exigea point, en 1957, l'acquiescement de Melanson à un texte qui ne devait être édicté que trois ans plus tard.

A n'en pas douter, on a voulu soumettre tardivement, *ex post facto,* un membre de la Gendarmerie à une ordonnance récente issue du décret approuvé par le Gouverneur général en conseil, le 1er avril 1960. Pour parvenir à ces fins, le commissaire Harvison, selon l'expression populaire, «a joué sur les mots». Il a tenté de transposer les dernières lignes du règlement 166 dans le règlement 189.

Le savant procureur de la demanderesse convint de l'inapplicabilité au cas présent d'aucun autre règlement que le 166, pour tomber aussitôt dans la même erreur que celle du commissaire Harvison, qui consiste tout simplement à vouloir lire, sous le numéro 166, le texte du règlement 189, précédemment exclu. Au surplus, cette ordonnance 189, eut-elle été en vigueur le 30 septembre 1957, quand le défendeur commença ses études de droit, qu'elle ne lui aurait pas été opposable en décembre 1962, deux ans et demi après sa sortie de l'université, puisque la validité de cette stipulation est assujettie impérativement à la formalité de la signature préalable du contractant. Je signale derechef le premier paragraphe de 189:

(1) Every member selected to attend a university, school, college or other place, to undertake at public expense a course of studies or instruction of more than six months' duration shall, before commencing the course, sign an honourable undertaking agreeing to continue to serve in the force for the duration of the course afforded him and for five years thereafter.

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La demande a tenté, comme argument ultime, de justifier ses excessives prétentions en scindant les deux dernières lignes du sous-paragraphe (*b*) de 166 de sa partie initiale, leur prêtant le sens du paragraphe (2) de 189. C'était là une récidive de la méprise déjà relevée de vouloir transposer dans le règlement 166 le dispositif de 189.

Nous avons vu que l'alinéa (*b*) du 166 impose à tout membre démissionnaire de la Gendarmerie Royale une indemnité forfaitaire de $5 par mois jusqu'à l'expiration normale de son engagement. Cet article ajoute en finale «...and on repayment of such *expenses* incurred on that member's behalf as the Commissioner may direct» (l'italique est de moi). De toute évidence, il s'agit là de dépenses minimes, telles, par exemple, le remboursement d'avances pour frais de voyage, le retour de pièces d'uniforme ou de l'arme réglementaire. Il semblerait outrancier d'assimiler l'expression «expenses», en fonction de l'ensemble de cet article, à celle de «salaire», et d'en étendre la portée aux proportions que lui suppose la demanderesse.

Ceci dit, il reste à se prononcer sur la valeur légale du consentement souscrit le 9 janvier 1963, dont le caporal Melanson, dans sa défense, demande l'annulation comme entaché de violence morale.

Menacé d'arrestation pour désertion s'il refusait de signer le «Memorandum of Undertaking», et même de représailles s'il renonçait à sa requête, il serait difficile, au regard de la preuve et de la loi, de soutenir que l'acquiescement du défendeur fut donné en toute liberté d'esprit.

Les articles 994 et 995 du Code Civil édictent, le premier, que:

La violence ou la crainte est une cause de nullité. . .

et le second, que:

La crainte produite par violence ou autrement doit être une crainte raisonnable et présente d'un mal sérieux,

On a égard, en cette matière, à l'âge, au sexe, au caractère, et à la condition des personnes.

Ce dernier texte s'inspire de l'article 1112 du Code Napoléon à l'effet que:

1112. Il y a violence, lorsqu'elle est de nature à faire impression sur une personne raisonnable, et qu'elle peut lui inspirer la crainte d'exposer sa personne ou sa fortune à un mal considérable et présent,

On a égard, en cette matière, à l'âge, au sexe et à la condition des personnes.

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L'illustre auteur de doctrine, Laurent, au 15e tome de son grand ouvrage «Principes de droit civil»[1], expose avec une lumineuse concision ce que la loi entend par l'exercice d'une violence indue, je cite:

511. Il n'y a point de consentement valable, dit l'article 1109, si le consentement a été extorqué par violence. L'article 1112 définit la violence en ces termes: «Il y a violence, lorsqu'elle est de nature à faire impression sur une personne raisonnable, et qu'elle peut lui inspirer la *crainte* d'exposer sa personne ou sa fortune à un mal considérable et présent». Ainsi la violence que la loi prévoit est celle qui inspire une crainte et qui par là porte celui qui contracte sous l'empire de cette crainte à consentir une obligation qu'il n'aurait pas souscrite s'il avait été libre de faire ce qu'il veut. Celui qui est violenté consent en ce sens qu'il préfère contracter l'obligation qu'on lui extorque que d'exposer sa personne ou ses biens au mal qu'il craint; de deux maux, il choisit le moindre, *mais on ne choisit jamais volontairement un mal; son consentement est donc vicié, parce que sa liberté est altérée.* La loi ne dit pas en quoi doit consister la violence, elle dit seulement quelle impression elle doit faire sur la personne violentée. La violence peut consister dans de mauvais traitements infligés à celui dont on veut extorquer le consentement, ce qui implique en même temps la menace de continuer ces actes de violence, si le consentement n'est pas donné; ou il peut y avoir simplement menace d'excès; toute violence implique donc la crainte d'un mal qui doit se réaliser si le consentement n'est pas donné. Nous avons supposé un mal concernant la personne; le mal peut aussi concerner les biens de celui dont on veut arracher le consentement: telle est une menace d'incendier ses propriétés...

513. L'article 1112 dit qu'il y a violence lorsqu'elle est de nature à faire impression sur une *personne raisonnable*; et le deuxième alinéa ajoute: «On a égard, en cette matière, à l'âge, au sexe et à la condition des personnes.» Cette dernière disposition corrige ce que la première a de trop absolu: elle prouve, comme nous l'avons dit pour l'erreur, *que les vices du consentement ont un caractère tout à fait individuel.* Telle personne a-t-elle consenti librement ou a-t-elle agi sous l'influence de la crainte que lui inspirait la violence? C'est bien là une question concrète: *il ne s'agit pas de savoir si un être abstrait a été libre ou s'il a été violenté, il s'agit de savoir si Pierre ou Paul a agi librement ou non. Or, une menace qui n'aurait fait aucune impression sur Pierre peut troubler l'esprit de Paul à ce point qu'il consente à tout ce qu'on lui demande pour échapper au mal qu'il redoute. C'est dire que la violence est essentiellement relative et doit, par conséquent, être appréciée par le juge d'après les circonstances individuelles...*

(l'italique est de moi)

De ce qui précède, deux constatations s'imposent. La première est qu'on a prétendu obtenir tardivement du défendeur un engagement d'une portée considérable afin de l'astreindre à un règlement inexistant lors du fait qui a provoqué le litige. La seconde, c'est que l'on a extorqué son

[1] Tome 15, 3e édition, 1878, numéros 511, 513.

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consentement sous l'influence d'une pression morale exercée par un haut supérieur hiérarchique sur un simple subalterne.

Dès que l'autorité suprême acquiesçait au congédiement du caporal Melanson, celui-ci, selon la clause 166, n'était redevable que d'une indemnité de $5 par mois pour chaque mois de son engagement inachevé, soit $245 qu'il a dûment versés comme le reconnaît la pièce D-7.

L'exploit de défense, outre le rejet de l'information, conclut que le défendeur soit remboursé de ses versements au fonds de pension s'élevant au chiffre de $2,285.90.

Il eut été sans doute plus conforme aux règles de procédure appliquées dans les instances soumises aux tribunaux de la province de Québec de prendre pareille conclusion par voie de demande reconventionnelle. La Cour tient compte de ce que le défendeur conduisait personnellement sa cause et davantage, il va sans dire, de cette très large faculté d'amender que lui confère l'article 119 des Règles et Ordonnances générales de la Cour de l'Échiquier, autorisant le juge à effectuer, *proprio motu*, les amendements qui lui paraissent justifiés. Conséquemment, je ferai droit à cette requête.

Par tous ces motifs, la Cour déclare nulle et de nul effet la pièce D-6, «Memorandum of Undertaking», datée le 9 janvier 1963, et, rejetant l'information de la demanderesse, enjoint à celle-ci de rembourser au défendeur, dans un délai de 15 jours de la date de ce jugement, ses contributions à son fonds de pension au total de $2,285.90, avec tous dépens contre la demanderesse.

Montreal 1966 Feb. 11

Ottawa Mar. 10

BETWEEN:

ABC REALTY CORPORATION .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Claims as incentive payments to builders and purchasers of houses—Authority of Appropriation Act No. 5 of 1963—Eligibility for the "winter house building incentive programme"—In October and November, 1963, conditions in force contained the words "multiple dwelling unit structures" but not the word "detached"—Order in Council P.C. 1964-232, February 13, 1964, and P.C. 1964-884 of June 18, 1964—Petition of Right rejected.

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The suppliant, a builder of houses, claims by its Petition of Right the sum of $24,000, i.e., $500 for each of the 48 suites erected by it in Montreal, P.Q. in the fall of 1963 and winter of 1964 as incentive payments to builders and purchasers of houses between December 1, 1963, and March 31, 1964, under the authority of *Appropriation Act No. 5* of the 1963 Session of Parliament of Canada.

The respondent refused to pay it on the basis that the suppliant's structure did not qualify for such payments.

The respondent's programme was restricted to residential structures that contain not more than four dwelling units.

Whereas, the structure built by the suppliant consists of twelve 4-storey units joined together by common walls which makes it a residential structure containing 48 units.

It was declared by the respondent's representative that there was no necessity for the respondent to encourage the building during winter months of structures containing more than four dwelling units as they were being built in sufficient quantities during the winter season.

Conditions of eligibility for "winter house building incentive" is described as follows:

> Eligibility is limited to single detached dwellings and multiple dwelling unit structures containing not more than four self-contained units which shall be built solely for year round residential use.

Orders in Council P.C. 1964-232 of February 13, 1964, and P.C. 1964-884 of June 18, 1964, which by inference clearly show that a multiple dwelling unit could not be joined to other such dwelling units by a common or party wall or a residential structure could not be joined side by side to one or more other such buildings by a common wall and qualify under the programme.

A proper consideration of the *Appropriation Act No. 5* of 1963 which authorizes the Government to make payments to a maximum established by the Act clearly states that such payments shall be made "in accordance with terms and conditions approved by the Governor in Council".

Held, That these terms and conditions were established by order-in-council dated February 13, 1964, and it appears clearly from its contents that the suppliant's buildings, which is admitted by its president, did not qualify under the regulations contained therein.

2. That in the Court's view, even if the suppliant had conformed to the conditions in force in the fall of 1963 inscribed on the reverse side of the application forms and even if the latter did not prohibit the units from being linked by a common wall, the suppliant would still not be entitled to any of the incentive payments because the suppliant did not comply as it had to with the terms and conditions set down in the order-in-council passed later, on February 13, 1964.

3. That no officer of the Crown was authorized to involve the Government in spending public funds without the authority of Parliament or upon conditions other than those established by it.

4. That the invitation made by the Department of Labour to take advantage of the programme was therefore subject to:

> 1. the appropriation of funds by the Government;

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2. the construction of the buildings as required by the conditions set down by the Governor in Council.

5. That the fact that the programme started prior to the adoption of these conditions, or that there was printed on the application forms conditions different from those adopted later by the Governor in Council cannot give the builders any right to the incentive payments as such if it turned out that their buildings did not meet with the requirements set down by the Governor in Council.

6. That the suppliant should have inquired specifically as to whether common walls were permitted and it would have been told at the time that common walls would not be allowed.

7. That the programme was subject to parliamentary approval of the money to be appropriated and also the buildings would have to comply with the regulations to be passed by order-in-council in order to be eligible for the bonuses.

8. That the suppliant having not complied with the regulations passed by the order-in-council therefore it is not entitled to the amount claimed as damages for the loss of the subsidies.

9. That the suppliant's petition of right be rejected.

PETITION OF RIGHT.

John G. Ahern, Q.C. for suppliant.

Paul M. Ollivier, Q.C. for respondent.

NOËL J.:—The suppliant, a builder of houses, claims by its petition the sum of $24,000, i.e., $500 for each of the 48 suites erected by it in Montreal, P.Q., in the fall of 1963 and winter of 1964 as incentive payments to builders and purchasers of houses between December 1st, 1963 and March 31st, 1964, under the authority of *Appropriation Act No. 5* of the 1963 session of Parliament which the respondent refuses to pay it on the basis that its structure does not qualify for such payments. The suppliant alleges that if it does not qualify for the incentive payments, it is because it was induced to erect the above mentioned structure at a cost of $300,000 by the erroneous approval of an application for same by the officer in charge of the administration of the programme, Mr. F. M. Hereford, who wrongly advised the suppliant that its project was eligible, when it was not as the structure built by the suppliant consists of twelve 4-storey units joined together by common walls which makes it a residential structure containing 48 units, whereas the programme was restricted to residential structures that contain not more than four dwelling units. There

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was indeed according to Mr. Hereford no necessity to encourage the building during the winter months of structures containing more than four dwelling units as they were being built in sufficient quantities during the winter season.

The suppliant alleges that the respondent is responsible for the damages suffered by it as a result of the erroneous advice given by Her representative Hereford.

The residential structure containing 48 units was erected in the following circumstances. As a result of the advertising of the winter build $500 cash bonus programme initiated to provide employment during the winter, Mr. S. Mitchell, president of the suppliant, wrote the Special Services Branch, Department of Labour on October 2, 1963, asking for the necessary forms and papers required to apply for the incentive payments. On October 4, 1963, Mr. F. M. Hereford, of the Department of Labour, Director of Special Services Branch, wrote Mr. Mitchell, enclosing ten copies of the pamphlet describing the winter house building incentive programme along with 60 copies of the application form.

Upon receipt of the documents, the suppliant, who had prior thereto secured the necessary land, caused plans to be prepared to erect thereon 48 individual dwellings consisting of 12 units of four flats each. On October 29, 1963, Mr. Mitchell visited the office of Mr. F. M. Hereford, in Ottawa, and submitted a set of blue prints which the latter looked at and application forms which he told him to leave with him. The same Mr. Hereford acknowledged receipt in writing of the application for certification of each of the 12 units and informed the suppliant that the first inspection of each structure and the building site would be carried out on or about November 30, 1963, and that it would be advised of the result of this inspection. On November 30, inspection certificates were issued for each unit as appears from Ex. S-2 stating that "the conditions of eligibility evident at the date of inspection have been fulfilled" and that "the applicant may assume the structure, has met the qualifications concerning the stage of construction permitted prior to November 30, 1963". One of the conditions of eligibility for the "winter house building incentive" in order to ensure that the major part of the work would be conducted during the winter months was that "construction shall not have

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proceeded beyond the first floor-joist stage (including sub-floor) or its equivalent prior to November 30, 1963", and the above certificates were for the purpose of ensuring only that the stage requirement prior to November 30, 1963, had not been exceeded. Around December 12, 1963, Mr. Mitchell, president of the suppliant, heard a rumour that his company did not qualify for the incentive payments and upon communicating by telephone with Mr. Hereford in Ottawa was told that there was some question as to the suppliant's eligibility for these amounts. On the same day, Mr. Hereford wrote to Mr. Mitchell (Ex. S-3) to this effect and referred to the conditions of eligibility under the programme as set out on the reverse side of the application form as follows:

> You will note that eligibility is limited to single detached dwellings and multiple dwelling unit structures containing not more than four self-contained units My information is that the housing being constructed by you consists of four storey quadruplex units adjoined to other quadruplex units by a common wall, and that the applications submitted by you cover one structure containing 48 individual units. If this is the case, I regret that I must inform you that the dwelling units will not qualify for the incentive payment.

On January 10, 1964, Mr. Mitchell, returning to Montreal after an absence of several weeks, found Mr. Hereford's letter of December 12, 1963, and wrote a letter (Ex. S-6) to the Honourable Minister of Labour, Allan J. MacEachen. In this letter, after mentioning his meeting with Mr. Hereford in Ottawa on October 29, 1963, when he left the applications for certification, he states that his "purpose for visiting the Department was not only to ensure that the application forms were properly filled out but more important to submit our plans for the dwelling units so that there should not be any possible mis-understanding on our part" and adding "the conditions of eligibility were discussed, the blue prints and plot plans were looked at by Mr. Hereford, and I was assured and satisfied when I left his office that there was no doubt whatsoever that we would be entitled to the incentive payment of $500 per dwelling unit". I might point out here that the plans contained the french words "murs mitoyens" which in English is "common walls". Mr. Mitchell then stated that the suppliant's estimated cost of each of the four storey units is

approximately $22,500, thereby involving a total investment of $270,000 and that:

Our entire planning and entering into this project was based on the Winter House Building Incentive Program, without which we stand to sustain a serious loss if the purchasers are ineligible to receive the incentive payments, a loss which would jeopardize the financial status of our company.

He then added that:

While we acknowledge that legally and or technically we do not comply with conditions of eligibility by virtue of the 12 units having common walls, it is our sincere opinion and belief that the fault was not ours.

We had sufficient space on our lots for 12 multiple dwellings each of 4 self-contained units and the extra cost entailed would have been of no consequence in terms of our overall investment.

On January 22, 1964, the Minister of Labour wrote Mr. Mitchell stating that he was sorry to learn that the 48 dwelling unit structure which the suppliant had under construction would not qualify under the winter house building incentive programme adding:

This program, as was very clearly indicated in all our publicity and informational material, is restricted to residential structures that contain not more than four dwelling units. Under the regulations, the housing which you are constructing does not qualify as it consists of twelve 4-storey units joined together by common walls, which makes it a residential structure containing 48 units.

I understand from Mr. Hereford that during his discussion with you he gained the impression that the residential structures you proposed to build would be separate buildings containing not more than four dwelling units. According to Mr. Hereford there was no suggestion by you that these units would be joined by common walls. Mr. Hereford says that he was shown a floor plan of one of the units and a plan showing a four unit structure, but that he did not see any plot plans or any evidence that these units were joined by common walls.

Mr Hereford further informs me that he gave you no assurance that the housing you are constructing would qualify under the program but advised you that your applications would be processed and that the building sites would be inspected by the Central Mortgage and Housing Corporation.

The application forms sent to the suppliant on October 4, 1963, comprised on the reverse side the conditions of eligibility for winter house building incentive and described as follows the type of structure that would qualify under the programme:

In English:

Eligibility is limited to single detached dwellings and multiple dwelling unit structures containing not more than four self-contained units which shall be built solely for year round residential use.

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In French:

L'admissibilité se limite aux maisons simples à logement unique et aux immeubles d'au plus 4 logements indépendants, construits uniquement aux fins d'habitation à l'année longue.

It was not until February 13, 1964, that an order in council was passed setting out the regulations concerning the programme and it was not also until then, according to the suppliant, that subparagraph (2) of paragraph 2 of the said regulations pointed out that the units could not be linked together by common walls, by providing that where "each dwelling unit in the building (i) has all the characteristics of a single detached dwelling unit except for being joined to other such dwelling units by a common or party wall and (ii) is built for occupancy by the purchaser thereof, the Minister may deem the building to be a residential structure".

The position taken by the suppliant herein as I understand it is that:

(1) prior to the above regulations in the fall of 1963, when the Government of Canada gave much publicity to its winter house building programme and invited builders to provide employment by building under the said programme, the conditions on the reverse side of the applications, which in October and November of 1963 were the conditions in force, contained the words "multiple dwelling unit structures" but did not contain the word "detached" and, therefore, did not prevent units from being joined by common walls. The suppliant therefore urges that it cannot be bound by conditions imposed (after its applications had been made and received) by orders in council P.C. 1964-232 of February 13, 1964 and P.C. 1964-884 of June 18, 1964 which by inference clearly show that a multiple dwelling unit could not be joined to other such dwelling units by a common or party wall or a residential structure could not be joined side by side to one or more other such buildings by a common wall and qualify under the programme;

(2) the suppliant was induced to erect the structure at a cost of $300,000 by the approval of its applications by the officer in charge of the administering of the programme, Mr. F. M. Hereford after examination of the plan (Ex. S-1) of the structure by the latter, which, as already mentioned, clearly stated in French that the walls

would be common, and his assurance that there was no doubt whatsoever that the buildings to be erected by the suppliant would be entitled to the incentive payments of $500 per dwelling unit and that, therefore, the respondent is responsible for the damages suffered by reason of the erroneous advice given by Her representative Hereford;

(3) that (this argument was raised during argument only) if Mr. Hereford did not, as alleged, give Mr. Mitchell such an assurance he was at fault in not telling him that his proposal did not meet with the requirements of eligibility, that no appropriation had yet been authorized for the programme and that regulations setting down the conditions of eligibility had not yet been passed.

Suppliant's first argument that it cannot be bound by conditions imposed (after its applications had been made and received) by the orders in council of February 13, 1964 and June 18, 1964, but is governed by the conditions contained on the reverse side of the application forms in force in the fall of 1963, which did not prevent the multiple units from being linked by common walls cannot be legally sustained even if the suppliant's interpretation of the conditions inscribed on the reverse side of the application forms is the correct one. A proper consideration of the *Appropriation Act No. 5* of 1963, which authorizes the Government to make payments to a maximum established by the Act clearly states that such payments shall be made "in accordance with terms and conditions approved by the Governor in Council . . .".

These terms and conditions were established by order in council dated February 13, 1964 and it appears clearly from its contents that the suppliant's buildings (and Mr. Mitchell admits that this is so) do not qualify under the regulations contained therein.

I am also of the view that even if the suppliant's contention that it had conformed to the conditions in force in the fall of 1963 inscribed on the reverse side of the application forms and even if the latter did not prohibit the units from being linked by a common wall, it would still not be entitled to any of the incentive payments for the following reasons.

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The Department of Labour advertised the bonus plan in the fall of 1963 prior to the passing of the *Appropriation Act* and invited builders to take advantage of the programme. No officer of the Crown, however, was authorized to involve the Government in spending public funds without the authority of Parliament or upon conditions other than those established by it. The invitation made by the Department of Labour to take advantage of the programme was, therefore, subject to (1) the appropriation of funds by the Government and (2) the construction of the buildings as required by the conditions set down by the Governor in Council. The fact that the programme started prior to the adoption of these conditions, or that there was printed on the application forms conditions different from those adopted later by the Governor in Council cannot give the builders any right to the incentive payments as such if it turned out that their buildings did not meet with the requirements set down by the Governor in Council.

The above is supported by considerable authority as expressed in a number of decisions of the Supreme Court.

In *Morris Robert Palmer and Hull Pipe and Machinery v. The Queen*[1] where the petitioners claimed damages for an alleged breach of a covenant of peaceful enjoyment after they had been expropriated by the Crown but had remained in occupation and paid rent to the Crown, it was held that as there was no lease between the parties (no valid consent having ever been given to bind the Crown by way of the authorization of the Governor in Council, which is an essential requisite for a valid lease entered into by a Department of the Crown) the petition had to be dismissed.

In *St. Ann's Island Shooting and Fishing Club Limited v. The King*[2], it was held that because section 51 of the *Indian Act*, R.S.C. 1906, c. 81, provides that all Indian lands which are reserves surrendered to His Majesty shall be managed, leased and sold as the Governor General in Council directs, subject to the conditions of surrender and the provisions of Part I of the Act, the authorization of the Governor General in Council was an essential requisite for a valid lease entered into by a Department of the Crown.

[1] [1959] S.C.R. 401. [2] [1950] S.C.R. 211.

The Jacques Cartier Bank v. Her Majesty the Queen[1], *Ludger Charpentier v. Her Majesty the Queen*[2], and *The B.V.D. Company Limited* and *Her Majesty the Queen*[3] are further authorities in this regard.

It therefore follows that as suppliant here has not complied with the conditions set down by the Governor in Council which are an essential requisite for its right to claim the incentive payments, it has no right to same and, therefore, its first submission cannot be entertained.

I should also point out that although the conditions of eligibility which were inscribed on the reverse side of the application form might have been more clearly spelled out in order to eliminate entirely the linking of the units by common walls by adding the word "detached" to the words "multiple dwelling unit", the words "multiple dwelling unit structures containing not more than four self-contained units" would alone, I believe, indicate that the construction containing the four units must be a detached building. The suppliant could have, and should have, in the fall of 1963, inquired specifically as to whether common walls were permitted and it would have been told at the time, if the evidence of Mr. Hereford is referred to, that common walls would not be allowed.

I now turn to suppliant's second submission that it is entitled to the amount claimed as damages sustained by it resulting from the fact that an officer of the respondent, Mr. Hereford, had assured its president, Mr. Mitchell, that the building it intended to erect qualified under the programme.

Evidence on this point was given by both Mr. Hereford and Mr. Mitchell. The former, at pp. 34 and 35 of the transcript, questioned by the Court, stated:

Q. But you definitely knew on the 29th October, that these units had to be individual units?

A. Yes.

Q And could not be part of any wall structure? You knew that?

A. Oh yes.

Q. But you didn't point that out to him?

A. I feel that I did. You see there were twelve applications for twelve separate buildings, four units, and he was anxious to have me indicate that I approved—which I was not in a position to do. All I could say to him, and all I did say to him, is that these were

[1] (1895) 25 S.C.R. 84. [2] [1955] S.C.R. 177 at 180.
[3] [1955] S.C.R. 787.

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individual buildings containing no more than four units. "The application would appear to be in order, it will be processed; inspection will be carried out and you will be notified in due course."

Q. Did you not point out to him that they had to be individual units?

A. I—yes. When I say "individual" separate buildings.

Q. Cannot they still be individual units and have a common wall?

A. Under the conditions of the programme as it existed at that time, the answer would be "no".

Mr. Mitchell at p. 5 of the transcript confirms Mr. Hereford's evidence that he did not assure the former that the applications would be confirmed in answer to the following questions:

Q. Did you discuss with him (Hereford) the eligibility of these constructions to receive the winter subsidy for constructions?

A. I did.

Q. And what did he tell you?

A. He said "leave the applications over here and as soon as I get approval I will mail it to you".

Counsel for the suppliant upon re-examination, by means of a reference to paragraph 2 of page 2 of a letter written by the president of the suppliant on January 10, 1964, to the Minister of Labour, attempted to reinforce the testimony of Mitchell on the question as to whether Hereford had given him an assurance that his construction qualified under the plan when at p. 18 of the transcript he asked him the following questions:

Q. Which version is right—the one you gave in the box previously, or the one you gave in the letter? In the box, previously, you said Mr. Hereford would submit your application to the higher-ups, and would let you know?

A. I didn't say "higher-ups". This is exactly the version of it, it goes back since 1964, that is exactly what happened in his office when the plans were presented to Mr. Hereford.

Q. He said, "Leave your applications there and I will send your approval"?

A. The impression was left with me, in fact in my remarks to him I said, it is the most wonderful thing the Government can do to stop unemployment, and he agreed with me on this particular matter. He said, "This will give people work and save a lot of money."

Counsel's efforts in this regard, however, were not successful as from a review of the above evidence, it appears that although the president of the suppliant parted with Mr. Hereford with the impression that his building project would be approved, he received no assurance from Mr. Hereford (who as a matter of fact had no authority to

give such assurance) that such would be the case. He was merely told that his company's applications seemed to be in order, that they will be processed, inspection will be carried out (which as already mentioned dealt with the stage requirement certificate to be obtained through Central Mortgage whose sole responsibility was in regard to ensuring that the construction had not gone beyond the stage of construction permitted prior to November 30, 1963) and that he would be notified in due course. This is far from the assurance pleaded in the petition of right and mentioned in Mr. Mitchell's letter to the Minister of January 10, 1964, and therefore the suppliant's claim based thereon must also fail.

I now come to suppliant's third plea raised by counsel in that if Mr. Hereford did not, as alleged, assure Mr. Mitchell that his proposed constructions met with the requirements he did not tell him that his proposal did not meet with these requirements when he should have, thus committing a fault of omission. According to counsel for the suppliant, Mr. Hereford, as Director of Services, had a duty to inform Mr. Mitchell in the fall of 1963 that no appropriation of funds had then been authorized for the programme, and that regulations had not yet been adopted by the Governor in Council and that having not done so, he is responsible for the loss of the subsidies sustained by the suppliant in the amount of $24,000.

There is, I believe, a simple answer to suppliant's last argument in that it does appear to me that Mr. Hereford's omission in not informing Mr. Mitchell that the programme was subject to Parliamentary approval of the money to be appropriated for the programme or that the buildings would have to comply with the regulations to be passed by order in council (if he was subjected to such a duty) had nothing to do with the fact that the suppliant's buildings were not eligible for the bonuses, but were due to the fact that Mr. Mitchell was imprudent, in view of the conditions of eligibility on the reverse side of the application, which indicated that multiple dwelling unit structures should not contain more than four self-contained units, in not pointing out to Mr. Hereford that the plans he was showing him indicated that the walls would be common. It is indeed not sufficient in the present circumstances to have, as Mr. Mitchell did, merely deposited blue prints

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indicating in the French language that the buildings would be joined by common walls, which Mr. Hereford states he did not notice nor realize as he cannot read nor understand the language. He is therefore responsible for his own misfortune and that of his company. I might inject here that had the situation been different and had Mr. Hereford assured Mr. Mitchell that his proposed buildings would qualify under the plan after the latter had informed him of the intention of his company to use common walls between the units, I might (under the authority of *Hedly Byne & Co. Ltd. v. Heller Partners Ltd.*[1], which can also, I believe, be sustained under the Civil Code [cf. 44 Revue trimestrielle de Droit civil, p. 46 *et seq.*]) have come to a different conclusion.

It therefore follows that the suppliant's petition of right is rejected with costs.

[1] [1963] 2 All E.R. 575.

Montréal 1966 le 8 mars

Ottawa le 16 mars

LA CITÉ DE JACQUES-CARTIER .....REQUÉRANTE;

ET

SA MAJESTÉ LA REINE .....INTIMÉE.

Couronne—Pétition de droit—Faculté spéciale d'annulation du bail par locateur—La nature d'une fin publique—L'Administration de la Voie Maritime du Saint-Laurent, chap. 242, S.R.C. 1952, articles 3(2), 9, 10, 12—Agent—Mandataire de Sa Majesté, du chef du Canada, de la Compagnie de l'Exposition universelle canadienne, Loi 11-12 Élisabeth II, chap. 12, S.C. 1962-63, art. 7(1)—Motif qui peut constituer une fin d'utilité publique—Terrains loués requis pour fins publiques.

En vertu d'un bail daté du 21 novembre 1960, l'Administration de la Voie Maritime du Saint-Laurent a loué à la Cité de Jacques-Cartier, requérante, pour un terme de 40 ans, un terrain d'une contenance de 22 4 acres affecté à l'installation d'un parc municipal.

Selon la clause 14 de ce bail, l'intimée s'est réservé une faculté spéciale d'annulation se lisant comme suit:

> 14. If the said land, or any portion thereof, should be required by Lessor, at any time during the currency of this lease, for any public purpose, the Lessor may terminate this lease by giving to the Lessee one month's notice in writing to that effect signed by the Legal Adviser of the St. Lawrence Seaway Authority, and mailed addressed to the Lessee.

Le 6 avril 1965, l'Administration, par le ministère de son conseiller juridique, a avisé, par écrit, la Cité de Jacques-Cartier qu'elle avait décidé de résilier ledit bail, se prévalant des dispositions attachées à la clause 14.

Conformément à l'art. 9, l'Administration, comme mandataire de Sa Majesté du chef du Canada, peut exercer les pouvoirs dont la présente loi l'investit.

A l'article 12, il est dit que:

> 12. L'Administration peut, avec l'approbation du gouverneur en conseil, louer à toute personne des terrains, des biens ou de l'énergie hydraulique, détenus au nom de Sa Majesté sous le contrôle de l'Administration.

Jugé: L'Administration a donc le droit, en vertu de la clause 14 dudit bail, de le résilier après avis de 30 jours, vu que la cause de résiliation invoquée a pour objet l'usage de terrains requis pour des fins publiques, à savoir: celles de la Compagnie de l'Exposition universelle canadienne, une compagnie mandataire de Sa Majesté.

2. Ce caractère d'utilité publique lui est conféré explicitement par la Loi 11-12 Élisabeth II, chap. 12, art. 7(1), S.C. 1962-63.

3. Il convient de remarquer le sens extensif de l'adjectif «any» comme aussi celui de l'expression «public purpose» que nul qualificatif n'applique limitativement aux seuls objets et besoins de l'Administration de la Voie maritime du St-Laurent.

4. Selon la clause 4 du bail, la Cité de Jacques-Cartier ne peut disposer, par sous-location ou autrement, des terrains à elle loués, sans l'assentiment écrit de l'Administration qui, selon l'art. 12 du chap. 242, peut, avec l'approbation du gouverneur en conseil, inclure dans un bail la faculté d'éventuelle résiliation: «If the said land, or any portion thereof, should be required by the Lessor, at any time during the currency of this lease, for any public purpose, the Lessor may terminate this lease by giving to the Lessee one month's notice in writing...».

5. Par ces motifs, la Cour déboute la Cité de Jacques-Cartier de ses conclusions, accueille la défense de l'intimée et rejette la pétition de droit avec dépens.

PÉTITION DE DROIT demandant que jugement intervienne déclarant arbitraire, illégale, nulle et de nul effet «l'annulation unilatérale qu'a faite l'Administration de la Voie Maritime du Saint-Laurent du bail consenti à la requérante le 21 novembre 1960,» et d'interdire à l'Administration «de donner suite et effet à telle prétendue annulation».

Émilien Brais, c.r. pour la requérante.

Gaspard Côté pour l'intimée.

DUMOULIN J.:—Les incidents qui ont déterminé ce litige ne sont guère compliqués; en voici l'exposé.

Aux termes d'un bail daté le 21 novembre 1960, l'Administration de la voie maritime du Saint-Laurent louait à la Cité de Jacques-Cartier, près Montréal, pour un terme de

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quarante ans, soit du premier septembre 1960 au trente et un août de l'an 2000, à raison de $25 par année, un terrain d'une contenance de 22.4 acres affecté à l'installation d'un parc municipal.

Ce bail, dont une expédition authentiquée est produite sous la cote R-1, contient, toutefois, dans l'avant-dernière clause (14) une faculté spéciale d'annulation par la partie de première part, que je désignerai par l'abréviation de «l'Administration», advenant l'éventualité ci-dessous:

> 14. If the said land, or any portion thereof should be required by the Lessor, at any time during the currency of this lease, *for any public purpose* (l'italique est de moi) the Lessor may terminate this lease by giving to the Lessee one month's notice in writing to that effect signed by the Legal Adviser of the St. Lawrence Seaway Authority, and mailed addressed to the Lessee...

Or, le 6 avril 1965, l'Administration, par le ministère de son conseiller juridique, M[e] J. A. Belisle, selon la clause abrogatoire précitée, expédiait à l'actuelle requérante, ce préavis, pièce R-2:

> Corporation de la Cité de Jacques-Cartier;
> Cité de Jacques-Cartier, P.Q.
>
> Messieurs,
> Prenez avis que l'Administration de la Voie Maritime du Saint-Laurent a décidé de canceller le bail (que ne «cancellait»-elle, du même coup, les barbarismes?) portant le numéro 61-47 (pièce R-2, à cause de certains besoins imminents d'ordre public et en conséquence vous donne l'avis de trente (30) jours aux fins de cancellation (re-sic) du dit bail...

La proposition de droit, soumise par le savant procureur de la Cité de Jacques-Cartier, M[e] Emilien Brais, c.r., est formulée à l'article 12 ci-après reproduit de la pétition:

> 12. La faculté d'annulation résultant de la clause 14 (du bail)...ne vise que les fins publiques qui sont les fins publiques propres de l'Administration de la Voie Maritime du Saint-Laurent.

Ces fins d'utilité publique, la requérante prétend les restreindre à celles de la Voie maritime, et notamment aux objectifs spécifiés à l'article 10 de la Loi 242 des Statuts revisés du Canada, 1952, l'acte constitutif de cette grande entreprise.

Je noterai, tout d'abord, que l'article 3, alinéa (2) du chapitre 242 fait de l'Administration à toutes fins, sauf les dispositions de l'article 9 (relatif au statut des employés), «un mandataire de Sa Majesté, du chef du Canada, et elle

ne peut exercer qu'à titre de mandataire de Sa Majesté les pouvoirs dont la présente loi l'investit».

Puis, à l'article 12, il est dit que:

12. L'Administration peut, avec l'approbation du gouverneur en conseil, louer à toute personne des terrains, des biens ou de l'énergie hydraulique, détenus au nom de l'Administration ou détenus au nom de Sa Majesté sous le contrôle de l'Administration.

Renouons maintenant le fil de la pétition. Il y est allégué que cet avis de cessation du bail n'était pas donné «pour des fins publiques propres à l'Administration de la Voie Maritime du Saint-Laurent, mais bien et exclusivement dans l'intention de louer temporairement ces terrains à la Compagnie Canadienne de l'Exposition Universelle de 1967, afin que cette dernière y aménage un parc de stationnement», (article 11). Or, continue la requérante (article 15): «L'Administration de la Voie Maritime du Saint-Laurent n'a aucun pouvoir de par sa Loi ou autrement pour agir comme mandataire ou agent de la Compagnie de l'Exposition Universelle de 1967, laquelle pouvait et devait si nécessaire traiter directement avec la requérante».

En conclusion de ces prémisses, la Cité de Jacques-Cartier demande que jugement intervienne déclarant arbitraire, illégale, nulle et de nul effet «l'annulation unilatérale que prétend avoir faite l'Administration de la Voie Maritime du Saint-Laurent du bail. . .consenti à (la) requérante le 21 novembre 1960. . .» et d'interdire à l'Administration «de donner suite et effet à telle prétendue annulation».

Après négation des allégués de droit de la pétition, l'intimée soumet en défense, aux paragraphes 14 et 15, qu'il appartenait à elle seule de définir ce qui pouvait constituer une fin d'utilité publique, excluant toute intervention judiciaire, puis, et surtout, que «les terrains faisant l'objet dudit bail étaient requis pour des fins publiques, à savoir, celles de la Compagnie de l'Exposition universelle canadienne, compagnie mandataire de Sa Majesté, ayant été constituée pour les fins mentionnées au paragraphe 3 de la Loi sur la Compagnie de l'Exposition universelle canadienne, chapitre 12 des Statuts du Canada, 1962-63». Pour ce double motif, l'intimée conclut au renvoi de la pétition de droit.

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Afin de circonscrire le débat dans ses limites pertinentes, j'en élaguerai tout de suite, comme peu convaincant, l'avancé de la requérante qu'il incombait à la Compagnie de l'Exposition universelle de traiter, directement, si besoin était, avec l'autorité municipale de la Cité de Jacques-Cartier. Prétendre cela est mettre en oubli, semble-t-il, la clause 4 du bail à l'effet que:

> Assignment. 4. The Lessee shall not make any assignment of these Presents, nor any transfer or sub-lease of any of the lands, rights or privileges demised or leased hereunder, without obtaining the consent in writing of The St. Lawrence Seaway Authority to such assignment, transfer or sub-lease.

L'on voit donc que la Cité de Jacques-Cartier ne pouvait disposer, par sous-location ou autrement, des terrains à elle loués, sans l'assentiment écrit de l'Administration à laquelle ressortissait la décision finale.

Je repousserai aussi sommairement la prétention de l'intimée de disposer arbitrairement, sans recours ni appel, de toute controverse sur la nature d'une fin d'utilité publique. Supposé que la cause de résiliation invoquée comme objectif d'utilité publique eut été l'affectation de ce terrain à une piste de courses, ou sa location à des commerçants, je n'irais certes pas jusqu'à tenir que la Cour dût perdre pour autant son droit de regard sur tout cela.

Mais telle n'est pas la question qui se pose présentement. La ligne d'argumentation du savant procureur de la pétitionnaire suit une orientation différente, comme nous l'avons vu précédemment. Selon la requérante, répétons-le, la faculté de résiliation à l'article 14 du bail, «for any public purpose», devrait s'entendre, restrictivement d'une utilité publique propre aux seules fins de la Voie maritime du Saint-Laurent, définies à l'article 10 de la loi organique de l'Administration comme étant:

> 10. ...
>
> *a*) ...d'acquérir des terrains pour des ouvrages qui peuvent être indispensables à l'établissement et à l'entretien, soit entièrement au Canada, soit conjointement avec des travaux entrepris par une autorité compétente aux État-Unis, d'une voie en eau profonde entre le port de Montréal et le lac Erié, et aux fins de construire, entretenir et mettre en service lesdits ouvrages; et
>
> *b*) ...de construire, entretenir et mettre en service tels ouvrages relatifs à cette voie en eau profonde que le gouverneur en conseil peut juger nécessaire pour remplir toute obligation assumée ou qui doit être assumée par le Canada aux termes d'un accord présent ou futur.

Tout objectif autre que ceux-ci, soutient la requérante, toute nécessité publique d'un ordre différent, demeurent radicalement étrangers aux buts assignés à l'Administration et ne sauraient, par exemple, autoriser la faculté de résiliement portée au bail, pièce R-1.

En outre, il n'existerait aucune interdépendance ou, plus précisément, nulle connexité entre les divers ministères ou autres organismes de l'État, à telle enseigne qu'un intérêt public relatif aux besoins du ministère des Transports, n'en serait pas un auprès du département des Postes. Un cloisonnement aussi étanche isolerait entre elles les nombreuses compagnies de la Couronne; un objectif d'utilité publique à la Société des Chemins de Fer nationaux perdrait cette qualité auprès de la Voie maritime du Saint-Laurent, et ainsi de suite.

C'est une thèse qui, assurément, ne manque pas d'inédit, mais est-ce bien celle qu'il me faudra approuver?

Semblable fractionnement de la souveraineté, tutélaire gardienne de l'intérêt de l'État, où qu'il se trouve et d'où qu'il provienne, paralyserait l'exercice de cette vigilance supérieure. Émietté de la sorte entre tous les services du gouvernement et ses émanations directes, les compagnies de la Couronne, l'intérêt collectif aurait tôt fait d'entrer en conflit avec lui-même.

Par son essence même, l'intérêt public est une indivisible réalité, dont la sauvegarde incombe à Sa Majesté, sans que rien, sinon un intégral accomplissement, puisse limiter ce devoir. Ce passage résume assez fidèlement, je crois, trois propositions développées en réponse par le savant procureur de l'intimée, Me Gaspard Côté, qui appuie ces moyens, *inter alia,* sur l'article 3, quatrième alinéa, de la *Loi de la Voie maritime du Saint-Laurent,* investissant Sa Majesté, autrement dit l'État canadien, de la propriété des biens acquis par cette société (l'Administration).

Le caractère public, comme l'atteste sa désignation officielle, de la Compagnie de l'Exposition universelle canadienne, lui est conféré explicitement à l'alinéa (1) de l'article 7 de la Loi 11-12 Élisabeth II, chapitre 12 (S.C. 1962-63), ci-après relaté:

7. (1) ...la Compagnie est, à toutes les fins de la présente loi, mandataire de Sa Majesté et n'exerce qu'à ce titre les pouvoirs que lui attribue la présente loi.

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Du reste, la requérante, à aucune phase de l'instance, ni oralement ni dans ses pièces litérales, n'a essayé de révoquer en doute l'envergure nationale de l'Exposition canadienne; elle s'efforce tout simplement d'établir une discontinuité absolue entre les divers organismes de l'État, afin de prévenir toute compénétration entre eux d'un facteur transcendant d'intérêt public.

Ce débat, dont je pense n'avoir rien omis, pour rendre justice à la remarquable compétence des savants procureurs ci-haut nommés, est susceptible, à mon sens, d'une très simple solution. Puisque «l'Administration peut, avec l'approbation du gouverneur en conseil (condition dûment remplie) louer à toute personne des terrains, etc.» (*vide* l'article 12 du chapitre 242), quel principe de droit lui pourrait interdire d'inclure dans un bail la faculté, ainsi conçue, d'éventuelle résiliation: «If the said land, or any portion thereof, should be required by the Lessor, at any time during the currency of this lease, *for any public purpose,* the Lessor may terminate this lease by giving to the Lessee one month's notice in writing...».

Il convient de remarquer le sens extensif de l'adjectif «any», comme, aussi, celui de l'expression «public purpose», que nul qualificatif n'applique limitativement aux seuls objets et besoins de l'Administration. Un raisonnement contraire n'équivaudrait-il pas à diminuer singulièrement le devoir de vigilance de l'État? Enfin, si pareille stipulation ne convenait point à la requérante, partie de seconde part au bail, il lui était parfaitement loisible de ne pas conclure.

PAR TOUS CES MOTIFS, la Cour, déboutant la Cité de Jacques-Cartier de ses conclusions, accueille la défense de l'intimée, et rejette la pétition de droit avec tous dépens à être taxés contre la requérante.

BETWEEN:

YARDLEY PLASTICS OF CANADA LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Toronto 1966 March 30, 31

Ottawa April 21

Revenue—Income—Income Tax Act—Sections 39(3), 39(4)(b), 39(4a)(c), 139(5a), 139(5d)(a)—Corporations being controlled by the same person or group of persons, associated with each other within the meaning of section 39(4)(b) of the Income Tax Act—Failure of the appellant to have successfully challenged the assumptions of fact that both corporations were under a common management coupled with the controlling group being common share-holders in both corporations—Appeal dismissed.

Appeal from the assessment of the appellant for the 1961 taxation year whereby a tax of $1,460 42 was levied on the basis that the appellant as well as a corporation called Canadian Mouldings Ltd., being controlled by the same group of persons, were therefore associated with each other within the meaning of section 39(4)(*b*) of the *Income Tax Act* and the appellant's tax was therefore determined in accordance with the provisions of subsection (3) of section 39 of the Act.

Section 39(4)(*b*) of the Act provides that corporations bear a tax rate of 18% on their first $35,000 profit and $6,300 plus 47% of the amount by which the amount taxable exceeds $35,000 if the amount taxable exceeds $35,000.

This, however, does not prevail if one corporation is associated with one or more other corporations at any time during the year when the 18% rate must be allocated to one of them or shared between them in some agreed proportion.

The sole issue in the present appeal is whether the appellant and Canadian Mouldings Ltd. are associated or not under section 39(4) of the *Income Tax Act* read in conjunction with sections 39(4)(*a*) and 139(5d)(*a*) of the Act.

The meaning of control of a corporation is not defined in section 39(4) and reference should be made in this regard to page 507 in *Buckerfield's Ltd. et al v. M.N.R.* [1964] C.T.C., Jackett P.:

> "...section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors. See *British American Tobacco v. C.I.R.* [1943] 1 All E R. 13, where Viscount Simon L.C., at page 15 says:
>
> > 'The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes'."

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The concept of control in section 39(4) of the Act has been expanded somewhat through section 39(4a)(*c*) which makes section 139(5d) applicable to section 39(4) of the Act and subsection (*b*) of section 139(5d) in the cases therein contemplated even makes mere factual control or even potential control sufficient within the meaning of control in section 39(4) so as to associate two or more corporations.

Held, That the appellant has not succeeded in its submissions because although section 139(5d) and its subsections directly affect section 39(4) in extending the meaning of control therein, they do not restrict its meaning.

2. That, although section 139(5d)(*a*) creates a statutory fiction in deeming that a related group in a position to control is a related group that controls a given corporation whether or not it is part of a larger group by whom the corporation is in fact controlled, it does so for the sole purpose of assisting in the construction of the words "related group" found in sub-paragraphs (iii) and (v) of section 139(*a*) as well as paragraph (*e*) of subsection 4 of section 39 of the Act, and does not create a statutory fiction in relation to the corporations controlled by an unrelated group as provided for in subsection (*b*) of section 39(4) of the Act, nor does section 139(5d)(*a*) eliminate the possibility of another group being held to control thereunder.

3. That section 139 (5d)(*a*) may become useful in a given case to determine when a related group may be declared to control but does not do away with or exclude or preclude the holding of an unrelated group as controlling two corporations when such a group does so control even when conditions are such that they happen to also meet with the requirements of the above section.

4. That section 139(5d)(*a*) indicates that the artificial construction was directed at the concept of a related group and would apply only when the statutory fiction of control created by the section and made available to the Minister as a possible basis of claim, from a revenue point of view, was required to bring into association two or more corporations controlled by related groups who otherwise would not fall within the strict conditions as set down, for instance in some of the subsections of section 139(5a)(*c*) of the Act.

5. That, when dealing with groups, it is always a question of fact as to whether any "group of persons" who own the majority of the voting power in a company are in effective control of its affairs and fortunes.

6. That "the appellant and Canadian Mouldings Ltd. were both, at some time in the taxation year 1961, controlled by a group comprised of F. B. Hill, F. B. Hill III, R. H. Wycoff, F. R. Daymond and W. E. Jacobson and that by virtue of paragraph (*b*) of s.s. (4) of sec. 39 of the *Income Tax Act,* the appellant and Canadian Mouldings Limited were associated in 1961"

7. Failure by the appellant to have successfully challenged the assumption of fact upon which the assessment was based and in view of the circumstances surrounding the origin of both corporations which were under a common management and the fact that the group chosen by the Minister as the controlling group were common shareholders in both corporations all lead to the conclusion that the group chosen is a group as contemplated by section 39(4)(*b*) of the Act.

8. That the appeal be dismissed with costs.

APPEAL from a decision of the Tax Appeal Board.

J. M. Shoemaker for appellant.

G. W. Ainslie and *Bruce Verchere* for respondent.

NOËL J.:—This is an appeal from a decision of the Tax Appeal Board[1] which confirmed a re-assessment of the appellant for the 1961 taxation year whereby a tax of $1,460.42 was levied on the basis that the appellant as well as a corporation called Canadian Mouldings Ltd., being controlled by the same group of persons, were therefore associated with each other within the meaning of section 39(4)(*b*) of the *Income Tax Act* and the appellant's tax was therefore determined in accordance with the provisions of subsection (3) of section 39 of the Act.

The above section provides that corporations bear a tax rate of 18% on their first $35,000 profit and $6,300 plus 47% of the amount by which the amount taxable exceeds $35,000 if the amount taxable exceeds $35,000. This, however, does not prevail if one corporation is associated with one or more other corporations at any time during the year when the 18% rate must be allocated to one of them or shared between them in some agreed proportion.

The shareholdings of the companies for the year 1961 (common as well as preferred both of which ranked equally for purposes of voting) were as appear in Schedule "A" produced hereunder:

SCHEDULE "A"

	CANADIAN MOULDINGS LIMITED			YARDLEY PLASTICS OF CANADA LIMITED		
	Common	Preferred		Common	Preferred	
Shareholder	Shares	Shares	%	Shares	Shares	%
F. B. Hill	1	162	4.6	5,321	53	28.0
F. B. Hill III	665	—	18.6	4,276	42	22.5
R. H. Wycoff	666	102	21.7	2,090	21	11.0
F. R. Daymond	669	102	21.7	2,660	27	14.0
A. Strachan	666	102	21.7	—	—	—
C. A. Ebner	—	—	—	3,231	33	17.0
W. E. Jacobson	333	81	11.7	1,425	14	7.5
	3,000	549	100%	19,003	190	100%

[1] 38 Tax A.B.C. 137.

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The respondent in its assessment assumed that the appellant and Canadian Mouldings Limited were both at some time in the taxation year 1961 controlled by the following group of persons in Schedule "D" hereunder, which comprises all the shareholders of both corporations who are common to both companies and therefore excepting therefrom A. Strachan who holds shares in Canadian Mouldings Limited only and C. A. Ebner, who holds shares in Yardley Plastics of Canada Limited only:

SCHEDULE "D"

MINISTERIAL GROUP
SHAREHOLDINGS OF THE COMPANIES—1961

	CANADIAN MOULDINGS LIMITED			YARDLEY PLASTICS OF CANADA LIMITED		
	Common	Preferred		Common	Preferred	
Shareholder	Shares	Shares	%	Shares	Shares	%
F. B. Hill	1	162	4.6	5,321	53	28.0
F. B. Hill III	665	—	18.6	4,276	42	22.5
R. H. Wycoff	666	102	21.7	2,090	21	11.0
F. R. Daymond	669	102	21.7	2,660	27	14.0
W. E. Jacobson	333	81	11.7	1,425	14	7.5
	2,334	447	78.3%	15,772	157	83.0%

At the hearing counsel for both parties agreed that the evidence in this appeal would be restricted to that of Mr. C. R. Hunter before the Tax Appeal Board to be found in the transcript at pp. 9 to 21 inclusive, that Schedules "A" and "D" produced by the appellant represent truly the holdings in both corporations, that two of the shareholders of both corporations, F. B. Hill and F. B. Hill III, are respectively father and son and are, therefore, related persons within the meaning of the provisions of section 139 of the *Income Tax Act* and that the other shareholders of the group chosen by the respondent are not related persons within the meaning of the Act. Counsel for the Minister finally admitted that the shareholders of both corporations which appear on Schedule "D" were the absolute and beneficial owners of all of the shares which appear opposite their names and that there was no arrangement contractual or otherwise which would bind any of the shareholders as to the manner in which they would cast or exercise their votes at any meetings of shareholders of either of the corporations.

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Mr. Hunter, the controller of Daymond Company, which administers the appellant corporation as well as Canadian Mouldings Ltd., stated that the Daymond Company Limited was incorporated around 1942 by a Mr. F. R. Daymond, father of the F. R. Daymond whose name appears as a shareholder of both the appellant company and Canadian Mouldings Ltd. The Daymond Company was engaged in the wholesale distribution of building materials as well as of plastic and aluminum products. When Canadian Mouldings Ltd. was formed in 1945, it purchased the assets of the metal moulding business which had been carried on by Mr. F. R. Daymond personally. When Yardley Plastics of Canada Limited was incorporated in 1947 it purchased assets from Yardley Plastics of Columbus, Ohio, including tools, jigs, dies and certain form manufacturing techniques. The Daymond Company Limited has continued its wholesale business, which consists of buying and reselling both plastic and aluminum products. The accounting, and administration of the various companies, is carried on at the office premises of the Daymond Company Limited, where each company has certain of its employees stationed for that purpose.

The sole issue in the present appeal is whether the appellant and Canadian Mouldings Limited are associated or not under section 39(4) of the *Income Tax Act* read in conjunction with sections 39(4a), 139(5a) and 139(5d)(*a*) of the Act, the relevant parts of which I have underlined. These sections read as follows:

39(4).

(4) For the purpose of this section, *one corporation is associated with another in a taxation year if, at any time in the year,*

(*a*) one of the corporations controlled the other,

(*b*) *both of the corporations were controlled by the same person or group of persons,*

(*c*) each of the corporations was controlled by one person and the person who controlled one of the corporations was related to the person who controlled the other, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations,

(*d*) one of the corporations was controlled by one person and that person was related to each member of a group of persons that controlled the other corporation, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations, or

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(e) each of the corporations was controlled by a *related group* and each of the members of one of the related groups was related to all of the members of the other *related group,* and one of the members of one of the related groups owned directly or indirectly one or more shares of the capital stock of each of the corporations.

39(4a).

(4a) *For the purpose of this section,*

(a) one person is related to another person if they are "related persons" or persons related to each other within the meaning of subsection (5a) of section 139;

(b) "related group" has the meaning given that expression in subsection (5c) of section 139; and

(c) *subsection (5d) of section 139 is applicable mutatis mutandis.*

139(5a).

(5a) For the purpose of subsection (5), (5c) and this subsection, *"related persons"* or persons related to each other are,

(a) individuals connected by blood relationship, marriage or adoption;

(b) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person related to a person described by subparagraph (i) or (ii);

(c) any two corporations

(i) if they are controlled by the same person or group of persons,

(ii) if each of the corporations is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

(iii) *if one of the corporations is controlled by one person and that person is related to any member of a related group that controls the other corporation,*

(iv) if one of the corporations is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

(v) *if any member of a related group that controls one of the corporations is related to each member of an unrelated group that controls the other corporation,* or

(vi) if each member of an unrelated group that controls one of the corporations is related to at least one member of an unrelated group that controls the other corporation.

139(5d).

(5d) For the purpose of subsection (5a)

(a) *where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by whom the corporation is in fact controlled;*

It will be useful at this point to consider the meaning of control of a corporation and as it is not defined in section 39(4), reference should be made to what the President of this Court said in this regard at p. 507 in *Buckerfield's Limited et al. v. M.N.R.*[1]:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the board of directors are separate, or it might refer to control by the board of directors. The kind of control exercised by management officials or the board of directors is, however, clearly not intended by Section 39 when it contemplates control of one corporation by another as well as control of a corporation by the individuals (see subsection (6) of Section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that in Section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors. See *British American Tobacco v. C.I.R.*, [1943] 1 All E.R. 13, where Viscount Simon L.C., at page 15 says:
>
> > "The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes."

I might enlarge somewhat upon these comments by saying that it appears to me that the concept of control in section 39(4) of the Act has been expanded somewhat through section 39(4a)(*c*) which makes section 139(5d) applicable to section 39(4) of the Act and subsection (*b*) of section 139(5d) in the cases therein contemplated even makes mere factual control or even potential control sufficient within the meaning of control in section 39(4) so as to associate two or more corporations when it states that:

> (*b*) a person who had a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, shares in a corporation, or to control the voting rights of shares in a corporation, shall, except where the contract provided that the right is not exercisable until the death of an individual designated therein, be deemed to have had the same position in relation to the control of the corporation as if he owned the shares.

Counsel for the appellant presented two rather ingenious submissions with which I will now deal. His first can be stated simply as follows: a related group composed of F. B. Hill and F. B. Hill III, father and son respectively, is deemed by section 139(5d)(*a*) to control Yardley Plastics

[1] [1964] C.T.C. 504.

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and since Hill and Hill III do not control Canadian Mouldings Ltd., the two corporations cannot be held to be in association. There is no doubt that as F. B. Hill and F. B. Hill III own 28.00% and 22.5% respectively of the voting shares of Yardley Plastics of Canada Limited, they are "in a position to control a corporation" and, therefore, as set down by subsection (*a*) of section 139(5d) they form a related group which, because of this same section, is "deemed to be a related group that controls the corporation" and this, according to the appellant, becomes an irrebuttable situation which would prevent the respondent from choosing another group as the controlling group under section 39(4)(*b*) of the Act. The appellant in order to succeed on this point had to establish that section 139(5d)(*a*) can change and restrict the natural meaning of the words found in paragraph (*b*) of subsection 4 of section 39 of the Act which sets out that "one corporation is associated with another in a taxation year if, at any time in the year...

(*b*) both of the corporations were *controlled* by the same person or *group of persons*."

(the emphasis is mine.)

The appellant has not, however, succeeded in this regard because although section 139(5d) and its subsections directly affect section 39(4) in extending the meaning of control therein, they do not restrict its meaning. Indeed, although section 139(5d)(*a*) creates a statutory fiction in deeming that a related group in a position to control is a related group that controls a given corporation whether or not it is part of a larger group by whom the corporation is in fact controlled, it does so for the sole purpose of assisting in the construction of the words "related group" found in sub-paragraphs (iii) and (v) of section 139(5a) as well as paragraph (*e*) of subsection 4 of section 39 of the Act, and does not create a statutory fiction in relation to the corporations controlled by an unrelated group as provided for in subsection (*b*) of section 39(4) of the Act nor does section 139(5d)(*a*) eliminate the possibility of another group being held to control thereunder. Section 139(5d)(*a*) therefore may become useful in a given case to determine when a related group may be declared to control but does not do

away with or exclude or preclude the holding of an unrelated group as controlling two corporations when such a group does so control even when the conditions are such that they happen to also meet with the requirements of section 139(5d)(*a*) such as we have in the present case.

I am further confirmed in this view by the language used in the above section which places an artificial construction on the words "related group" and not on the word "control" by repeating the words "related group" when it states that "where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation" instead of merely saying as it could have that "it shall be deemed to control". This indeed indicates that the artificial construction was directed at the concept of a related group and would apply only when the statutory fiction of control created by the section and made available to the Minister as a possible basis of claim, from a revenue point of view, was required to bring into association two or more corporations controlled by related groups who otherwise would not fall within the strict conditions as set down, for instance in some of the subsections of section 139(5a)(*c*) of the Act. It, however, does not have the effect of eliminating the right of the Minister to adopt another basis of claim which flows from another section and which is given in the clear words of section 39(4)(*b*) in a case where a larger unrelated group controls.

It therefore follows that if a case be found to come within subsection (*b*) of section 39(4) of the Act, it is not necessary for the purpose of association to look any further and enquire as to whether it might fall (because it has one or two persons related amongst the group who own more than 50% of the voting shares of one company) in a class covered by section 139(5d)(*a*) of the Act because this section is merely supplementary and an expansion of the cases where control of two or more corporations may be found for the purpose (through section 39(4a) of its subsections) of ascertaining the associated status of corporations under section 39(4) of the Act.

I cannot indeed come to the conclusion, upon a reading of all the sections which deal with associated corporations, that the natural meaning of the words used in section 39(4)(*b*) in the present case are altered or modified so as to

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exclude an unrelated group common to both corporations every time one finds amongst such a group as here two persons who are related and who own more than 50% of the voting shares of one corporation, but less than 50% of the other corporation, nor can I accept that because of this it would not be permitted to look at any other unrelated group common to two corporations and which controls both of them.

The appellant's second submission is that under section 39(4)(*b*) for the purposes of association, where corporations are controlled by the same group of persons, this group must have the right to effectively control the corporations and if it does not, then it cannot be considered as the group contemplated in the section.

Counsel for the appellant relies in this respect on the decision of the President of this Court and the expression quoted therein of Viscount Simon L.C. at p. 15 *in re British American Tobacco Co. v. C.I.R.*[1] where he says:

> The owners of the majority of the voting power in a company are the persons who are in *effective control* of its affairs and fortunes.

(the emphasis is mine.)

Counsel for the appellant, referring again to the *Buckerfield's case* (*supra*) states that the President of this Court when referring to the word "controlled" used in section 39 (and not control), has defined it as the right of control which means the right to exercise effectively the ultimate decision as to the carrying on of the business of the corporation. He relies on a further decision of the President of this Court in *Dworkin Furs (Pembroke) Limited v. M.N.R.*[2] which also indicates that "controlled" means something more than "control" when at p. 468 of the above decision it is stated that:

> ...One corporation cannot, in my view, be said to be "controlled" by another in any possible sense of that word unless that other can, over the long run, determine the conduct of its affairs.

He then concludes that "controlled", when control by a group is involved, is therefore something more than mere "control", i.e., a holding which might carry the majority of votes but must be the group that effectively controls and carries with it the power to determine the conduct of the corporation's affairs over the long run.

[1] [1943] 1 All E.R. 13. [2] [1965] C.T.C. 465.

As, according to counsel for the appellant, the group chosen by the Minister herein as the group that controlled is not the only group that could have been chosen (Schedule "B" produced by the appellant indeed pointed out five other combinations of groups which could also have been taken and which all would have held a majority of the voting power) it cannot have effective control of the corporations nor determine their affairs over the long run and, therefore, cannot be the group that effectively controlled the corporations.

I do not believe, as submitted by counsel for the Minister, that the latter is allowed to choose out of several possible groups any aggregation holding more than 50% of the voting power, even if the members of the group are common shareholders in both corporations and that such a group then becomes irrebuttably deemed to be the controlling group for the purposes of section 39(4) of the Act as this could lead to an absurd situation where no two large corporations in this country would be safe from being held to be associated.

I would indeed hold that when dealing with groups it is always a question of fact as to whether any "group of persons" who own the majority of the voting power in a company are in effective control of its affairs and fortunes following in this regard the dictum of Jackett P. in *Buckerfield's Ltd. et al v. M.N.R.* (*supra*) at p. 508 where he stated:

> Where, in the application of Section 39(4), a single person does not own sufficient shares to have control in the sense to which I have just referred, it becomes a question of fact as to whether any "group of persons" does own such a number of shares.

In the instant case, however, because of the history of both corporations, Yardley Plastics of Canada Limited and Canadian Mouldings Ltd., and in view of the fact that both, for many years, have been administered by the same corporation, Daymond Company (incorporated by the father of one of the shareholders of both companies, F. R. Daymond) it is not too surprising that the Minister in assessing the appellant and in his reply to the notice of appeal assumed, at paragraph 6 thereof, the following facts on which he based the assessment:

> 6. The Respondent says that the Appellant and Canadian Mouldings Limited were both at some time in the taxation year 1961 controlled by a group comprised of F. B. Hill, F. B. Hill III, R. H. Wycoff, F. R. Daymond

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and W. E. Jacobson and that by virtue of paragraph (*b*) of s.s. (4) of sec. 39 of the *Income Tax Act*, the Appellant and the Canadian Mouldings Limited were associated in 1961.

It then follows, referring to the dictum of Rand J. in *Johnston v. M.N.R.*[1] that:

> Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the Appellant.

The appellant here could have (as pointed out by Cattanach J. in *M.N.R. v. Pillsbury Holdings Ltd.*[2]) met the Minister's pleading that in assessing it he assumed the facts set out in paragraph 6 of his reply to the notice of appeal by

(*a*) challenging the Minister's allegation that he did assume those facts;

(*b*) assuming the onus of showing that one or more of the assumptions were wrong, or

(*c*) contending that, even if the assumptions were justified they do not of themselves support the assessment.

The appellant here attempted to challenge the assumptions of fact of the Minister by merely pointing out that several other combinations or groups could be held to have controlled the corporations during the year without, however, discharging the burden it had, and can exercise, by putting evidence before the Court to establish that the group assumed by the respondent to control the corporations was not the group that controlled the corporations, as it had to do in order to succeed herein.

It then follows that because of the failure of the appellant to have successfully challenged the assumptions of fact on which the assessment is based and also because of the circumstances surrounding the origin of both corporations, their being under a common management, coupled with the group chosen by the Minister as the controlling group being common shareholders in both corporations, I must and do find the said group so chosen to be a group as contemplated by section 39(4)(*b*) of the Act.

The appeal is dismissed with costs.

[1] [1948] S.C.R. 486.

[2] [1964] C.T.C. 294 at 302.

BETWEEN:

YORK, MARBLE, TILE AND TERRAZZO LTD. ..... SUPPLIANT;

Toronto 1966 May 5, 11

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Petition of right—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, s. 30(1)(a)—Imported goods not produced or manufactured in Canada —"Building materials" as defined in Schedule III by Section 6 of chapter 12, Statutes of Canada 1963 are irrelevant—Polishing and cutting of imported marble slabs for custom installation—Liability for tax.

The suppliant imported slabs of marble in bulk from Italy and used it mainly in carrying out subcontract work for its installation in new buildings. This work involved polishing and cutting the slabs and then installing them in place.

The issue for determination in this action was whether the polishing and cutting of the marble resulted in goods being "produced" or "manufactured" in Canada so as to incur tax under section 30(1)(*a*) of the Act.

Held, That the suppliant's activities did not involve the application of any art or process so as to change the character of the imported natural product.

2. That the words "goods produced or manufactured in Canada" in the context of section 30(1)(*a*) had no application to the work done on the marble by the suppliant.

3. That the Petition is granted with costs against the respondent.

PETITION OF RIGHT to recover sales tax assessed by the Minister of National Revenue, under provisions of the *Excise Tax Act.*

W. D. Goodman and *B. A. Spiegel* for suppliant.

N. A. Chalmers and *A. B. Garneau* for respondent.

GIBSON J.:—By its Petition of Right the suppliant, a company incorporated under the *Ontario Corporations Act,* with head office in the City of Toronto, seeks to recover certain moneys paid by it under protest pursuant to a Notice of Assessment for sales or consumption tax dated January 18, 1965 made by the Minister of National Revenue purporting to act under the provisions of s. 30(1)(*a*) of the *Excise Tax Act,* Revised Statutes of Canada 1952, c. 100.

The issue for determination in this action is whether the work done by the suppliant on imported slab marble

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resulted in such marble becoming "goods produced or manufactured in Canada" as those words are employed in the said s. 30(1)(*a*) of the *Excise Tax Act*.

According to the evidence, the suppliant in the main, imports the slab marble it uses in the course of its business from Italy. (Some small quantities of marble are purchased by it in Canada, but such fact does not affect the decision in this matter). It is imported in slab form in various thicknesses and sizes which may vary from four feet to 12 feet in length and from two feet to six feet in width. The most used thickness of such slabs is seven-eighths inch. These slabs are quarried and sawn in these sizes and thicknesses in Italy and in such form are delivered to the business premises of the suppliant either bundled, packed in wooden crates or sometimes in loose form.

Although some of this marble is sold by the suppliant in the form in which it is imported, the major portion of it is sold polished and installed in various buildings. These latter sales are made by the suppliant as part of sub-contracts entered into with general contractors in the construction of new buildings. Such sub-contract installations take a number of forms, such as for decorative walls, floors in certain areas or window stools and so forth; and all become part of the finished building. The suppliant obtains such installation sub-contracts from general contractors in a number of ways but generally by competitive bidding based on specifications prepared by the architects of such buildings.

On obtaining such a sub-contract the suppliant selects the specified lengths and thicknesses of marble from its stock, polishes it, cuts it to the size required and then delivers it to the particular job site and installs it where required.

The polishing and cutting are done by relatively unskilled workmen and neither are complicated or costly tasks to perform, but substantial skill and expenditure of labour costs are required to install such marble into buildings on the job sites.

On the evidence there is one exception to this manner of doing business and it concerns some marble cut for an altar for a Catholic church in Hamilton, Ontario; but this was an exceptional and isolated instance and not the usual business of the suppliant and is therefore of no help in determination of the issue in this action.

It is in respect to this polishing and cutting activities of the suppliant in relation to the marble it imports that this action is concerned. Whether as a result "goods are produced or manufactured in Canada" as these words are used in this taxing statute is the question for decision.

The answer poses some difficulty for a number of reasons. To illustrate I mention three:

FIRSTLY, as Chief Justice Duff in *The King v. Vandeweghe Limited*[1] said:

> The words "produced" and "manufactured" are not words of any very precise meaning and, consequently, we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe.

SECONDLY, the verb "produce" ordinarily is almost synonymous with the verb "manufacture", but how many exceptions there are is not easy to say. For example, a thing can be "produced" as a result of assembly of various parts, although it is not "manufactured".

THIRDLY, in taxing statutes "manufacture" generally is given its narrower meaning of production of articles for use from raw and prepared materials by giving them new forms, qualities and properties or combinations and usually, but not always, excludes repairing or processing for the purpose of restoring an article to its former condition. But there is no absolute rule as to how the word "manufacture" should be construed in a taxing statute.

In this case I think that counsel for the respondent put the issue for determination adequately when he submitted that the decision depends on its own facts in relation to the words used and the context in which they are used in the *Excise Tax Act*.

The material words of s. 30(1)(*a*) of the *Excise Tax Act* have remained substantially unaltered for many years in this statute and in the predecessor statute, the *Special War Revenue Act*.

The suppliant heretofore and up until this case was never considered by the Minister of National Revenue to have "produced" or "manufactured" "goods" in Canada by reason of the polishing and cutting work it did in its shop

[1] [1934] S.C.R. 244 at p. 248.

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on the marble imported into Canada before it incorporated the same into buildings in its role as building sub-contractor.

The said marble that the suppliant incorporated in the manner mentioned into buildings was never heretofore considered by the Minister of National Revenue as a building material within a specific definition of such in Schedule III of the *Excise Tax Act* and therefore the repealing of the exemptions from sales tax of certain "building materials" as defined in Schedule III by s. 6 of c. 12 of the Statutes of Canada 1963 is irrelevant to the determination of the issue for decision in this case.

No new type of work has been done by the suppliant to the marble it imported during the relevant time in this action. The polishing and cutting work continued to be done in the same fashion as always.

On these facts, I find it impossible to conclude that this work on the marble constituted, in the result, manufacturing or producing as meant in this taxing statute.

In the result therefore, I find on the facts of this case that the words "goods produced or manufactured in Canada" in s. 30(1)(*a*) of the *Excise Tax Act* and in their context in that statute have no application to the work done by the suppliant during the relevant time on the marble it imported into Canada (or on the relatively small quantities of marble it purchased from others).

In my opinion, the activities were not the application of any art or process so as to change the character of the imported natural product dealt with so as to come within the meaning of "produced" or "manufactured" in that statute. The activities of the suppliant in relation to the imported marble were done as part and parcel of executing building sub-contracts resulting in such marble becoming part of the realty and in doing so the suppliant did not at any material time produce or manufacture in Canada "goods" as meant in s. 30(1)(*a*) of the *Excise Tax Act*.

The suppliant is therefore entitled to judgment against the respondent for the return of the money paid during the relevant period in so far as these moneys relate to the issue decided in this action. If the exact sum cannot be agreed upon, then there shall be a reference to the Registrar of this Court to determine the sum.

The suppliant is entitled to its costs.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

Toronto 1966 May 12, 13

AND

FRASER H. WATTS ..... RESPONDENT.

Income Tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)—Award received by architect in architectural competition—Whether income or capital receipt—Prize—Travelling expenses.

The respondent submitted competition drawings to Central Mortgage and Housing Corporation pursuant to an offer made by it to the architectural profession in general, under which the competitors were to be paid for their work in conformity with stated terms.

Watts received a cheque of $4,000 in due course, as one of five entrants who agreed to submit further drawings and to compete for the top award of $15,000. This sum of $15,000 was won by him. The Minister sought to assess both amounts as income for services rendered.

The travelling expense deduction allowed by the Tax Appeal Board, relating to travelling undertaken in pursuit of studies of European projects similar to that involved in the competition, was also contested by the Minister.

Held, That the entering of the competition by the respondent and the filing of drawings created a contractual relationship between him and Central Mortgage and Housing Corporation under which the respondent became entitled to such remuneration as was specified in the published conditions of the competition.

2. That the $4,000 payment was income received under the contract and the $15,000 payment, although called a prize, was paid in discharge of a contractual obligation for services rendered and was not a gift within the meaning of the Act.

3. That the amount allowed by the Tax Appeal Board for travelling expenses was properly allowable.

4. That the appeal be allowed in part.

APPEAL from a decision of the Tax Appeal Board.

G. W. Ainslie and *J. E. Sheppard* for appellant.

D. G. Kilgour for respondent.

GIBSON J.:—This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board dated March 12, 1965 regarding the assessment for the taxation year 1961 of the respondent. The issues for decision on this appeal are whether the respondent in computing his income for the year 1961 was entitled to deduct the

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sum of $497.20 paid to B.O.A.C. for a return air ticket to the United Kingdom and Holland as an expense in earning his income and whether there should be included in the respondent's taxable income for the year 1961 the sums of $4,000 and $15,000 received from Central Mortgage and Housing Corporation.

The facts are relatively undisputed and are set out adequately in the Tax Appeal Board's judgment and are not repeated in these reasons but are referred to in part. The dispute is as to the conclusion in law to be drawn from these facts.

As to the deductibility of the said sum of $497.20, I agree with the Tax Appeal Board and dismiss the appeal insofar as this issue is concerned.

As to the other issue, the appellant in its Notice of Appeal relies for its case on the assessment made by the Minister which it is pleaded was based on certain assumptions, among which is the assumption contained in paragraph 5(*f*) of the Notice of Appeal which reads as follows:

> The sums of $4,000 and $15,000 were paid to the Respondent by Central Mortgage and Housing Corporation for services rendered by the Respondent in submitting a design for a housing development for land owned by Central Mortgage and Housing Corporation, and hence were income from a business within the meaning of sec. 3, 4, and para. (*e*) of ss. (1) of sec. 139 of the *Income Tax Act* R.S.C. 1952 c. 148.

The respondent says that these sums were received by him as gifts and not as income within the meaning of the *Income Tax Act*.

As is well known, apart from describing certain types of income which attract tax, in the *Income Tax Act* there is no comprehensive definition of "income". As a result of judicial decisions however, it is possible to name some criteria which assist in determining the quality of a given receipt or profit in reference to taxation under the *Income Tax Act*, but there is no all-inclusive list of such criteria.

There is also no comprehensive definition of "gift" in the *Income Tax Act*, but a gift *inter vivos* (as the receipt of these said sums of $4,000 and $15,000 are alleged to be by the respondent) is one method of transferring personal property.

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Halsbury's Laws of England[1] defines a gift *inter vivos* as follows:

> A gift *inter vivos* may be defined shortly as the transfer of any property from one person to another gratuitously while the donor is alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor, and with the full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver.

There are many qualifications to this general statement in the decided cases. For example, the gratuitous aspect for the purposes of taxation may include contract cases where the consideration given is substantially out of proportion to the benefit received, in which event the differential is often considered a gift by the taxing authorities.

Because it is not possible to lay down any comprehensive definition of "gift" or "income" under the *Income Tax Act*, each case must fall to be considered on its facts in matters such as are in issue in this particular case.

In this case it is possible however to categorize the matter from which certain legal consequences flow.

The respondent during the relevant period registered and submitted competition drawings to the Central Mortgage and Housing Corporation pursuant to an offer made by it to the architectural profession in general in respect to the so-called Smyth Road project in Ottawa. The terms and conditions of this competition are set out in Exhibit R-1 filed at this trial at pages 1 to 19 inclusive. In addition, as part of these terms and conditions there were certain questions and answers which constituted an extension of the conditions of the competition which are set out at pages 20 to 23 of said Exhibit R-1. The respondent or any of the other competitors were to be paid for their work according to the precise stipulations therein contained, and were not to be paid otherwise.

However, by telegram dated April 13, 1961 from Central Mortgage and Housing Corporation to him, the respondent was advised that he was one of five persons who had been chosen to compete in final run-off competition, so to speak, to determine the winner of the moneys offered in the original competition to the winner chosen by the judges of the

[1] Third Edition, Vol. 18, p. 364, para. 692.

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competition. This was not in accordance with the terms of the original competition and was in effect an amendment to it.

This telegram was followed by a letter dated the same date to the respondent advising him of this and informing him that a cheque for $4,000 was approved for payment to him and to the other four persons as expenses and asking about his willingness to participate further in this competition. The respondent agreed to participate, doing so by telegram dated April 14, 1961; and subsequently he received from Central Mortgage and Housing Corporation the said $4,000. The respondent then re-submitted drawings along with the other four competitors chosen for this run-off competition, pursuant to the directions given, and finally on July 19 he was chosen the winner of the competition and with a letter dated July 26, 1961 was sent a cheque in the sum of $15,000 which was the sum offered in the competition (before the above mentioned amendment to it) and which is referred to by Central Mortgage and Housing Corporation in Exhibit R-1 as a prize. (Subsequently, as provided for in the terms and conditions of the competition, the respondent entered into a further contract with Central Mortgage and Housing Corporation and did certain other further work, but the project was never proceeded with. But these subsequent matters are irrelevant to the issue in this action).

It is on the facts above recited that the issue arises as to whether the sums of $4,000 and $15,000 are gifts or income within the meaning of the *Income Tax Act* and the jurisprudence under that Act.

I am of the opinion that as a matter of law on these facts the entering into this competition by the respondent and the filing of drawings pursuant to it created a contractual relationship between the respondent and Central Mortgage and Housing Corporation. Pursuant to the terms of that competition contract the respondent had no claim against Central Mortgage and Housing Corporation for remuneration except according to the terms of the published conditions of that competition. These terms were unilaterally changed by Central Mortgage and Housing Corporation on April 13, 1961, which change was agreed to by the respondent by his acceptance by telegram dated April 14, 1961

followed by the receipt of the sum of $4,000 pursuant thereto. This amount was not agreed to between the parties after negotiation. It was offered by Central Mortgage and Housing Corporation, and tacitly accepted by the respondent.

It is not necessary to decide whether or not the respondent might have had a cause of action against Central Mortgage and Housing Corporation on a *quantum meruit* basis for the work which he had done pursuant to this competition contract if he had refused to accept this change in the conditions and terms of the competition.

It is sufficient to find, as I do, that this $4,000 was income received by the respondent arising out of this amended contract which he entered into with Central Mortgage and Housing Corporation.

Then subsequently, as successful winner of this competition, the respondent received the payment of $15,000 which was the payment called for under this competition contract. As stated, it was called a prize by Central Mortgage and Housing Corporation in the terms and conditions of the competition but that fact is of no legal significance in determining whether the receipt of it was income for tax purposes or a gift. What is of legal significance is that the payment of this sum constituted a discharge of the contractual obligation between Central Mortgage and Housing Corporation and the respondent to pay this sum for services rendered by him pursuant to the terms and conditions of this competition contract. The fact that Central Mortgage and Housing Corporation received no economic benefit from the services rendered by the respondent is inapposite.

It was not a gift *inter vivos* in any legal sense of a method of transferring personal property, and in any event, it was not a gift within the meaning of the *Income Tax Act*.

Instead, this $15,000 was income received by the respondent in his "business" as architect within the meaning of s. 139(1)(*e*) and ss. 3 and 4 of the Act.

In the result, therefore, the appeal is allowed in part and the matter is referred back to the Minister for reassessment not inconsistent with these reasons.

The appellant shall be entitled to 50 per cent of its taxed costs.

Toronto 1966 May 16, 17

BETWEEN:

CLARE LECKIE, Executrix of the Estate of ADAM NEWTON LECKIE } APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Estate tax—Estate Tax Act, s. 9(8)(d)(i)—"Place of transfer of shares"—The situs of shares is "in the province where the deceased was domiciled at the time of his death"—Deduction for provincial taxes—Meaning of "place of transfer"—Interpretation of statutes.

The Estate of Adam Newton Leckie was assessed by the Minister under the *Estate Tax Act*. The deceased died on January 2, 1962, at Oakville, Province of Ontario, where he was domiciled. The total value of his estate was $818,851.10 Of the property passing on the death of the deceased, there was 30,001 common shares and 165 preferred shares in the public company known as Leckie Enterprises Limited (a Manitoba company) having a value of $607,514 75, and certain shares in Anglo-Newfoundland Development Co. Ltd. The estate paid Ontario Succession duties on these assets.

As to shares in Leckie Enterprises Ltd, there was no formal register for the transfer of shares anywhere but in Manitoba. As to the shares in Anglo-Newfoundland Development Co. Ltd. there was in fact a branch register of transfer of shares in Ontario.

The issue on both appeal and cross-appeal is whether or not there was a "place of transfer" for each of these shares in Ontario so as to qualify the Estate for the deductions sometimes called the provincial tax credits, on certain property passing on the death of the deceased calculated and prescribed by s. 9 of the *Estate Tax Act*.

Held, That, in so far as the subject matter of the cross-appeal is concerned, namely the Anglo Newfoundland Development Co. Ltd. shares, there is no error in law in the decision of the Tax Appeal Board and, therefore, the cross-appeal is dismissed with costs.

2. That, as to the shares in Leckie Enterprises Ltd., the provincial tax credit from the aggregate taxable is allowable to this estate as on the facts of this case there was a "place of transfer" within the meaning of section 9(8)(*d*)(i) of the *Estate Tax Act* in the Province of Ontario where the deceased was domiciled at his death

3. That, for determining the situs of the subject matter, the purposes of the *Estate Tax Act* are set out in s. 9(8)(*d*)(1) which statutory provision says that such situs is "in the province where the deceased was domiciled at the time of his death" if any register of transfers or place of transfer is maintained by the corporation in that province.

4. That it was established that the deceased Adam Newton Leckie operated, considered and treated Leckie Enterprises Limited as if it was a sole proprietorship owned by himself, in the same manner as so many lay persons do in reference to corporations they wholly own and control.

5. That the deceased in effect considered the shares of Leckie Enterprises Ltd. could be transferred at any material time where he resided, namely, in Oakville, Province of Ontario. This is sufficient to constitute Oakville a "place of transfer" within the statutory prescription that the corporation at the time of the deceased's death must in fact maintain a "place of transfer" in the Province of Ontario.

6. That Leckie Enterprises Ltd, at the time of the death of Adam Newton Leckie, maintained a "place of transfer" for its shares in the Province of Ontario within the meaning of s 9(8)(*d*)(i) of the *Estate Tax Act*.

7. That the appeal of the appellant is allowed with costs and the matter referred back for reassessment not inconsistent with these reasons.

APPEAL from a decision of the Tax Appeal Board.

D. A. Keith, Q.C. for appellant.

G. W. Ainslie and *Gordon V. Anderson* for respondent.

GIBSON J.:—This is an appeal and cross-appeal from the decision of the Tax Appeal Board dated November 12, 1965 concerning the tax levied against the estate of Adam Newton Leckie under the *Estate Tax Act*. The deceased died on January 2, 1962 resident at Oakville, Ontario and domiciled in the Province of Ontario. The total value of this estate was $818,851.10. The estate has paid Ontario Succession Duties.

The issue on both appeal and cross-appeal is whether the deductions, sometimes called the provincial tax credits, on certain property passing on the death of the deceased, calculated and prescribed by s. 9 of the *Estate Tax Act*, are allowable to this estate.

The property passing on the death of the deceased with which the appeal is concerned consists of 30,001 common shares and 165 preferred shares in the public company known as Leckie Enterprises Limited, having a value of $607,514.75. The provincial credit if allowable would amount to somewhere between eighty and ninety thousand dollars.

The property passing on the death of the deceased with which the cross-appeal is concerned consists of 300 shares of Anglo Newfoundland Development Company Limited having a value of $2,925.

Insofar as the subject matter of the cross-appeal is concerned, I am of the opinion that there is no error in law in

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the decision of the Tax Appeal Board and therefore the cross-appeal is dismissed with costs.

As to the subject matter of the appeal, namely, the shares in Leckie Enterprises Limited, the provincial tax credit from the aggregate taxable value is allowable to this estate if the situs of these shares for the purpose of the *Estate Tax Act* was the Province of Ontario and not the Province of Manitoba. The Tax Appeal Board found that these shares did not have such a situs within the Province of Ontario.

The rules for determining the situs of the subject matter of this appeal for the purposes of the *Estate Tax Act* are set out in s. 9, s-s. (8), para. (*d*), s-para. (i). In brief this statutory provision says that such situs is "in the province where the deceased was domiciled at the time of his death, if any register of transfers or place of transfer is maintained by the corporation in that province..."

There is no dispute about the fact that the deceased was domiciled in the Province of Ontario at the time of his death and the parties have agreed that Leckie Enterprises Limited kept only one "register of transfers" of shares and it was kept at Winnipeg, Manitoba.

The issue for decision therefore resolves itself into the question of whether or not on the facts of this case the corporation Leckie Enterprises Limited maintained a "place of transfer" for its shares in the Province of Ontario within the meaning of s. 9(8)(*d*)(i) of the *Estate Tax Act*.

The *Estate Tax Act* does not define "place of transfer". The only evidence adduced dealing specifically with these words was to the effect that public corporations with large numbers of shareholders often maintain one or more recognized trust company offices as places of transfer of its shares, but that a corporation such as Leckie Enterprises Limited never does. The meaning therefore of "place of transfer" in this case must be determined from all the other facts adduced.

The parties have agreed to the following Statement of Facts:

1. The deceased, Adam Newton Leckie, died testate on the 2nd day of January, A.D. 1962.

2. Under the last will and testament of the deceased, probate of which was granted to the Appellant by the Surrogate Court for the County of Halton, Province of Ontario, on the 17th day of April, 1962, the Appellant was appointed the sole executrix of his will.

3. At the time of his death, and for at least ten years prior thereto, the deceased was domiciled and resident in the County of Halton in the Province of Ontario.

4. At the date of his death, the deceased was the beneficial owner of 30,003 common shares of Leckie Enterprises Limited, being all of the issued and outstanding common shares of the said company. 30,001 of the common shares at the date of death were registered in his name, and the other two were registered in the names of nominees for the deceased. The deceased was the beneficial owner of 165 preferred shares of Leckie Enterprises and Hunter Enterprises was the beneficial owner of 100 preferred shares being the balance of preferred shares which had been issued and had not been redeemed at the date of death.

5 Leckie Enterprises Limited was incorporated on the 2nd day of October, 1957, under the provisions of the Manitoba Companies Act.

6. The head office of Leckie Enterprises Limited was at all times at the City of Winnipeg.

7. At the date of the death of the deceased, Leckie Enterprises Limited kept only one register for the transfer of shares, which register was kept at the head office of the Company at the City of Winnipeg, and at no time had the directors appointed any place, within the meaning of ss. (1) of sec. 346 of the Manitoba Companies Act for the keeping of a branch register of transfers.

8 At the meeting of the first or provisional directors of Leckie Enterprises Limited, held on the 7th day of October, A.D. 1957, By-Law Number 1, being a by-law relating generally to the transaction of the business and affairs of the company was passed, and at the first general and special general meeting of the shareholders of Leckie Enterprises Limited, held on 7th October, 1957, the said By-Law was passed, sanctioned and confirmed by the shareholders.

9. Anglo Newfoundland Development Company Limited was incorporated under the provisions of the Companies Act of Newfoundland, R S N. 1952, c. 168, and the registered office of the company was in St. John's, Newfoundland.

10. Anglo Newfoundland Development Company was authorized by its Articles of Association to keep a branch register of members outside of the province of Newfoundland, and at the time of the deceased's death, kept a branch register in the Province of Ontario.

11. At the date of death, the deceased was the beneficial owner of 300 common shares of Anglo Newfoundland Development Company Limited. These shares were never transferred by the estate following the death of Adam Newton Leckie, the said shares being redeemed by the company in the month of July, 1962, and the redemption price being paid directly to the Executrix in the Province of Ontario some time during the said month. No releases were ever required by the Province of Newfoundland and no proceedings of any kind were had or taken in the Province of Newfoundland with respect to the transfer of the said shares.

12. The Province of Ontario was a prescribed province, but neither the Provinces of Manitoba nor Newfoundland were prescribed provinces, within the meaning of sec 9 of the Estate Tax Act.

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13. The parties agree that the following documents shall be admitted in evidence without formal proof and shall form part of this Agreed Statement of Facts:

(a) Letters Probate of the Surrogate Court of the County of Halton, dated 17th of April, 1962, of Last Will and Testament of the deceased, with a certified copy of the Last Will and Testament of Adam Newton Leckie attached thereto;

(b) Letters Patent of Leckie Enterprises Limited, dated 2nd day of October, A.D. 1957;

(c) By-Law Number 1 of Leckie Enterprises Limited.

The evidence adduced at the trial of this action established the kind of company that Leckie Enterprises Limited is and how it operated. It is a public company incorporated under the Manitoba *Companies Act*. Mr. D. A. Thompson, Q.C., Winnipeg, Manitoba, gave evidence that at the material time only public companies could be incorporated under the Manitoba *Companies Act*. He described from the minute book Exhibit A-4 and the so-called stock ledger Exhibit A-5 how in fact this company did operate.

This evidence established that the late Adam Newton Leckie was the sole beneficial shareholder and the sole operative officer and sole director with authority of this company; that in the minute book of the company *ex post facto* from time to time were recorded various transactions entered into by the late Mr. Leckie which required some corporate record; that there was no reference in the minutes of the company to the maintaining of any "register of transfers of shares" or "place of register".

In brief, the evidence established that the late Mr. Leckie operated Leckie Enterprises Limited as if it was a sole proprietorship owned by him.

The so-called share "register of transfers" in fact consisted merely of stubs from printed forms of share certificates. And at all material times the actual share certificates were endorsed in blank, and in such street form were pledged to and were in the custody of the Bank of Montreal head office branch in Winnipeg, Manitoba as collateral security for a loan, so that the "register of transfers" that the parties have agreed was kept at Winnipeg was a very basic thing, but quite satisfactory for a company such as this.

The problem is what would a company such as this do to maintain a "place of transfer". Certainly, as indicated in the evidence, it would be ridiculous for it to have a public

trust company as such, which, as stated, a company with many public shareholders often does.

To reach a practical answer to this problem, it is relevant to keep in mind that the deceased Adam Newton Leckie considered and treated Leckie Enterprises Limited as part of himself, in the same manner as so many lay persons do in reference to corporations they wholly own and control. They do not look on such corporations as third parties separate and distinct from themselves even though legally it is uncontrovertible that such corporations are separate legal entities.

Taking this into consideration, there is no doubt in my mind on the facts of this case that the deceased in effect considered the shares of Leckie Enterprises Limited could be transferred at any material time where he was, as, for example, where he resided, namely, in Oakville, Ontario. The question is whether or not this is sufficient to constitute Oakville a place of transfer to bring it within the statutory prescription that the corporation at the time of the deceased's death must in fact have maintained a "place of transfer" in the Province of Ontario before the provincial credit to this estate is allowable.

It is unequivocal that this statutory provision is remedial and it is also patent on the facts of this case that a grievous injustice and absurd result will obtain if this estate is denied this deduction of provincial tax credit.

On considering this sub-section in the *Estate Tax Act* it would seem clear that this provision was enacted having in mind the usual situation that obtains with a public corporation, namely, a large number of public shareholders, substantial corporate staff, good corporate business practice which would dictate the necessity of having a register of transfers of shares and places of transfer in all provinces where there were any number of shareholders, and so forth. But this provision also in law does apply to Leckie Enterprises Limited which it is clear is an entirely different kind of corporation and one which the drafters of the legislation may not have had in mind. But the proper rules of construction of statutes must also apply to the case of this corporation.

Important among these rules is the rule prescribing that where there are two constructions, the one which will do injustice and the other which will avoid that injustice and

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will keep exactly within the purpose for which the statute was passed, the court should always adopt the second and not adopt the first of these constructions. In many cases the courts have applied this rule of construction.

Also without breaching any of the principles of law set out in *Salomon v. Salomon & Co*[1]. in many other cases the courts have lifted the corporate veil so as to come to a correct conclusion in law on the facts of the matters before the courts.

An example of this is the situation where the court has been called upon to determine whether there was any basis for granting a company winding-up order. (See *Re Bondi Better Bananas et al.*[2]; and *Re R. C. Young Insurance Ltd.*[3]).

Another example is the situation in which the court was called upon to decide whether during the first war a corporation whose shareholders were alien enemies could institute an action against an English company for payment of a debt where payment of a debt was prohibited as trading with the enemy. (See *Daimler Company, Limited v. Continental Tyre and Rubber Company (Great Britain), Limited*[4]).

There are also cases in which the court for the purposes of certain statutory offences has found that a corporation can have *mens rea.* (See the reference to the "brains of the company" in *John Henshall (Quarries) Ltd. v. Harvey*[5]).

The principles enunciated however in the numerous cases establishing the jurisprudence as to the situs of shares for purposes other than s. 9 of the *Estate Tax Act* are not helpful in deciding the issue here; and the provisions of the Manitoba *Companies Act* are irrelevant.

Instead, in this case I am of the opinion that applying the said rule of statutory construction and lifting the corporate veil of Leckie Enterprises Limited the correct conclusion in law will be reached in this case.

In doing so the finding of fact and law must be and is that the will of Leckie Enterprises Limited for the purposes of s. 9(8)(*d*)(i) of the *Estate Tax Act* was that of the late Adam Newton Leckie its sole beneficial shareholder and sole operative officer and sole director with authority at all

[1] [1897] A.C. 22.
[2] [1951] O.R. 845.
[3] [1955] O.R. 598.
[4] [1916] 2 A.C. 307.
[5] [1965] 2 W.L.R. 758.

material times; that the late Adam Newton Leckie also at all material times considered that where he was domiciled and resided, namely, for example, Oakville in the County of Halton in the Province of Ontario was a "place of transfer" for the shares of Leckie Enterprises Limited; and that Leckie Enterprises Limited at the time of the death of Adam Newton Leckie maintained a "place of transfer" for its shares in the Province of Ontario within the meaning of s. 9(8)(*d*)(i) of the *Estate Tax Act*.

The appeal is therefore allowed with costs and the matter referred back for reassessment not inconsistent with these reasons.

Toronto
1966
Mar. 29, 30
Ottawa
May 17

BETWEEN:

SOUTHAM BUSINESS PUBLICATIONS LTD. ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Income Tax Act, R.S.C., 1952, c. 148, ss. 11(1)(a), 12(1)(a)(b) —Purchase of weekly newspaper as going concern—Whether amount attributed to subscription lists and circulation records a deductible expense or a capital outlay—Depreciation—Goodwill.

The appellant is a publisher of a large number of trade and technical periodicals. It paid $50,000 for the circulation records and subscription lists of the Financial Times and sought to deduct that amount of $50,000 under s. 12(1)(*a*) of the Act as a normal means of acquiring subscribers the cost of which compared favourably with the cost of acquiring them by direct approach.

The appellant has also acquired at the same time the exclusive right to publish the Financial Times, the right to the name, the vendor's advertising and other records, its furniture and fixtures, accounts receivable, inventory of newsprint and goodwill, all for the sum of $25,000.

The Financial Times Limited undertook to change its corporate name and not to compete.

In the Minister's view the appellant purchased a business as a going concern and the expenditure was a non-deductible, non-depreciable outlay.

Held, that the appellant purchased a business as a going concern and with the exception of the amount paid for office equipment and accounts receivable, the real character of the expenditure was for goodwill.

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2. That even if the amount in dispute were not paid for goodwill but for customers lists and address plates, the intrinsic value of the latter was nil and their value lay in the information they contained, which was not depreciable property.

3 That the appeal be dismissed.

APPEAL from a decision of the Tax Appeal Board.

Hon. R. L. Kellock, Q.C. for appellant.

M. A. Mogan for respondent.

NOËL J.:—This is an appeal from the decision of the Income Tax Appeal Board[1], dated April 26, 1965, dismissing appellant's appeal from its income tax assessment for the year 1961 whereby a part of the purchase price of certain assets of a newspaper concern in an amount of $50,000, which had been deducted by the taxpayer, was added to its income.

The appellant, a Toronto corporation, is a publisher of a large number of trade and technical periodicals. On October 27, 1961, it purchased certain assets of a company called Financial Times Limited (sometimes hereafter called The Times) located in Montreal, for the sum of $75,000 in accordance with an accepted offer to purchase, the relevant clauses of which are reproduced hereunder:

October 27, 1961.

Financial Times Publishing Co Ltd,
410 St. Nicholas Street,
Montreal, P Q

Dear Sirs,

We (hereinafter called the "Purchaser") hereby offer to purchase from you (hereinafter called the "Vendor"), upon the terms and subject to the covenants and conditions hereinafter set forth, the following assets of the Vendor, as the same shall exist at the opening of business on the Closing Date, at the prices set opposite the said assets respectively as follows:—

(1) all Canadian subscriptions to the said Financial Times and all circulation lists of Canadian subscribers thereto, including address plates and circulation records; and the Vendor's membership in, and statements and records pertaining to, the Audit Bureau of Circulation,

all for the price of $50,000

and

(2) The exclusive right to publish in Canada a weekly newspaper under the name Financial Times and otherwise to use the said name in Canada and, so far as the Vendor is able to grant the same, the right to use the said name outside Canada for any or all purposes,

[1] 38 Tax A B C 152

and the goodwill of the Vendor's business associated with the said name; all advertising contracts, all advertisers' prospect lists; all advertisers' records and correspondence with advertisers; all files pertaining to the said Financial Times newspaper; all available copies of past issues of the said Financial Times; all invoices or copies thereof to current advertisers in the said Financial Times; all equipment, furniture, fixtures and library; all accounts receivable and inventory of newsprint, if any

all for the price of $25,000

making an aggregate purchase price of $75,000 for all the said assets (hereinafter collectively called the "Newspaper Assets") described in the foregoing subclauses (1) and (2)

1. Notwithstanding anything set out elsewhere herein, the obligation of the Purchaser to complete the purchase of the Newspaper Assets shall be subject to the following conditions which are inserted for the exclusive benefit of the Purchaser and may be waived in whole or in part by it at any time:—

.

(3) that from at least 1st January, 1960, up to the Closing Date the Vendor shall have carried on in the ordinary course its business of publishing at Montreal a weekly financial newspaper under the name Financial Times;

. . .

2 The transaction of purchase and sale provided for herein shall be closed on the 24th day of November, 1961, or such later date as may be agreed upon by the parties, upon which date the Purchaser shall be given possession of all the Newspaper Assets and, subject to adequate provision being made for payment of the creditors of the Vendor listed in the above-mentioned affidavit required by the Bulk Sales provisions of the said Civil Code, shall pay the aggregate purchase price by certified cheque to the Vendor or as it may direct The closing shall take place at the office of the Vendor, 410 St. Nicholas Street, Montreal, at 11:00 a m Montreal time on the Closing Date. The expression "Closing Date" shall mean the 24th of November 1961, unless the date of closing is extended pursuant to this paragraph, in which case the expression "Closing Date" shall mean the extended date of closing

3. The Vendor covenants and agrees with the Purchaser:—

(1) that it will carry on its said business of publishing the said Financial Times in the usual and ordinary course between the date hereof and the Closing Date:

(2) that within thirty days after the closing of the transaction of purchase and sale provided for herein the Vendor will apply to the Secretary of State of Canada to change the Vendor's corporate name so that neither of the words Financial or Times shall form part of the Vendor's name;

(3) that for a period of five years after the Closing Date it will not within Canada, by itself, or in partnership or in conjunction with any other person, firm or corporation as principal, agent, shareholder, lender or in any other manner whatsoever and either directly or indirectly carry on or be engaged or concerned in, or give any advice in, any business similar to the publishing business now carried on by the Vendor.

. . .

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7. It is understood and agreed that after the closing of the said purchase and sale of the Newspaper Assets the Purchaser will assume the obligation of the Vendor to provide the weekly newspaper Financial Times to its Canadian subscribers in accordance with their respective subscriptions thereto, but that the Purchaser will not assume any other obligations or liabilities whatsoever of the Vendor and that the Purchaser will not purchase or acquire any interest in any list of subscribers in the United States of America to the said Financial Times, or any interest in any subscriptions of any such subscribers.

. . .

SOUTHAM-MACLEAN PUBLICATIONS LIMITED,
SOUTHAM-MACLEAN
(Signed) J. A. Daly
(Signed) W. H. Jones

We hereby accept the above offer.

FINANCIAL TIMES PUBLISHING CO. LTD.

(Signed) Deidy E. Erot
President
(Signed) John A. McCorkell
Secretary

In coming to a conclusion herein, three questions must be solved: (1) was the expenditure of $50,000 by the appellant made for the purpose of gaining or producing income within the meaning of section 12(1)(*a*) of the *Income Tax Act* (2) if it was so made, was such payment an allowable expense or was it a capital outlay within the meaning of section 12(1)(*b*) of the *Income Tax Act*, and alternatively, (and in the event the sum paid was not deductible as an expense) (3) are the circulation lists of the subscribers, including address plates and circulation records, purchased from Financial Times Publishing Co. Ltd. tangible capital assets depreciable under section 11(1)(*a*) of the *Income Tax Act* and regulations which deal with capital cost allowances.

There is no question that the expenditure was made "for the purpose of gaining or producing income" within the meaning of section 12(1)(*a*) of the Act and the only matter to be determined with regard to its deductibility is whether this expenditure is an income or a capital disbursement.

The question as to whether a particular outlay by a trader can be set up against income or must be regarded as a capital outlay is not always an easy matter to determine and can be answered only in the light of all the circumstances of each particular case.

The particular circumstances under which the appellant operated its business and purchased the assets of Financial Times Publishing Co. Ltd. will now be considered.

In the fall of 1961, the appellant was operating some 30 odd technical and business journals, serving different fields, deriving revenue therefrom from two sources, subscriptions and advertising. The appellant acquires, maintains and builds up circulation for its publications through its circulation department by (1) direct approach to a subscriber or a prospective subscriber; (2) by purchasing lists of prospective subscribers (from firms who deal in such lists such as from Wallace Publishing Company and Age Publishing Company); (3) by renting such lists of prospective subscribers (from firms such as Might Directories, in Toronto, and Sanford Evans in Winnipeg), and, finally, (4) by acquiring the circulation lists of an existing publication which is going out of business for one reason or another, such as it has done here.

The advertising revenue from which the appellant derives the greater part of its revenue is dependent upon the paid number of subscribers or circulation for a particular periodical, which is audited every year by the Audit Bureau of Circulation, an independent body consisting of advertisers, advertising agencies, publishers of periodicals, newspapers and magazines.

James Alexander Daly, President and Managing Director of the appellant, stated that the latter had been in business since 1880 under different names, publishing trade, technical and business periodicals. He explained that there is a very small profit from the subscriptions on established publications and that the cost of building up new publications is considerably higher. The main source of revenue of the appellant is derived from its advertising and although the cost of same is dependent upon the number of subscribers who receive the periodical, the buying power of the subscriber is also a factor.

The operation of obtaining readers and subscribers to its periodicals is, according to Mr. Daly, a continuing operation by its circulation department, which is charged with the responsibility, not only of seeking new names in each field as new people appear, but also of renewing the existing ones when their subscriptions expire. It is a standard

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practice in the industry to circulate free copies among non-subscribers for a limited period and then ask them to subscribe, and this was done extensively after the appellant purchased the Times.

The cost of printing, supplying and mailing the Times for the first couple of years after the purchase was equal to the total revenue derived from advertising and subscriptions. In addition to the above cost, the appellant had large editorial, advertising and sales expenditures, overhead and rentals.

Mr. Daly further explained that circulation lists of subscribers, no matter how obtained, were of a transitory nature, continually in a state of flux, in the sense that people subscribe, the majority for one year, others for two or three years, and in order to obtain renewals, the interest of the reader in the publication must be maintained. There is also a considerable turnover in the various businesses and fields served with people moving from position to position, being promoted and retired and most of its readers being older people, the mortality and retirement rate is very high.

The appellant became interested in the Financial Times Publishing Co. Ltd. when it was brought to their attention that it was for sale by both their bank (which bank happened to be the same as that of the Financial Times Publishing Co. Ltd.) and the Gazette Printing Company, the Times's publisher.

The Times, according to the first issue published by the appellant on December 1, 1961 (Ex. R-2) had "been devoted to the interests of the Canadian public for 49 years" when in August 1961 its publisher died after an illness of two or three years, during which time he was not able to attend to his business.

Daly explained that the figure of $50,000 for the purchase of the circulation lists of Canadian subscribers, including address plates and circulation records together with the vendor's membership in the Audit Bureau of Circulation and statements and records pertaining thereto, was arrived at because the appellant thought that it was purchasing 5,000 readers and its experience was that to get these readers by direct mail solicitation would cost approximately $10 each. However, instead of getting 5,000 subscribers, it only obtained 2,935 in good standing when an audit was made after the purchase. This discrepancy, according

to Mr. Daly, was due to the fact that the records had been allowed to deteriorate because of the illness of the publisher and the lack of experience of his wife and the rest of the staff.

The circulation of the Financial Times from November 1961 through to December 1963 appears on Ex. R-3 reproduced hereunder:

CIRCULATION OF FINANCIAL TIMES

	In Nov. 1961	Net increase during 1962	Total in Dec. 1962	Net increase during 1963	Total in Dec. 1963
Paid Subscriptions	2,935	4,896	7,831	8,306	16,137
Unpaid Circulation	883	7,855	8,555	474	9,029
Newsstand copies		2,495	2,495	246	2,741
TOTAL		15,246	18,881	9,026	27,907

Of the 2,935 paid subscribers in 1961, 307 had already run out in the three months preceding October 1961, 441 expired in the remaining period of the year, 1,723 expired in 1962, 443 in 1963 and 31 in 1964. Mr. Daly stated that 75 percent of these subscribers, however, renewed their subscriptions. Upon acquiring the assets, the appellant enlarged the circulation promotion department to seek new subscribers and carried on circulation solicitation programmes by spending $91,000 in 1962 and $203,000 in 1963 which, although successful in increasing subscribers, cost $18 per subscriber for the year 1962 and $24 per subscriber for 1963.

The staff of the Times, consisting in eight people and a half-time accountant together with one senior and one junior editor, were all kept on from week to week after the takeover and the periodical continued to be published by the Gazette Publishing Company. The advertising salesman in Toronto remained one year and a half with the appellant and the Montreal salesman remained two years. The clerical staff departed at irregular times in accordance with normal turnover. The staff remained in the Times premises for a few months after the purchase until room could be made in the appellant's own premises.

The circulation records of the Times were kept on Elliot stencils which is a tissue in a card, a specimen of which was

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produced as Ex. 2. These cards were used in a machine to inscribe the name of each subscriber on the periodical for the purpose of distribution; girls typed them on a special carriage with a special ribbon on the typewriter and the names were punched out on a graphotype machine. There were also two lists of Canadian subscribers prepared from the Elliot stencils and glued on to sheets of paper and used, one by the Audit Bureau's auditor and one for the publisher's own internal corrections from month to month. Mr. Daly stated that the original stencils acquired in 1961 were destroyed shortly thereafter because all the appellant's operations were on a different type of system, the speedomat metal plate which is much faster and more durable. He added that the list had to be reconstructed anyway as it was in such a poor shape.

Prior to the purchase of the assets, Mr. Daly had seen the financial statement of the Times for the year ending August 31, 1960 (Ex. 3) which indicated a net loss of $7,466. The financial statement for the year 1961 (Ex. 4), ending August 31, 1961, indicates a net loss of $14,956.43.

Daly explained at p. 88 of the transcript, through a reading of a part of his examination for discovery, the factors considered in arriving at the total purchase price of $75,000 for the assets:

> So we had in our own minds, or in our own memorandum here, we decided our top price would be $65,000, but the final negotiations—on the final negotiations we arrived at the figure of $75,000. This was based, in our final consideration, on two factors. One that 5,000 subscribers were worth $10 each, which would be the equivalent cost of getting them, and secondly $100,000 on advertising revenue annually via 25 per cent which is standard commission cost on securing advertising.

The evidence discloses that the appellant was able to secure after the purchase the continued business of 95 percent of the advertisers.

Included in the assets acquired is the exclusive right to publish in Canada a newspaper under the Financial Times as well as the right to use the name in Canada, and outside, which, however, according to Daly, had a negative value only as the Times were in disrepute with their suppliers, their bank, advertisers and agencies. Asked by counsel whether he would have been willing to pay $50,000 for the circulation lists without the name he answered:

> A. Yes, if the proposition had been put to us in that way. I think so.

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Then he was asked (at p. 44 of the transcript):

Q Well, supposing you hadn't got the right to use the name, what was the alternative?

A. Well, we had been looking into this field previously and we had come to the conclusion that there might be room in Canada for a second publication directed to the financial field, the investor, and the alternative was to start one of our own.

He then later in cross-examination, at p. 83 of the transcript, stated in answer to the following question:

Q So that apart from your reservations, the name must have had some positive value, didn't it?

A. On balance, considering these other factors we decided that we would continue to use the name. It is a very difficult decision to make. I can't really say truthfully whether we decided it had positive value or whether we couldn't do any better with a different name.

HIS LORDSHIP:

Q. What better name could you find for a financial publication?

A None. We thought that adding the name Southam, the reputation of the Southam Company could rehabilitate its image, and I think it has.

The furniture and fixtures purchased had practically no value and were shortly thereafter sold for $20 or $50; $5,698.08 out of a total of accounts receivable of $6,938.86 were recovered by the appellant.

The purchase price was paid by the appellant as follows: $10,006.52 was paid to the Gazette Publishing Company Limited, $29,961.48 to the Financial Times Publishing Company Limited and $35,032 to the Royal Bank of Canada.

Although the accepted offer to purchase (Ex. 1) in paragraph (2) mentions that the goodwill of the vendor's business is sold, Daly stated that there was no goodwill here as, according to its financial statements, it was a losing business.

He further enlarged upon this at p. 84 of the transcript in answer to the following question:

Q. And towards the end of your evidence you offered an opinion which I didn't object to, that there was no good-will to this publication because, in your own words, it was a losing proposition. Is that the only reason you, in your opinion, you held that there was no goodwill to it?

A. No, that is a major factor but it isn't the only factor in my mind. Something that is losing and could be made profitable, looking at it from a layman's point of view, not an accountant's, I think would have a residue of goodwill. But the other factors, the editorial

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reputation, the reputation among advertisers that I have mentioned, the reputation in the business community, these were the other factors that were in my mind when I gave that answer.

He then later in cross-examination, after it was pointed out to him that the appellant did acquire 2,935 subscribers of which it retained 75 percent and 85 percent of the advertisers stated at p. 85 of the transcript:

THE WITNESS:

We retained them but we immediately made substantial improvements in the paper, added editorial staff, people with names in the editorial field in Canada. For example, as I say, we hired an editor from the Financial Post who was an associate editor there. I think our retention was based upon the immediate improvements, both in advertising and in subscriptions. If—this was a sick dog when we bought it.

HIS LORDSHIP:

Q. You injected new life into the business?
A. Yes.

Q. That is what you did?
A. Yes, it was dying when we bought it.

MR. MOGAN:

Q. But you knew it was a sick dog when you bought it?
A. Yes, and it wouldn't have gone on for many more weeks.

Mr. M. E. Wright, a chartered accountant, gave evidence on behalf of the plaintiff and on the basis of the financial statements of the Times for 1961 and 1962, confirmed Daly's view that there was no goodwill therein when at p. 102 of the transcript he stated:

A. From my examination of these statements the company is on the verge of insolvency or bankruptcy and in my opinion no goodwill attaches to that company in the accepted accounting sense of the term.

He then, at p. 103, was queried by the Court as follows:

HIS LORDSHIP:

Q. If the condition of the company, if the depressed condition of the company was due to the fact of mismanagement and could be corrected by an injection of new life, couldn't there still be goodwill in a company such as this?
A. Yes, my lord. What the—I think if I may I should give you what I think of as an accountant's definition of goodwill, which is the ability of a company to earn profits in excess of a fair return on the—

Q. Investment?
A. Investment. And if behind these statements there is some undisclosed fact, which given good management, would allow the company to turn around and produce large earnings, I would agree.

Q. You might have a dormant goodwill?
A. There could be a factor of dormant goodwill.

The position taken by counsel for the appellant herein is that as the cost of obtaining subscriptions to the periodicals upon which the advertising revenue depends (which happens to be the appellant's main source of revenue) is an expense to the appellant deductible from its revenue, it should always be so, no matter in which way it is obtained, even if it is obtained in the process of acquiring a new business or all of the assets of a former periodical such as here.

According to the appellant, the cost of purchasing the subscription list here is analogous to stock in trade, as inventory under the *Income Tax Act*, is a very wide concept. Furthermore, the evidence adduced supports the value of $50,000 attached to the subscription list and this amount is therefore not fictitious. The appellant also submits that there was no goodwill attached to the business purchased as there was a history of losses and not of profits, that the subscriptions on the average were for short terms (85 per cent of the 2,935 expired by the end of 1962, the normal subscription was for the year and there was no guarantee at the time of purchase that any subscriber would renew) that the subscribers' contracts are ordinary commercial contracts on revenue account and are not related to the capital structure of the company nor are they assets of an enduring benefit. It was also urged that the purchase of this subscription list was in line with the appellant's policy of always looking for an opportunity of extending its business and occurred in the course of carrying on this business and this expenditure was of the same type as that which the appellant was incurring every day in relation to its other publications. The amount so expended could, therefore, be assimilated to floating assets or circulating capital which the appellant will get back little by little and its cost, therefore, should be a proper expense just as the revenue from its use will be a taxable income.

This apparently plausible submission, that the cost of obtaining subscriptions should always be deductible no matter how obtained is not true under ordinary business principles nor is it especially true in relation to matters of taxation where the solution depends only on the rules laid down by the relevant legislation by reference to which

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income for tax purposes is to be measured and under which capital expenditure is not deductible. It is not, indeed, sufficient to say that an expense is analogous to stock in trade or even to an operating expense to render such an expenditure deductible as an operating cost if in fact it was one expended for the acquisition of a capital asset. A rental payment for the pursuit of a business is a deductible expenditure from its operations whereas the capital used in the acquisition of premises (although deductible under the rules governing capital cost allowances) would not be. Yet the amounts expended would be analogous in that both expenditures are used for the purpose of supplying the business with a place to pursue its operations.

Nor is the cost of purchasing the subscription list, as submitted by the appellant, analogous to stock in trade here as the appellant is not in the business of selling subscription lists of customers. The only things sold by it are a publication and advertising space and it therefore appears to me that all those authorities submitted by the appellant which deal with expenditures incurred in the purchase of stock in trade have no relevance in this case.

The appellant's contention that there was no goodwill in the vendor's business can be dealt with shortly by referring to the appellant's offer to purchase which clearly states that its purchase includes goodwill as well as to Mr. Daly's evidence at p. 84 of the transcript that the vendor had a residue of goodwill. Goodwill in a business, in my view, is not restricted, as submitted by Mr. Daly or by Mr. Wright, to "the ability of a company to earn profits in excess of a fair return on the investment" but involves in a large measure both the value of its assets and its potential earning power and the amount expended by the appellant for the purchase and exclusivity of the vendor's business and the exclusive use of its name was based on the potential earning power of the business acquired.

At the hearing Mr. Daly was quite critical of the value of the business acquired in an attempt to establish that there was no goodwill in the vendor's business at all and that the company being in disrepute with the bank, the advertising agencies and its publisher, the name had a negative value only. The facts reveal, however, that there was enough

value therein to cause the appellant to disburse $75,000 for the acquisition of the newspaper and the use of the name which it is still using today together with 2,935 subscribers, 75 percent of which it retained after their subscription had expired and $100,000 in advertising contracts of which 85 percent were retained and the advantages thus obtained were of a continuing and not of a transient nature. It therefore appears that the appellant considered the positive factors of the business and of the name of the vendor and on this basis established the value of its potential earning power. In *Foster v. Mitchell*[1] Teetzel J. said at p. 428 *et seq*:

> As stated in Lindley on Partnership at p. 476, the expression "goodwill", when applied to a business "is generally used to denote the benefit arising from connection and reputation and its value is what can be got for the chance of being able to keep that connection and improve it."

Or as put by Lord MacNaughton in *Inland Revenue Commissioners v. Muller*[2] at pp. 223-224:

> ...It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.

In *Dominion Dairies Ltd. v. M.N.R.*[3] Gibson J. held that in the purchase of a dairy business that part of the purchase price imputed to customers' lists and related information was purchased goodwill and, therefore, a capital asset. In *Schacter v. M.N.R.*[4] Thurlow J. also held that the purchase of an accountant's list of accounts in the course of the purchase of his business was also goodwill and not deductible.

Goodwill is also, as stated in *Trego v. Hunt*[5] at p. 8, with reference to what Wood V.C. said it must mean in *Churton v. Douglas* (Joh 174,188):

> ...every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business.

[1] 3 O.W.N. 425.
[2] [1901] A.C. 217.
[3] [1966] C.T.C. 1.
[4] [1962] C.T.C. 437.
[5] [1896] A.C. 7.

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In the same case reference was also made to what Sir George Jessel stated when discussing in *Ginesi v. Cooper*[1] the language of Wood V.C. in the *Churton v. Douglas case* (*supra*):

> Attracting customers to the business is a matter connected with the carrying of it on. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of goodwill.

Looking at the nature of the purchase by the appellant of the vendor's assets here, it appears to me that with the exception of the office equipment, which the appellant sold shortly after the purchase for $50.00 and $5,598.08 recovered for accounts receivable, the real character of the balance expended is all goodwill as it was related only to customers of either a reader or an advertiser and I should add that this is not only what the appellant purchased but it is also the only valuable thing the vendor had to sell.

Whether the expenditure by the appellant of the amount of $50,000 is goodwill or not, there is however a further reason for disallowing it as an operational expense if it happens to be an outlay of a capital nature.

The question of determining the capital or revenue nature of a particular outlay is not always an easy matter and a great number of decisions have been rendered based, however, always on the circumstances of each particular case.

In *Regent Oil Ltd. v. Strick Inspector of Taxes*[2] at p. 658 Lord Morris of Borth-Y-Gest stated:

> In some cases payments can by general assent be recognized at once as being either of capital or of revenue nature. Where dispute arises a court must do its best to assess the value and the weight of all the particular features which may point to one conclusion or the other and, in doing so, to have in mind the legal image which a wealth of judicial utterance reveals.

The difficulty resides in being able to distinguish an outlay made for the acquisition of the means of production and the use of such means or, as put differently, in *New State Areas Ltd. v. Commissioner of Inland Revenue*[3] at p. 621:

> The contrast has been observed between expenditures forming "part of the cost of improving or adding to the income-earning plant or machinery" and "part of the cost of performing the income earning operations."

[1] 14 Ch. D. 596.
[2] [1965] 3 W.L.R. 636
[3] S.A.L.R. (1946) A.D. 610

In *Robert Addie & Sons Collieries Ltd. v. Inland Revenue*[1] the Lord President (Clyde) queried at p. 235:

> Is (the expenditure) part of the company's working expenses; is it expenditure laid out as part of the process of profit earning or, on the other hand, is it a capital outlay; is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?

Counsel for the appellant cited a great number of authorities which, however, deal with an expenditure made in the course of the carrying out of a trade. Now, as already mentioned, the question of determining in such a situation whether a particular outlay by a trader is on account of capital or income is a rather difficult matter to resolve. This appears particularly so from two recent decisions, one of which *B. P. Australia Ltd. v. Commissioner of Taxation of the Commonwealth of Australia*[2] was cited by the appellant as sustaining its case where an expenditure was held to be deductible from operations and another dealing with substantially the same facts, where the House of Lords held the contrary view in *Regent Oil Co. Ltd. v. Strick*[3]. The matter is much easier of solution, however, in the case of the purchase of a business as a going concern, when the expenditure (if it is not clearly for the purchase of stock in trade) is always a capital outlay and this has been so ever since the decision in *City of London Contract Corporation Limited v. Styles*[4] in 1887 to which I referred to in *Seaboard Advertising Co. Ltd. v. M.N.R.*[5] and which was referred to in *John Smith & Son v. Moore*[6] by Lord Sumner as never having been questioned. In this case a company acquired a business including unexpired income producing construction contracts, and that part of the purchase price being allocated to the cost of these contracts was not permitted to be deducted from profits on the basis that it was part of the capital invested in the business. The sum was paid with the rest of the aggregate price to acquire the business and thereafter profits were made in the business; the sum was not paid as an outlay in a business already acquired, in order to carry it on and to earn a profit out of this expense as an expense of carrying it on.

[1] 8 T.C. 676
[2] [1935] 3 All E.R. 209.
[3] [1965] 3 W.L.R. 636.
[4] 2 T.C. 239.
[5] [1965] C.T.C. 320.
[6] 12 T.C 266.

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The matter is also clearly set out by the Privy Council in *Nchanga Consolidated Copper Mines*[1] at p. 213 (an authority cited by the appellant) by Viscount Radcliffe when he stated:

> While, no doubt, money paid to acquire a business or to shut a business down for good or to acquire some contractual right to last for years may well be capital expenditure...

This applies clearly to the situation found in the present case as the appellant instead of starting a new business or a new periodical addressed to a new group of subscribers in the financial field, purchased and made an expenditure to acquire a business already existent including the membership for such periodical or business in the Audit Bureau of Circulation (one being required for each periodical issued or operated by the appellant) and thereby added one more business or periodical to its 30 odd periodicals it had at the time. I should interpolate here that whether the purchase price was segregated or not or whether the segregated price paid for the subscribers' list or plates compared with the expenses, the appellant would have had to make to obtain these subscribers had it started a new business should make no difference whatsoever if such expenditure is made in the purchase of a business.

That the appellant here purchased a business as a going concern cannot be contested. The agreement of October 27 together with Daly's evidence clearly establishes that the appellant paid an "aggregate purchase price of $75,000 for all the newspaper assets" and the sum of $50,000 in issue here is a part of that purchase price. In paragraph 2 of the agreement, the vendor was required to undertake, and undertook, to carry on the ordinary course of its business of publishing the periodical under the name Financial Times until the closing date when the appellant took over, and although the appellant's president stated that it had bought a dead dog, this indicates that it was only going to buy it if it survived and was maintained in operation. In subparagraph (2) of paragraph 3 of the agreement, the vendor covenanted and agreed to change its name (the name had already in the first page of the agreement been sold to the appellant) which, of course, confirms that a newspaper, part of a going concern, is being acquired and the name is part of the newspaper asset. In subparagraph

[1] [1964] 1 All E.R. 208.

(3) of paragraph 3 of the agreement, the vendor covenants not to compete, and this also is normal and incidental, to the purchase of a business. In paragraph 7 of the agreement, there is a provision whereby after the closing of the said purchase and sale of the newspaper assets, the purchaser will assume the obligation of the vendor to provide the weekly Financial Times to subscribers in accordance with their subscription and this was carried out by the appellant with the result that the ownership of the newspaper changed hands without a single break in the constant flow of issues to what subscribers the paper had. Finally, the acquisition of a business is further confirmed by an excerpt in the first issue of the periodical published by the appellant entitled "A Message from the Publisher" which reads as follows:

> The Financial Times has been devoted to the interests of the Canadian investing public for 49 years.
>
> With this issue Southam-MacLean Publications Ltd. assumes *ownership and publication of the old established financial weekly*. The news-gathering facilities and resources of Southam-MacLean Publications Ltd. and the Southam Co. Ltd. will be utilized as rapidly as possible; and their effect should become increasingly evident from issue to issue.
>
> Plans for major changes in policy are under discussion and target date for their completion is March 1st, 1962.
>
> It is the intention of Southam-MacLean Publications to carry on the traditions of The Financial Times, and we hope for a long, happy productive relationship with you, our readers. (the emphasis is mine).

I should also add that the evidence of Wells is to the effect that according to the appellant's investigation of the market there was place for two investment periodicals in Canada and two of them, the Financial Post and the Financial Times existed at the time. Having purchased the latter and insured that the former owners would not compete with them, the appellant thereby obtained a good part of the exclusivity of this field and the exclusion of what might have been serious competition, which must also be considered as indicating the purchase of an advantage of an enduring nature and points also to the outlay being one of capital rather than of revenue.

I now turn to appellant's alternative argument which is that if the $50,000 is not a current expense, it was expended for a tangible asset depreciable under the regulations which deal with capital cost allowances. In view of my holding that the amount of $50,000 was paid for goodwill which is

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an intangible, such a submission becomes untenable. However, even if it is not goodwill, the intrinsic value of the customers' list or of the address plates are nil. The list was merely a document listing the subscribers and the address plates had no value as the evidence discloses that they were destroyed a few days after the purchase. The costs of the lists or the plates were only goodwill costs (compare *Shacter v. M.N.R. (supra)* and the lists or the plates merely represented the manner in which the customers' names were recorded. The information on the lists or plates, the customers' names were the value to the appellant and not the plates or the lists in themselves and they were shortly replaced by other plates.

It therefore follows that when all the circumstances of the present case are considered and all the authorities are looked at, it appears clearly that an asset such as that acquired by the taxpayer in the present case must be regarded as a non-tangible capital asset and, therefore, cannot be depreciated under the capital cost allowance regulations nor can it be deductible as an operational expense.

The appeal is dismissed with costs.

St. Catharines 1966

June 1

Ottawa June 22

BETWEEN:

JAMES SIM ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 4, 5, 12(1)(a)(h), 139(1)(e)(m)(ab)—Income from business whether as employee or carrying on business—Out-of-town trips to give lectures—Whether part-time lecturer engaged as "officer" or "employee"—Deductibility of travelling expenses.

The appellant, a dentist in St. Catharines, where he carried on his practice, agreed to give lectures on various aspects of dentistry at the University of Toronto, as an assistant. In the years 1961 and 1962 he made occasional trips to deliver similar lectures for dental associations in other cities.

In his annual income tax returns, the appellant reported the entire amounts of $782.55 for 1961, and $813.48 for 1962, a sum total of $1,596.03 which however, he sought to deduct on the ground that they were "travelling expenses" within the excepting proviso of paragraph (*h*), subsection (1) of the Act's section 12.

The Minister denied such an assumption, contending the expenditure afore-mentioned consisted of "personal or living expenses" and assessable as such.

Both parties agreed that the nature of Dr. Sim's connections with the scientific bodies before which he lectured would influence the problem's solution strongly.

In other words, it remained to be decided whether or not the appellant's capacity could be likened to that of an employee.

Held, That in ordinary usage the appellant was not an "employee" because none of the bodies which engaged him could, as of right, "control and direct" the form, method or manner of his teaching, "as to details and means" nor could they exactly prescribe "the result to be accomplished".

2. That the appellant was entitled to the deductions claimed because his lecturing activities had none of the characteristics belonging to the status of an employee.

3. That a part-time assistant lecturer could not be said to occupy an "office", particularly when not eligible to participate in any superannuation or other beneficial plan and not a member of the permanent staff.

4. That the appellant was carrying on an educational business or pursuit.

5. That the appeal be allowed.

APPEAL from a decision of the Income Tax Appeal Board.

J. R. Barr, Q.C. for appellant.

N. A. Chalmers for respondent.

DUMOULIN J.:—Dr. James Sim, a member of the Royal College of Dental Surgeons, practices his profession in the City of St. Catharines, Ontario, where he permanently maintains an office with a staff of three employees.

He derives the major portion, and by far, of his income from attending patients in St. Catharines. For a few years past, the appellant was also paid some professorial fees by the Dental School of the University of Toronto and, occasionally, for lectures to dental associations or dental student groups in various cities in Canada or the United States, the two American centres mentioned in exhibit A-6 being Birmingham, Michigan, and Syracuse, New York.

The taxation years in issue are 1961 and 1962, during which some payments received by Dr. Sim for lectures included an allowance on account of travelling expenses inherent thereto. "In other cases, a flat fee was paid", but, without any exception, the appellant listed in his yearly

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returns all sums received and claimed as deductible the actual amount paid out by him for travelling expense "in earning this income". The inclusion in appellant's tax reports for 1961 and 1962 of all emoluments received is admitted by the respondent.

On the ground that "travelling expenses to the extent of $782.55 in 1961 and $813.48 in 1962 claimed as deductions from income were personal or living expenses within the meaning of paragraph (*h*) of subsection (1) of section 12 of the Act", the Minister, by notification dated January 19, 1965, affirmed his previous disallowance of these out-of-pocket disbursements.

In his appeal against this refusal, the appellant argues, and properly so, I believe, that "the point in issue...is whether or not, at the time he delivered his various lectures, he was an officer or employee of the body which had invited him to lecture and not entitled to deduct any of his travelling expenses" (cf. Statement of Facts, para. 7 as amended at trial).

Paragraph 5 of a Memorandum of Readiness, eased the evidence in stating that "...The parties, by their counsel, have agreed that for the purposes of this appeal, it will not be necessary for the plaintiff to prove the said expenditures...", their deductibility constituting the only moot question.

Relying upon section 4 and paragraph (*a*) of subsection (1) of section 12 of the *Income Tax Act,* the appellant submits the total outlay of $1,596.03 was incurred "for the purpose of gaining or producing the reported income", and, therefore, ought not to have been assessed.

To the above contention, respondent takes exception for the threefold motive that:

(*a*) the income derived by the appellant from lectures was income from an office or employment within the meaning of sec. 5 of the Income Tax Act;

(*b*) the amounts claimed by Dr. Sim as travelling expenses for the purpose of earning income, being derived from lectures, were personal or living expenses and no portion of them had been incurred in the course of carrying on his business, as excepted by sec. 12(1)(*h*);

(*c*) the appellant, pursuant to para. (*a*) of ss. (1) of sec. 12, is not entitled to any deduction, because the lecture fees received by him were not income from a business but from an office or employment.

Set in its true context the fabric of the case is that Dr. Sim, aged 38 years in 1961, having graduated in 1946 with high honours from Toronto University, started a dental practice in St. Catharines, a populous city 80 miles distant from the provincial capital, and rapidly achieved an enviable measure of success.

His excellent record as a student, duplicated in his professional capacity, could not escape the attention of the University authorities. The young practitioner had barely left the dental school when he was invited to join, on a purely part time basis (cf. A-3, for instance), with the modest rank of "Assistant", the academic personnel of the Faculty of Dentistry.

Dr. Sim's acceptance of the offer was prompted by a practical appreciation of the flattering acknowledgement rendered to his technical skill and, in no less a measure, by a grateful wish of devoting some of his time to the educational pursuits of his former Alma Mater.

Against an hourly stipend of $10, spread over a teaching schedule of eighteen assignments of six hours each for the session 1960-1961, and of approximately 22 others for 1961-1962, (each Thursday from August 17 to February 9 inclusive; cf. exhibits A-1 and A-2), it is not improbable that this well noted practitioner, in a thriving urban centre, did not ignore the call of duty when he agreed, for a span of several working days, to leave his office, travel 160 miles to and from Toronto, and shoulder a heavy teaching assignment requiring long periods of preparation.

An itemized account of the sums paid to the appellant for lectures and clinical demonstrations at the School of Dentistry, coupled with expense allowances amounting respectively to $1,067.70 (fees), and $217.50 (travelling expenditures), for taxation year 1961, and to $991.25 and $340 for 1962, is listed on exhibit A-6, a statement prepared for Dr. Sim by Mr. J. E. Lee, a chartered accountant of Hamilton, Ontario.

On the same sheet are also mentioned the appellant's two lectures in Birmingham and Syracuse, U.S.A., and six or seven lectures in as many Ontario towns, delivered under the auspices of the extra-mural plan, an initiative sponsored by the Royal College of Dental Surgeons. Again, in these instances, fees and travelling expenses are shown on exhibit A-6.

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Dr. Sim explained the objectives and functioning of the extra-mural plan "designed to bring post-graduate education to dentists practicing in outlying districts. It is administered by the University of Toronto which makes some financial contributions to the scheme". The witness added "I was paid from two sources: first, from the University of Toronto, the cheque depending on the length of absence from my office. Next, you would receive a travel expense form sent by the Royal College of Dentists. You would then fill in this form, return it and be reimbursed for travelling expenditure".

This recital of facts substantiates the view, practically shared by both parties, that the problem up for solution is the nature of Dr. Sim's connection with the various medical organizations at whose request he lectured or gave clinical demonstrations, whether or not, when so doing, he was an employee or officer of those scientific bodies.

I assume the most pertinent provisions of the Act to be found in sections 12(1)(*a*), 12(1)(*h*), 139(1)(*e*), 139(1)(*m*) and 139(1)(*ab*).

At the outset of the academic year, the appellant was duly notified by the Dean of the Dentistry School, Dr. Roy G. Ellis, Exhibits A-1, A-2, A-3 are so many customary letters in which reappears a selfsame phrase, suggestive of a purely optional choice, scarcely reconcilable with the grant of an employment or the bestowal of an office; I quote: "*If you participate* (emphasis not in text) in the lectures, you will be notified regarding these either directly from the administrative office or by the head of the department concerned".

The current or colloquial interpretation of a word usually affords some insight into its true meaning; in this line of thought, the noun "employee", as defined in Black's Law Dictionary[1], does not differ from the sense popularly attached to it. This definition reads thus:

EMPLOYEE.

...it is understood to mean some permanent employment or position.

...

One who works for an employer; a person working for salary or wages; applied to anyone so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or to domestic servants....

[1] 4th ed., 1961.

Generally, when person for whom services are performed has right to control and direct individual who performs services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an "employee".... "Servant" is synonymous with "employee"...

Were it permissible to decide the point in the light of the lexicon's language, it could readily be held that Dr. Sim's teaching activities had none of the characteristics belonging to the status of an employee. Neither the University, nor the executive bodies of the extra-mural plan or dental societies could, as of right, "control and direct" the form, method or manner of his teaching "as to details and means" nor could they exactly prescribe "the result to be accomplished". And, of course, a University lecturer offers but a poor synonym indeed for "servant".

Let us now progress from the dictionary to the concise and technical definitions attributed by our *Income Tax Act* to the substantives: business, employee, employment and office, so many words which derive their interpretation from section 139 and legal consequences from sections 12(1)(*a*) and 12(1)(*h*).

139.(1)(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade *but does not include an office or employment*. (emphasis added throughout these notes.)

139.(1)(*la*) "employee" includes officer.

139.(1)(*m*) "employment" means the position of an individual *in the service of some other person* (including Her Majesty or a foreign state or sovereign) and "servant" or "employee" means a person holding such a position.

139.(1)(*ab*) "office" means the position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a Minister of the Crown, the office of a member of the Senate or House of Commons of Canada, a member of a legislative assembly, senator or member of a legislative or executive council and any other office, the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity and also includes the position of a corporation director; and "officer" means a person holding such office.

Since the law's interpretation of "employment" substantially tallies with that of the dictionary, previously held inapplicable to the actual case, it needs no further comments. In a like vein, the far loftier connotation predicated of an "office" cannot be so reduced as to reach the part time task of Assistant at the School of Dentistry nor that of occasional lecturer on request.

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The appellant, moreover, never joined the executive staff of the Dental Faculty, nor belonged to any of its committees, and was ineligible to any superannuation, beneficial or protective plan sponsored by the University of Toronto.

A suitable inference remains: it is that Dr. Sim, in his capacity of part time clinical demonstrator and occasional lecturer, was, in the purview of the *Income Tax Act*, "carrying on" an educational business or pursuit.

Should the above assumption be a proper one, section 12 would entitle the appellant who, I repeat, dutifully reported all the fees earned, to deduct his travelling expenses. This deductibility is allowed, generally, by section 12(1)(*a*), and specifically by section 12(1)(*h*) providing that:

> 12 (1) In computing income no deduction shall be made in respect of
>
> (*a*) an outlay or expense *except* to the extent that it was made or incurred by the taxpayer *for the purpose of gaining or producing income from ... a business of the taxpayer.*
>
> ...
>
> (*h*) personal or living expenses of the taxpayer, *except travelling expenses* (including the entire amount expended for meals and lodging) *incurred by the taxpayer while away from home in the course of carrying on his business.*

Of the several cases referred to by the appellant's learned counsel, I must say that, after an attentive perusal, I could not detect any worthwhile analogy between those precedents and the matter at bar.

In *Ricketts v. Colquhoun*[1], the House of Lords considered the appeal of a London barrister appointed to the office of Recorder at Portsmouth who sought to deduct from his official emoluments the expenses of travelling many times each year from one city to another. A section of the relevant statute provided that:

> If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.

[1] [1926] A.C. 1 at 4.

Conformably to the law, Viscount Cave said:

As regards the appellant's travelling expenses to and from Portsmouth, with which may be linked the small payment for the carriage to the Court of the tin box containing his robes and wig, the material words of the rule are those which provide that, if the holder of an office is "necessarily obliged to incur...the expenses of travelling in the performance of the duties of the office" the expenses so "necessarily incurred" may be deducted from the emoluments to be assessed. The question is whether the travelling expenses in question fall within that description. Having given the best consideration that I can to the question, I agree with the Commissioners and with the Courts below in holding that they do not. In order that they may be deductible under this rule from an assessment under Sch. E, they must be expenses which the holder of an office is necessarily obliged to incur—that is to say, obliged by the very fact that he holds the office and has to perform its duties—and they must be incurred in—that is, in the course of—the performance of those duties.

The expenses in question in this case do not appear to me to satisfy either test. They are incurred not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder and, having concluded those duties, desires to return home. They are incurred, not in the course of performing his duties, but partly before he enters upon them, and partly after he has fulfilled them.

The actual appellant cannot be statutorily considered "the holder of an office or employment", therefore the irrelevancy of the pronouncement above becomes at once apparent.

In the matter of *Great Western Railway Co. on behalf of W. H. Hall, clerk to the G. W. R. Co. v. Bater, Surveyor of Taxes*[1], Hall had remained in the railway company's service for over 20 years, and was fully entitled to the superannuation provisions it extended to its permanent clerks, a state of facts nowise assimilable to the matter under examination.

In *Minister of National Revenue v. Wilfrid Pelletier*[2], the respondent enjoyed the full status of permanent employment in the service of the Quebec Government, as decreed by two Orders in Council, the second of which, dated May 3, 1954, is hereunder recited:

With regard to the salary of Mr. Wilfrid Pelletier as Director of the Conservatory of Music and Dramatic Art of the Province of Quebec:

> That the salary of Mr. Wilfrid Pelletier c/o the Conservatory of Music, 1700 St. Denis Street, Montreal, in his capacity as Director of the Conservatory of Music and Dramatic Art of the Province of Quebec be increased to $5,500.00 per annum with an additional $2,000.00 for travelling expenses; that he be assigned to class "G"

[1] [1920] 2 K.B. 266 and 271-272 [2] 63 D.T.C. 1059 at 1060.

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permanent commencing May 1, 1954, and this in accordance with the eligibility list No. 1051-54 of the Civil Service Commission of the Province of Quebec.

Dr. Pelletier also was eligible to the Province's Civil Service pension fund.

For the above reasons, the appeal herein should be allowed and the record of the case referred to the Minister for re-assessment in accordance with the findings of this judgment. The appellant is entitled to his costs after taxation.

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Mar. 29-31,
Apr. 1,
5-7, 12

May 2

BETWEEN:

ALASTAIR R. C. DUNCAN and FRANÇOISE DUNCAN ..... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Petition of Right—Negligence—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a)(b)—Damages claimed for the alleged pollution of well supplying water for domestic purposes to suppliants' house, in which they live—Doctrine based on a legal duty arising out of the concept that "one must so use his property as not to injure the property of others"—Crown is liable as "if it were a private person of full age and capacity", "in respect of a breach of duty attaching to the ownership, occupation, possession or control of property"—Suppliants are entitled to be paid compensation of $5,000 by the respondent.

This is a Petition of Right whereby the suppliants claimed damages for the alleged pollution of the well supplying water for domestic purposes to the house in which they live.

In the fall of 1961, the suppliants and their children were seriously ill in a manner usually associated with bad water.

For a period of three years from the fall of 1961 until the fall of 1964, the water from the suppliants' well was so obviously polluted that they did not dare to use it for human consumption.

In the fall of 1964, it was discovered that a twelve-inch Department of National Defence sewer main had been discharging raw sewage into the ground less than one hundred feet from the suppliants' well. In these circumstances, the suppliants reached the conclusion that the troubles with their water were attributable to some fault on the part of officers or servants of the Crown, or some breach of duty owing to them by the Crown, by reason of which they were entitled to be compensated by the Crown.

By 1958, the Department of National Defence had constructed a housing development to the north of the suppliants' property known as Cartwright Point in the Township of Pittsburgh, Division of Kingston

and Frontenac in the Province of Ontario. During the latter part of 1960, the Department of National Defence undertook the construction of a twelve-inch lateral sewer main to take the sewage from the National Defence housing development which lay to the north of Cartwright Point so that it could be emptied in the City of Kingston's four-foot sewer main at a manhole which was at an eighty-five foot distance from the Duncan well. The ditch in which the National Defence lateral was to be laid had to be blasted out of limestone. This blasting was carried out during the month of January, 1961, and was so severe that it shook the suppliants' house.

The contractor built the National Defence lateral in accordance with specifications supplied to him by the Department. The specifications for the principal part of the main were prepared by a "consultant" from "standard" Department of National Defence specifications.

By September 1964, a substantial break in the lateral main was discovered through which sewage was escaping. The earth and fill surrounding the area bore all indications of having been subjected to very substantial pollution by sewage. This discovery was made in the period from July 12 to July 15, 1964.

By sometime in October 1964, permanent repairs were made to the National Defence lateral.

Later in 1964, or early in 1965, the stench, discolouration and frothing character of the water from the suppliants' well had disappeared and, since that time, the water from the suppliants' well has been, as far as outward appearances are concerned, quite normal.

Held, That in the Court's view, sewage was finding its way from the break in the National Defence sewer main into the suppliants' well in substantial quantities from the fall of 1961 until after the break was repaired in the fall of 1964. It could not have been caused by any other source of possible contamination to which the Crown, or any other party, has pointed throughout the course of the trial. Even more significant is the fact that, after the break in the National Defence sewer was repaired, the character of the water that reflected a massive invasion of the suppliants' well by sewage gradually disappeared. These facts are inferences "of fact legitimately arising out of the facts established by the evidence". (see *Shawinigan Carbide Co. v. Doucet*, (1909) 42 S.C.R. 281, per Duff at page 304.)

2. That having regard to the background of knowledge given by Dr. Ambrose, head of the Department of Geology at Queen's University, a highly qualified geologist, the Court comes to the conclusion that the overwhelming probability is that the obvious physical characteristics in the water from the Duncan well (the stench and discolouration) from the fall of 1961 to the end of 1964, were entirely attributable to sewage coming from the break in the Department of National Defence sewer, even though it is not improbable that some pollution was reaching the well from other sources from time to time.

3. That it is not irrelevant to consider what the probabilities or possibilities are as to what physically caused the break.

4. That the obvious fouling of the suppliants' water, which stopped when the break in the National Defence sewer was repaired, had its origin in sewage from that break.

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5. That in the Court's view, the Crown is liable to the suppliants by virtue of subsection (1) of section 3 of the *Crown Liability Act*, chapter 30 of the Statutes of 1952-3, which reads as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, or
>
> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

6. That "sewage" is, from the present point of view, just as "dangerous" as gas. See *Northwestern Utilities Ld. v. London Guarantee and Accident Co.* [1936] A.C. 108, where Lord Wright said at pp. 118-9 that "though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come prima facie within the rule of strict liability if the gas escapes ... and the rule established by *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) requires that they act at their peril and must pay for damage caused by the gas if it escapes, even without any negligence on their part". What Lord Wright said as to the state of the law applies equally to the facts of this case.

7. That the bringing of sewage on to land in a sewer main is not such a "natural" use of the land as to take the facts outside of the doctrine. The application of the doctrine to sewage allowed to escape from sewer mains has been recognized in such cases as *Haigh v. Dendraith, R.P.C.*, per Vaisey J., [1945] 2 All E.R. 661-664, and *Smeaton v. Ilford Corpn.*, per Upjohn J., [1954] 1 All E.R. 923, 929 *et seq.*

8. That the contention that the fact that the blockage material in the National Defence sewer system included sticks, twigs and a skipping rope showed that the break was the result of a deliberate act of a third party, has no application here as the evidence makes it clear that the possibility of such material getting into their sewer system was the very thing that they foresaw or ought to have foreseen. They knew that they could expect such pranks and must guard against them.

9. That there was no evidence of a deliberate forming of a blockage or creation of a break in the sewer by a third person.

10. That the respondent has, therefore, failed to discharge the onus of showing that the escape was due to the deliberate or conscious act of a stranger over whom he had no control and against whose acts he could not reasonably be expected to have taken precautions. (see *Salmond on Torts*, 14th ed., (1965) page 460, and *Windfield on Tort*, 7th ed. (1963) page 457.)

11. That a private person would be liable to the suppliants by virtue of the doctrine in *Rylands v. Fletcher*, as that doctrine is based on a legal duty arising out of the concept that one must so use his property as not to injure the property of others *(Rylands v. Fletcher*, L.R. 3 H.L. p. 341, per Lord Cranworth: "For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum".)*

12 That this is clearly a case in which "if it were a private person of full age and capacity" the Crown would be liable "in respect of a breach

of duty attaching to the ownership, occupation, possession or control of property". That the Crown is therefore liable by virtue of paragraph (*b*) of subsection (1) of the *Crown Liability Act*.

13. That the Crown is liable for the negligence of the officer or servant who authorized the use of a sewer built in accordance with the specifications which were provided to the contractor, without taking adequate precautions against the risks involved, with the result that the suppliants' well was bombarded with sewage from the National Defence sewer for over three years. That the officer or servant of the Crown who had failed to guard against the dangers inherent in the use of it as built was guilty of negligence that caused the suppliants' well supply to be polluted by sewage from that sewer, and therefore draws on the Crown a liability by virtue of paragraph (*a*) of subsection (1) of section 3 of the *Crown Liability Act*.

14. That there will be judgment that the suppliants be entitled to be paid by the respondent the sum of $5,000 as damages and their costs to be taxed.

PETITION OF RIGHT whereby the suppliants claimed damages for the alleged pollution of their well supplying water for domestic purposes to the house in which they live.

Henry L. Cartwright for suppliants.

Norman D. Mullins and *H. A. Newman* for respondent.

James R. Herrington and *Philip D. Quintin* for third party L. M. Welter Limited.[1]

JACKETT P.:—This is a Petition of Right whereby the suppliant, Alastair R. C. Duncan and his wife, Françoise Duncan, claim damages for the alleged pollution of the well supplying water for domestic purposes to the house in which they live.[1]

Alastair R. C. Duncan was at all relevant times a professor of philosophy at Queen's University in Kingston, Ontario, and during a large part of the time was Dean of Arts and Science at that university.

The unadorned facts are: that, in the fall of 1961, the suppliants and their children were seriously ill in a manner usually associated with bad water; that, for a period of over three years commencing at about the same time, the water from the suppliants' well was so obviously polluted

[1] Third Party proceedings were dismissed with costs during the course of argument.

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that they did not dare use it for human consumption; and that, in the fall of 1964, it was discovered that a twelve-inch Department of National Defence sewer main had been discharging raw sewage into the ground less than one hundred feet from the suppliants' well. In these circumstances, it is not surprising that the suppliants reached the conclusion that the troubles with their water were attributable to some fault on the part of officers or servants of the Crown, or some breach of duty owing to them by the Crown, by reason of which they are entitled to be compensated by the Crown.

To decide whether they were justified, as a matter of law, in reaching that conclusion, I must examine, in some detail, the facts that have been established in order to reach a conclusion as to what, on a balance of probability, the relevant facts are.

The suppliants' residence stands on an irregularly shaped parcel of land referred to during the trial as "Lot 71". Lot 71 is part of a slightly larger lot which, under the following description,

> "that certain parcel or tract of land and premises situate, lying and being part of the Fort Henry Reserve in the Township of Pittsburgh, being Block B according to registered Plan No. 419 as registered in the Registry Office for the Registry Division of Kingston and Frontenac."

was leased in 1949 by Henry L. Cartwright and Vera A. Cartwright to Glen Shortliffe and Margaret Shortliffe, for a term of ten years commencing January 1, 1950, at an annual rent of $75 per year. The lease was renewable in perpetuity on the same terms subject to adjustment in the rent and it provided that any buildings placed on the demised land were to remain the property of the lessees who were entitled to sell any such buildings to a sub-lessee or assignee.

The premises so leased are on an area of land known as Cartwright Point, which is surrounded by the Saint Lawrence River and land in the occupation of the Department of National Defence. Cartwright Point slopes from the Department of National Defence property at the north in a southerly or southeasterly direction towards the Saint Lawrence River. At the time of the commencement of the Shortliffe lease, there were no year round residences upon

Cartwright Point except the Cartwrights', there were no water main or sewer main services available and the only building on the demised premises was an old barn.

Glen Shortliffe, who was and is a professor of French at Queen's University in Kingston, and his wife, erected a residence on the property, had a well drilled under the north part of the residence, and, on the south side thereof, constructed a septic tank and weeping tile field for sewage disposal. They lived there until 1958.

In 1950 or 1951 the Shortliffes, having encountered some difficulty with the weeping tile field (which was not adequate to prevent the effluent reaching the surface of the soil above it), added to the four twenty-foot lines of weeping tile constituting the original field, a further line of tiles leading to an old disused well at the far end of the lot. After that, they found their sewage disposal system satisfactory.

During the period from the commencement of the lease until 1958, the Shortliffes had the water from the well tested periodically. In the beginning the tests were made monthly, later they were made twice a year and during the last part of the period they were made only in the spring of each year. Those tests never showed any bacillus content in the water. (At some time in this period a neighbour, Dr. Rublee, had apparently had some trouble with his well.)

By 1958, the Department of National Defence had constructed a housing development to the north of the demised premises and a number of other all year round residences had been constructed on Cartwright Point.

Prior to May, 1958 the City of Kingston had built a four-foot sewer main across Cartwright Point. This sewer passed very close to the northeast corner of the demised premises and was only eighty-five feet from the well on the demised premises. It was apparently not yet in use at that time.

In May, 1958 the suppliants, for a consideration of $16,000, purchased the buildings on the demised premises from the Shortliffes and obtained an assignment of the lease. They moved into the property at that time and have lived there with their family ever since.

At the time that they moved into the premises, the suppliants had a contractor rebuild the tile field for the

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septic tank and about a year later they had the septic tank itself cleaned out. The suppliants have never had any trouble with this system. The suppliants were indeed quite satisfied with their water system during the first while they lived on the premises.

After taking possession of the premises, the suppliants built an addition to the residence at a cost of $7,300, and, in 1959, they insured it against fire for $24,000.

In 1959, the lease was renewed with an increase in the rent from $75 per year to $100 per year.

In 1960, the suppliants had a special pit and tile bed constructed for the disposal of their washing machine and sink water. This bed was also south of the house but was separate from the tile bed to which the effluent from their septic tank went.

In July 1959, the suppliants had the water from their well tested and received a satisfactory report. This report showed zero "Total Coliform organisms" and zero "E. Coli". What this was meant to convey to the householder is indicated by the back of the report form which read, in part, as follows:

E. coli. Water containing bacteria of this type should not be used for drinking purposes without treatment. E. Coli organisms indicate pollution of intestinal origin.

Other coliform organisms. These bacteria may or may not indicate pollution of human origin and water containing these should be re-examined to determine whether or not E. Coli may be present at times. If repeated examinations do not show the presence of E. Coli and there is no source of pollution nearby, the water may be considered to be satisfactory particularly if the water site has been inspected by a medical officer of Health or Sanitary Inspector. Drinking water should be boiled or chlorinated meantime.

Some time in 1960, the suppliants received a report showing slight pollution of their well but this disappeared and Professor Duncan was not unduly alarmed as he understood that wells did show such indications of pollution from time to time and that it was nothing to be alarmed about. In the summer of 1960, Professor Duncan, while in Nova Scotia, and the suppliants' son, while at Cartwright Point, each suffered from a stomach upset of the kind that one associates with water. In November of that year, however, they received a further satisfactory report on a sample of water from their well.

Some time, during the latter part of 1960, the suppliants commenced the practice, which they continued until the fall of 1961, of treating the water from their well, before using it for human consumption, with pills known as Halozone pills, which, they understood, would protect them against any possible contamination. This practice was adopted by reason of the fact that the Kingston sewer main was then in use and, presumably, also by reason of the occasional bad reports they, and their neighbours, had already had on water from wells on Cartwright Point. During the latter part of 1960, the Department of National Defence made a contract with a local contractor in Kingston for the construction of a twelve-inch lateral sewer main to take the sewage from the National Defence housing development which, by that time, lay to the north of Cartwright Point, so that it could be emptied into the City of Kingston's four-foot sewer main at a manhole in the latter main known as manhole fourteen, which was eighty-five feet from the Duncan well.

The ditch in which the National Defence lateral was to be laid (that is, from manhole fourteen to the sewer mains in the housing development) had to be blasted out of limestone. This blasting was carried out during the month of January, 1961 and was so severe that it shook the suppliants' house.

The Department of National Defence lateral sewer main was constructed in or about the month of February, 1961. It was constructed of bell and spigott concrete tiles three feet long. The main as constructed was intended to test for the internal pressure developed by a three-foot head of water. It would probably contain a pressure double that—that is, the pressure developed by a six-foot head. There was a head of nine feet from the level of the National Defence lateral at manhole fourteen to the top of the first manhole on the lateral (National Defence manhole 512) up the hill from manhole fourteen. The connection of the lateral to the City of Kingston sewer was effected by a drop pipe type of connection, which involved the sewage coming to a twelve-inch T-shaped tile and normally falling down a "drop pipe" being the upright portion of the T and passing from the drop pipe to the City sewer. If any sewage passed over the drop pipe, it could pass into the manhole through

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the part of the tile constituting the cross line of the T. The contractor built the National Defence lateral in accordance with specifications supplied to him by the Department. The specifications for the principal part of the main were prepared by a "consultant" from "standard" Department of National Defence specifications. The drop pipe connection was constructed in accordance with a "standard" City of Kingston specification. There is no indication that any person, and particularly any person qualified to do so, gave any consideration to the adequacy of the design for this sewer coming down an incline and entering another sewer through a drop pipe connection. There was evidence that, by reason of blockages that developed periodically in the housing development sewer system, it was necessary to have a maintenance crew who had equipment to clear such blockages and who, at least in the period up to 1962, were supposed to inspect the sewers by flushing them out periodically when they were not clearing blockages or doing other maintenance or repair work. The National Defence lateral was laid on a compacted bed consisting of gravel of a mix sized from fine sand to half-inch diameter. The lateral was approximately six feet below the surface of the land at manhole fourteen.

On February 28, 1961, water from the suppliants' well showed the presence of "2.0" E. Coli, and, on March 1, 1961, a similar test showed "39+" E. Coli.

On March 6, 1961, a solicitor for the suppliants and seven other residents of Cartwright Point wrote to the Ontario Water Resources Commission and stated that, since the installation of the City of Kingston sewer across the Fort Henry Reserve in the Township of Pittsburgh, a number of wells in the vicinity had become contaminated and that those showing "serious contamination" included the well of the suppliants. The letter, which was written to seek an investigation of the source of contamination, stated further that there had been "serious sickness as a result of this contamination".

About the 15th of March 1961, the flow of sewage was started through the Department of National Defence lateral for the first time.

Following an inspection of Cartwright Point made by an official of the Ontario Water Resources Commission on

April 4 and 5, 1961, as a result of the solicitor's letter of March 6, 1961, a report was made to the Commission reading, in part, as follows:

GENERAL DESCRIPTION OF AREA

From the northern limit of this subdivision where it borders the military premises, the terrain slopes downward in a southerly direction to the St. Lawrence River. A lower area extends from north to south through the subdivision, from the general location of Lot #70 to Lot #58. Fractured limestone bedrock predominates to the east of this natural indentation, while to the west the limestone reportedly tapers off on Precambrian granite. The depth of overburden reportedly varies from several feet in the low-lying area to an absence thereof in some sections. Well-drilling records on file with this Commission indicate that the limestone bedrock frequently extends to the surface in this area.

The City of Kingston trunk sanitary sewer, which extends through the Barriefield area to the city sewage treatment located approximately 3 miles to the east in Pittsburgh Township, crosses the Cartwright Point subdivision as shown on the appended plan. This sewer lies in the fractured limestone at depths varying from 16 to 20 feet at this location, according to profile plans examined at the Kingston city engineering office. This 48-inch diameter concrete sewer has tongue and groove cement joints. The specifications for constructing this sewer called for the use of a concrete cradle which would embrace approximately the lower $\frac{1}{3}$ of the sewer.

SERVICES PROVIDED AT CARTWRIGHT POINT

Private drilled wells supply water for domestic purposes at this subdivision. Although private septic tank systems are employed in some instances, there several premises located near the city trunk sanitary sewer have connections thereto.

Data was obtained during these investigations with respect to sewage disposal facilities and private wells utilized at the pertinent premises at Cartwright Point. This information is shown in Table 1 which is appended to this report.

REPORTED POLLUTION OF WELLS

Frequent sampling of the private water supplies at Cartwright Point for bacteriological analysis at the Regional Health Laboratory, Kingston, reportedly has revealed the consistent presence of coliform organisms and, in most instances, Escherichia coli organisms in the majority of these waters. Diverging from this trend, however, are the wells located at Mr. Cartwright's former home (Lot #74, Reg. Plan #970), and on the premises of Mr. MacLeod (Lot #8, Reg. Plan #419). The Cartwright well is drilled through limestone into granite bedrock. Samples of water taken from this well reportedly have remained free from coliform organisms.

It is the contention of Mr. H. L. Cartwright, owner of this tract of land, that pollution of the wells there resulted from sewage flows escaping from the local section of the city sewer and seeping into the wells. Pollution of these wells could result from either one or both of the following two conditions:

1. It is not improbable that some sewage flows may escape from the city trunk sewer and seep through the limestone bedrock into water-bearing strata

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2. The use of private septic tank and associated tile bed systems on numerous premises there could contribute to pollution of ground water, especially in an area where fissured limestone bedrock prevails. The overburden is shallow and in some instances is non-existent, thus permitting surface run-off flows not only to conduct contaminants into the ground, but also to flush subsurface disposal system contaminants into the ground water supplies.

INVESTIGATIONS

Samples were collected from 9 private water supplies in the Cartwright Point area on April 5th, 1961, and were submitted to the Ontario Water Resources Commission Laboratory for sanitary chemical analysis and coliform determination. The results of the laboratory tests are appended to this report in Table 11.

The free ammonia and total Kjeldahl values of samples taken from the Rublee well and the Avis well are somewhat higher than those obtained from the other wells. A high 5-day B.O.D. was revealed in the Avis well which is located only a few feet from the city sewer. These values suggest, but do not confirm, the fact that these water supplies may be adversely affected by seepage from the city sewer. Confirmation is lacking due to the proximity of underground sewage disposal systems. A small hypochlorinator has been provided at the Avis residence for disinfecting the private water supply there; the chlorine line was disconnected in order to obtain a sample of untreated water. Coliform organisms were not present in this sample.

The bacteriological analysis of samples taken from the 9 wells revealed coliform organisms in 6 of these wells, indicating that well pollution is general in this area. Of some significance is the satisfactory bacterial quality of samples collected from the Cartwright well and the Thompson well, both wells extending into granite bedrock which normally is less likely to conduct polluting materials than is the fissured limestone.

Householders in this area reported that the well pollution appears to predominate during the spring months when a higher ground water table would exist. The pollution appears to abate or become absent at other times. This would support the theory that abundant ground waters, as well as surface run-off flows entering through the shallow overburden, tend to conduct shallow subsurface contamination into the wells.

In assessing the possible sources of contamination, it is apparent that several potential sources exist. The contributing factor is the fissured limestone bedrock which would permit contaminants to seep readily into ground waters.

PROVISION OF SAFE WATER SUPPLIES

A discussion was held on April 4th, 1961, with Mr. G. R. Davis, Manager, Kingston Public Utilities Commission concerning the possibility of providing city water to the Cartwright Point premises. The city presently supplies water to the Department of National Defence premises and the Royal Military College, both located in Pittsburgh Township. The city has received several requests for the extension of water services into the township. These requests either have been refused or held in abeyance until a distinct policy therefor[e] may be formulated. Some apprehension was expressed concerning the legal responsibilities which the city would assume in supplying water to adjacent municipalities.

SUMMARY

Investigations were made on April 4th and 5th, 1961, to determine the extent of pollution reported in private wells at the Cartwright Point subdivision (Reg. Plan #970). This survey had been requested by Mr. H. L. Cartwright, Kingston, who owns the land comprising this subdivision.

The high coliform contents revealed in many of the private drilled wells there has caused Mr. Cartwright to regard the Kingston trunk sewer, which extends through a section of this subdivision, as a possible source of pollution. Although some of these premises have obtained connections to the city sewer, private septic tank and tile bed systems are employed in several instances.

The bacteriological analysis of samples collected from the wells at this subdivision revealed coliform organisms in 6 of the 9 wells sampled.

In view of the fissured limestone bedrock which is prevalent in this region, and the minimal depth of overburden thereon, it would appear unlikely that ground waters free from coliform organisms could be assured at all times. In short, elimination of either of the possible sources of pollution would not necessarily ensure the safety of ground water quality. The fissured limestone bedrock, combined with a shallow or nonexistent overburden, is synonymous with ground water pollution.

RECOMMENDATIONS

In view of the geological conditions prevalent in the Cartwright Point area, measures should be adopted in order to provide water of satisfactory bacterial quality for domestic use. One of the following procedures should be considered:

1. Present water supplies could be disinfected on a private basis utilizing chlorination facilities.
2. A community water supply employing adequate treatment facilities could be considered.
3. Water is supplied from the City of Kingston water distribution system to the Department of National Defence premises which are located adjacent to the Cartwright property in Pittsburg Township.

If a satisfactory arrangement could be made with the city for supplying water to the Cartwright property, the local residents could abandon the use of their private wells.

A copy of this report was sent to the solicitor for the residents of Cartwright Point under cover of a letter from the Commission dated May 12, 1961, reading in part:

In the first place, I should like to comment on what may be expected of water quality in wells in a geological formation such as that in this locality. Where rock is present close to the surface, and it contains fissures, it is the usual experience that the wells will be contaminated because of drainage from near the surface getting down into these waters. This pollution may come from many places. In the samples collected, the bacterial pollution was not high in any of the wells, but coliform organisms were found in six of the nine wells sampled. It is quite impossible to say whether this contamination came from leakage from the sewer or from the different septic tanks in the area, or from surface drainage in general. The fact that all wells are relatively deep should give some degree of protection regardless of the source of pollution.

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I do not know what more we can do in this investigation. Even if it were shown that some pollution is getting into the wells from the sewer, the situation would still be an undesirable one because of the nature of the formation and the presence of other polluting substances. It is interesting also to observe that wells quite some distance back from the sewer also show pollution and in about the same degree as those close at hand. Under these circumstances, it does appear highly desirable to have water from a public system installed as soon as this can be.

If there is anything further we can do to assist you in this, please let me .

During the summer of 1961, the suppliants used the water from their well for all household purposes, treating the water used for consumption with Halozone pills and the dish water with Javex. There was no outward indication of anything abnormal about it and they suffered no ill effects from it.

In September of 1961, in the course of clearing a blockage that originated in the housing development sewer system, National Defence personnel, including one Staff Sergeant Webber, had occasion to visit manhole fourteen and the staff sergeant made a visual inspection of the horizontal National Defence lateral at the higher of the two points where it entered the manhole. There was, of course, limited light for such inspection but, as far as he could see, there were no defects in the six feet of pipe which could be viewed from inside the manhole.

On October 16, 1961, the solicitor for the local residents wrote to the National Defence District Engineer in Kingston a letter reading as follows:

Anything you could do to expedite the department's decision with regard to the supply of water to this area would be appreciated. The situation is that eight wells have been seriously contaminated and there is great danger to the health of the parties concerned. The probable source of infection is the city sewer which is also used by army housing. In these circumstances I suggest that you should do everything possible to assist these people in clearing up the health hazard at the earliest possible moment.

The number of people affected is only eight and the total number that could possibly, in the future, become members of the water area would be thirty. The Kingston Public Utilities Commission is prepared to supply the water and the only obstacle, at present, is obtaining the permission of the Department of National Defence to passing this water through D.N.D. water mains. The Kingston Public Utilities Commission would take all responsibility for metering and billing and would deduct the amount of water supplied to the water area from the total amount going into the D.N.D. mains.

I would appreciate your assistance in getting this matter cleared soon as we had hopes of installing the water before winter.

In the fall of 1961, all the members of the Duncan family became seriously ill in a way associated with contaminated water. Commencing at about the same time, there was a pronounced change in the character of the water from their well. It was seriously discoloured, it gave off a strong sewer-like stench whenever water was drawn from the taps and, when boiled, it frothed. (The frothing is apparently attributed to detergents in the water.) Since the water developed these obvious manifestations of pollution, the suppliants have, of course, refrained from using the water for personal consumption, cooking, or the washing of teeth. Indeed, it may be said, without undue exaggeration, that, since that time, everybody on Cartwright Point has been seriously worried about their water supplies.

Since the commencement of the drastic change in the apparent character of the water from their well, Professor Duncan has had to bring, from either the university or the home of a neighbour, all water used in their home for personal consumption, cooking or washing of teeth.

The conditions of stench, discolouration and frothing in the water from the suppliants' well that developed in the fall of 1961, continued unchanged throughout 1962, 1963 and most, if not all, of 1964. During this period, the residents of Cartwright Point made strenuous efforts to obtain a safe supply of water through their own municipality but no results were attained.

On July 16, 1964, water from the suppliants' well still showed the presence of "39 + E." Coli.

On July 23, 1964, a further inspection was made of private wells on Cartwright Point and the report made as a result read as follows:

INTRODUCTION

In response to a request submitted to this Commission by Mr. H. L. Cartwright, Kingston, investigations were made on the above date to review conditions pertaining to the quality of ground water at Cartwright Point. Mr. Cartwright had requested a general investigation of ground-water supplies and the possible sources of any pollution. In conjunction with the investigations which were made on July 23, 1964, interviews were held with Mr. H. L. Cartwright and with Mr. D. P. Ross, P. Eng., City Engineer, Kingston.

A survey of ground-water quality was made at Cartwright Point by OWRC staff on April 4 and 5, 1961. The results of that survey can be reviewed by making reference to the report which was prepared and distributed subsequent to the field investigations.

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DESCRIPTION OF THE AREA

The residential area known as Cartwright Point is located east of the community of Barriefield and south of the Department of National Defence premises in the Township of Pittsburgh. Approximately 40 houses are located in this subdivision where the residents have leased building lots from Mr. H. L. Cartwright.

The general topographical and geological features of the area were described in the 1961 report. Of special interest in these investigations is the fact that fractured limestone bedrock predominates in the area where polluted ground-water supplies have been reported. The depth of overburden varies from several feet to an absence thereof in some sections.

The City of Kingston trunk sanitary sewer extends through the Cartwright Point subdivision to the city's sewage treatment plant which is located near the St. Lawrence River in the Township of Pittsburgh. As described in the 1961 report, this trunk sewer lies in the fractured limestone at depths varying from 16 to 20 feet in the Cartwright Point area.

WATER SUPPLIES

The residents of this subdivision obtain water from private drilled wells. Sampling of various wells in the area during 1961 revealed the incidence of appreciable pollution in some of the water supplies. The appended laboratory results pertaining to water samples collected on July 23, 1964, reveal varying degrees of pollution in the wells which were sampled. Excessive pollution was revealed in the water samples obtained from the well which serves the Avis residence. A hypochlorinator is utilized on these premises for the disinfection of the domestic water supply. (The hypochlorinator was disconnected in order to obtain unchlorinated water samples.) In general, the presence of sanitary waste was apparent in many of the samples collected on July 23, 1964.

POTENTIAL SOURCES OF POLLUTION

The fissured limestone bedrock would facilitate the entry of contaminants to ground waters. Two possible conditions which could result in pollution of the ground water at Cartwright Point are as follows:

1. In the area concerned, several residences utilize sub-surface sewage disposal systems. The presence of fractured limestone bedrock and the minimal depth of overburden are factors which could permit waste flows to gain access readily to ground waters.
2. It is not improbable that some sewage flows could escape from the city's trunk sanitary sewer and enter the ground water.

Although either or both of these conditions could result in the pollution of ground-water supplies at Cartwright Point, elimination of either of the possible sources of pollution would not necessarily ensure the safety of ground-water quality.

It is Mr. Cartwright's contention that the city's trunk sanitary sewer is responsible for the adverse quality of the water supplies. The city's recent proposal to purchase equipment for inspecting the interior of sewers has prompted Mr. Cartwright to suggest the use of such a device in the trunk sewer extending through his property. It is understood that the officials concerned would not be averse to the consideration of such a proposal when the equipment has been obtained for inspection.

PROVISION OF A SAFE WATER SUPPLY

Subsequent to the aforementioned investigations which were conducted in 1961, the Commission report recommended that one of the following procedures should be adopted in order to provide water of satisfactory quality at Cartwright Point:

1. Present water supplies should be disinfected on a private basis utilizing chlorination facilities. (It is obvious that, if well pollution is severe, treatment in addition to chlorination might be required.)
2. A community water supply employing adequate treatment facilities could be considered.
3. If a satisfactory arrangement could be made with the City of Kingston for supplying water to the Cartwright property, the local residents could abandon the use of their private wells. The city supplies water to the Department of National Defence premises which are located adjacent to the Cartwright subdivision.

COMMENTS

The use of a tracer dye by local residents to determine if waste escapes from the city's trunk sanitary sewer was unsuccessful, probably due to the high dilution in the sewage flows. A great deal of dye would be required even if flows do escape from the sewer. An alternate procedure would be to place a non-toxic dye in the private sewage disposal systems at Cartwright Point to determine if this dye would establish a relationship between these systems and the well pollution. This action would at least provide a deductive method of investigating the pollution problem.

According to information obtained during this survey, the City of Kingston officials have displayed a co-operative attitude by offering to supply city water to the Cartwright Point premises providing that the local residents would agree to waive any future claims concerning ground-water pollution. Since some of the residents in the subdivision have refused to sign such an agreement, the negotiations have collapsed. The negative response made by some residents is attributed to the belief that their water supplies are of satisfactory quality and will remain so.

SUMMARY

Investigations were made on July 23, 1964, to determine the extent of pollution in private wells at the Cartwright Point subdivision. This survey was performed at the request of Mr. H. L. Cartwright who owns the land comprising the subdivision, and was a review of conditions investigated previously by OWRC staff on April 4 and 5, 1961.

Many of the wells yield water which appears to be adversely affected by sanitary waste gaining access to the ground waters. The immediate potential sources of pollution could be the private sub-surface sewage disposal systems and the City of Kingston's trunk sanitary sewer. The removal of either of these potential sources of pollution would not ensure the safety of water supplies due to the geological conditions. There is an obvious necessity for an adequate supply of safe water.

RECOMMENDATIONS

Consideration should be given to the provision of an adequate supply of safe water at the Cartwright Point subdivision. Successful negotiations with the City of Kingston is one practical method by which this objective could be achieved.

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A copy of this report was sent to the solicitor for the residents under cover of a letter from the Commission dated September 8, 1964.

Very shortly after receipt of that letter by their solicitor, a pool of raw sewage was discovered on the ground in the vicinity of manhole fourteen. As a result of excavation to discover the source of that sewage, it was discovered that about four inches of the gravel bed under the second and third tiles in the National Defence lateral (i.e., the two tiles closest to the T tile through which the lateral connected with manhole fourteen) had disappeared, with the result that those tiles had subsided under the pressure of the fill above (breaking off part of the "bell" shaped end of the T-shaped tile that connected with manhole fourteen) leaving a substantial break in the lateral through which the sewage was escaping. In the tile next to manhole fourteen (the T-shaped tile), there was a blockage consisting of twigs, sticks, toilet paper, rags, a skipping rope and other material preventing sewage from entering the Kingston sewer by either of the two possible entrances. The earth and fill surrounding the area bore all indications of having been subjected to very substantial pollution by sewage. This discovery was made in the period from July 12 to July 15, 1964.

By some time in October 1964, permanent repairs were made to the National Defence lateral.

Later in 1964, or early in 1965, the stench, discolouration and frothing character of the water from the suppliants' well had disappeared and, since that time, the water from the suppliants' well has been, as far as outward appearances are concerned, quite normal. It has, however, shown indications of pollution when tested from time to time. For example, on September 22, 1965 and on October 4, 1965, it showed 39 + E. Coli. What is more important, Mrs. Duncan, and others, had been present at the opening of the break in the National Defence lateral and everybody living on Cartwright Point or thinking about living on the Point would have heard vivid descriptions of the conditions discovered when it was opened up. Mrs. Duncan said, according to my note of her evidence, "...when I saw the amount of the soil contamination and smelled the incredible stench I personally thought it might remain a long time and I was not going to risk anything". The change in the apparent

character of the water back to normal did not therefore have the effect of making it possible for the suppliants to resume the use of water from the well, subject to appropriate treatment, for personal consumption, cooking, washing of teeth and other similar uses. It did, however, relieve the suppliants from the annoyance, discomfort and odium of having sewer stench and discoloured water in their home and it did make the use of their own water for personal washing and bathing less distasteful.

On these facts, considering the matter without the assistance of any scientific or other expert evidence, I am of opinion that the balance of probability is that sewage was finding its way from the break in the National Defence sewer main into the suppliants' well in substantial quantities from the fall of 1961 until after the break was repaired in the fall of 1964. The stench and colour that appeared in their water in the fall of 1961, as described by the suppliants, could only have been caused, as nearly as I can judge without expert assistance, by a very substantial invasion of their well by sewage. Such an invasion could have been caused by sewage from a twelve-inch main. As nearly as I can judge without expert assistance, it could not have been caused by any other source of possible contamination to which the Crown, or any other party, has pointed throughout the course of the trial. Even more significant, of course, is the fact that, after the break in the National Defence sewer was repaired, the character of the water that reflected a massive invasion of the suppliants' well by sewage gradually disappeared.[1]

The only argument of the Crown against this conclusion is that the break in the National Defence sewer could not have occurred until very shortly before it was discovered in September 1964, because, otherwise, it would have been discovered by periodic National Defence inspections of their sewers that were supposed to take place at intervals of not more than two weeks. The evidence relied upon for this argument is that of Staff Sergeant Webber, who was,

[1] In the absence of explanation, these facts warrant the inferences that I have drawn. They are not mere "conjectures" such as were the subject matter of *The King v. Moreau*, [1950] S.C.R. 18. They are inferences "of fact legitimately arising out of the facts established by the evidence". See *Shawinigan Carbide Co. v. Doucet*, (1909) 42 S.C.R. 281, per Duff J. at page 304.

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from January 1960 to January 1962, a sort of superior foreman or clerk of works who worked under the National Defence Engineer who was responsible for the sewer system. The Staff Sergeant's evidence was that he had instituted such a system of inspection. I am not satisfied that, if the system of inspection as described by the Staff Sergeant had been carried out, it would necessarily have revealed the break; I have no evidence that it was in fact carried out during the period when the witness was in charge;[1] and I have no evidence that that system of inspection was even supposed to be in effect after his time. The Staff Sergeant himself had not been near manhole fourteen since the incident in September 1961, to which I have already referred. If any National Defence personnel had visited the sewer in question during the vital period from September 1961, to September 1964, he was not called as a witness nor was any explanation given for not calling him. Furthermore, when the pool of sewage was discovered near manhole fourteen, a plumber, who was working under Staff Sergeant Webber's successor and who was sent to inquire into the source of the sewage on the surface, thought it necessary to seek Mr. Cartwright's permission to go on his land at manhole fourteen, which suggests to me that there was no practice of inspecting the sewer at that point. For all these reasons, I reject the contention that the evidence concerning a system of inspections establishes that the break in the National Defence sewer could not have happened until shortly before it was discovered.

Neither party put before the Court the opinion of any expert witness as to what caused the break in the National Defence sewer or as to when it occurred. The Crown took the position that the suppliants, who had the onus of proving their case, should have incurred the very considerable expense of providing the Court with this type of assistance. I repeat that, in the absence of any such assistance, I can only conclude that what happened is what seems probable to a person who has not the advantage of scientific or other

[1] That all instructions given in the unit in question by higher authority are not automatically carried out precisely as given is shown by the fact that the instructions that appear on Exhibit R10, that Staff Sergeant Webber was to notify the City of Kingston when the National Defence sewer was being connected so that the City might inspect the work during construction of the connection, was not complied with.

expert training or experience or of advice from a person who has such training or experience. I infer that the Department of National Defence did not feel impelled to obtain any expert opinion as to why or when their sewer broke and discharged sewage into their neighbours' ground or that any such opinion that the Department did obtain supports the result that I have reached.

In attempting to assess the probabilities as to whether the suppliants' well was invaded by effluent escaping from the break in the National Defence lateral, I have had the assistance of evidence from a highly qualified geologist, Dr. J. W. Ambrose, head of the Department of Geology at Queen's University.[1] As I understand it, one can conceive of the relevant part of Cartwright Point as consisting of a hill sloping down towards the Saint Lawrence River in a southerly direction, such hill consisting of limestone with a layer of earth on top of it. The limestone, in itself, is to be conceived of as impervious to water but it is divided by cracks or spaces (some of which are filled with earth, gravel, and other material, and some of which are not so filled) following more or less a pattern that can be described in technical terms by the geologists and through which water can percolate or flow. The earth layer, which varies in depth from several feet in some places to zero where there are outcroppings of rock, is full of air spaces more or less perceptible to the human eye through which water can percolate or flow. Furthermore, one can conceive of all the spaces in the limestone or the earth constituting this hill as being filled with water, called "ground water", up to a level, called the "ground water level," which follows a line from the level of the water in the Saint Lawrence River, at the river edge, to a level somewhere in the neighbourhood of twenty feet below ground level at the top of the hill. Such ground water level is a "subdued reflection" of the ground level above it. Furthermore, one can conceive of a tendency of the ground water to flow or move towards the river by virtue of the tendency of water to seek the lowest level. This flow or movement is relatively slow compared to a flow of water in ordinary surface channels because a movement

[1] During the course of the trial the Court, in the presence of counsel and Dr. Ambrose, took a view of the locality, which was of assistance in an appreciation of the evidence.

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of water through relatively small, if not minute, channels is of necessity slowed down by the physical impediments to flow.

In effect, therefore, one can think of the situation as being

(*a*) that there is an area below the ground water level where, except for spaces in the centre of rocks or other contained places, all space not filled with solid material is filled with water, which is generally tending to flow towards the river,

(*b*) that there is an area between the ground water level and the ground level—which can be called the "aerated zone"—in which the spaces between the solids (the rock and the earth) are filled with air through which water entering from the surface percolates, in accordance with the principle that water seeks the lowest level, until it reaches the ground water level where it joins the ground water which is moving towards the river, and

(*c*) that there is water on the surface known as surface water, which flows towards the river until it encounters open spaces in the ground surface through which it enters the aerated zone to percolate towards the ground water.

The result is that water below the earth surface percolates either directly down towards the ground water or follows cracks or other spaces in the limestone, which will, generally speaking, lead it in a direction downward and towards the river but which could conceivably, in exceptional cases, lead downward but away from the river. In any event, when water percolating through the aerated zone reaches the general body of ground water, it will then follow the general tendency to flow towards the river.

Having regard to the background of knowledge given to me by Dr. Ambrose, I am satisfied that the overwhelming probability is that the obvious physical characteristics in the water from the Duncan well (the stench and discolouration), from the fall of 1961 to the end of 1964, were entirely attributable to sewage coming from the break in the Department of National Defence sewer, even though it

is not improbable, as I will show later in these reasons, that some pollution was reaching the well from other sources from time to time.

In reaching the conclusion that I have already expressed that sewage was escaping from the break in the National Defence sewer from September 1961 until the break was repaired in October, 1964, it is not irrelevant to consider what the probabilities or possibilities are as to what physically caused the break.

In my view, having regard to the evidence as to the physical facts and the evidence of Mr. J. D. Lee and Mr. D. C. Smith, each of whom was a well qualified engineer with experience in connection with sewer works (neither of them had been employed to prepare themselves to express an opinion as to what actually happened and neither of them expressed any such opinion), the most probable hypothesis as to what happened is as follows:

1. After Staff Sergeant Webber's view of the first six feet of the National Defence lateral in September of 1961, another plug developed, this one in the T drop pipe—this block would have prevented the sewage from going from the lateral into the Kingston sewer.
2. As a result of the block, the lateral would relatively quickly fill with sewage from the T drop pipe towards manhole number 512 and possibly almost to the top of that manhole, which would create a nine-foot head of sewage effluent.
3. The resulting pressure at the lower end of the lateral would have fractured the joint between the T tile, which adjoins manhole fourteen and the next tile, letting liquid effluent out and bringing about relief from the pressure.
4. The liquid effluent leaving the sewer through the cracked joint under pressure would wash away, through fissures in the rock, the finer components in the bed under the two tiles next to the T drop tile. Having regard to the pressure of a head of six to nine feet, this would take place fairly quickly.
5. When sufficient of the bed under those two tiles was washed away, the weight of the six feet of fill and soil above them (1200 pounds per running foot)

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would have forced them to subside breaking off the lower part of the "bell" end of the T tile and leaving a four-inch opening through which the sewage effluent would escape and this would have permitted the renewal of normal flow through the National Defence sewer.

(All of the above could have happened, so far as I can judge unassisted by expert testimony on the question, between the time that Staff Sergeant Webber inspected the sewer from manhole fourteen, in September of 1961, and the time that the suppliants' well water became obviously foul.)

6. The sewage thus diverted from the National Defence sewer would then have found ways to flow off through the aerated space between the level of the broken tile and the ground water level and one of these ways would have led directly or indirectly to the suppliants' well.

7. The next stage would have been the gradual formation of gelatinous material in the soil and the open spaces in the rocks which ultimately sealed off some of the routes by which the sewage effluent was escaping so that less was then able to escape downward from the break than was flowing down the sewer to the break. This would have resulted in the sewage again backing up in the sewer to a head of at least six feet and so building up pressure on the sewage effluent that could not find adequate escape routes from the break by reason of the gelatinous material.

8. This pressure would have forced the sewage upward so that it finally bubbled out on the surface in August or September, 1964.

Counsel for the Crown accepted this theory as to what had happened except that he submitted that the whole process took place in a matter of days or weeks before the middle of September, 1964. As I have indicated, he based this submission on the evidence about an inspection system. I have already given my reasons for rejecting this qualification on the view that I have expressed as to what probably happened

Counsel for the suppliants put forward a somewhat different version as to what had probably happened. In the first place, he suggested that there was probably water flowing down the trench in which the National Defence sewer was laid before the bed for the pipe was completed. He suggested that this would result in water in the gravel constituting the bed below the two tiles next to the T tile, that this water would be frozen when the tiles were laid in February 1961, that when spring came, this water would thaw and that the bed would then subside enough so that there would be a fracture in the joint at that time through which small amounts of effluent would escape (causing small amounts of pollution to the suppliants in the spring and summer of 1961) and that this effluent would gradually wash away the bed under the two tiles that ultimately subsided in the fall of 1961, after Staff Sergeant Webber's view from manhole fourteen, causing the major pollution from that time until after the break was discovered in September of 1964. Counsel for the suppliants further suggested that the blockage in the T pipe did not occur until September 1964, when it caused the sewage to bubble out at the surface.

I find the suggestions put forward by counsel for the suppliants to be no more than conjectures. There are no proven facts that make such conjectures probabilities. Their main merit, from the point of view of the suppliants, is that they put the responsibility for minor pollution of the suppliants' well in the summer of 1961 on the break in the National Defence sewer.

I repeat that my view starts with the probability that I have already developed that the obvious fouling of the suppliants' water, which stopped when the break in the National Defence sewer was repaired, had its origin in sewage from the break. I regard my conjectures as to how and when the break occurred as being the most probable explanation of how the obvious fouling of the suppliants' water by the sewage from the National Defence sewer could have happened.

On these facts, I am of opinion that the Crown is liable to the suppliants by virtue of subsection (1) of section 3 of the *Crown Liability Act,* chapter 30, of the Statutes of 1952-3, which reads as follows:

3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

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(a) in respect of a tort committed by a servant of the Crown, or

(b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

In the first place, the facts, as I have found them, in my view fall clearly within the principle of strict liability laid down in *Rylands v. Fletcher*[1] as applied by the Judicial Committee of the Privy Council in the Alberta case, *Northwestern Utilities Ld. v. London Guarantee and Accident Co.*[2] See per Lord Wright at pages 118-9:

> Before discussing the facts in the case, it is desirable to explain the principles of law which, in their Lordships' judgment, are applicable.
>
> That gas is a dangerous thing within the rules applicable to things dangerous in themselves is beyond question. Thus the appellants who are carrying in their mains the inflammable and explosive gas are prima facie within the principle of *Rylands v. Fletcher*, L.R. 3 H L. 330, affirming *Fletcher v. Rylands*, (1886) L.R. I Ex. 265: that is to say, that though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come prima facie within the rule of strict liability if the gas escapes: the gas constitutes an extraordinary danger created by the appellants for their own purposes, and the rule established by *Rylands v. Fletcher*, L.R. 3 H.L. 330, requires that they act at their peril and must pay for damage caused by the gas if it escapes, even without any negligence on their part. The rule is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land: it applies equally in a case like the present where the appellants were carrying the gas in mains laid in the property of the City (that is in the sub-soil) in exercise of a franchise to do so: *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K.B. 772.
>
> This form of liability is in many ways analogous to a liability for nuisance, though nuisance is not only different in its historical origin but in its legal character and many of its incidents and applications. But the two causes of action often overlap, and in respect of each of these causes of action the rule of strict liability has been modified by admitting as a defence that what was being done was properly done in pursuance of statutory powers, and the mischief that has happened has not been brought about by any negligence on the part of the undertakers.

There was no question of a defence based on statutory authority here. (Another defence that is well established, and which was relied upon here, is that the "escape" was caused by the deliberate act of a third party. I refer to this a little later in these reasons.) In my view "sewage" is, from the present point of view, just as "dangerous" as gas and what Lord Wright said as to the state of the law applies equally to the facts of this case. Further, in my view, the bringing of sewage on to land in a sewer main is

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[1] L.R. 1 Ex. 265; L.R. 3 H L. 330 (1868).

[2] [1936] A C. 108. Referred to in *Read v. Lyon & Co. Ltd.*, [1946] 2 A.E.R. 471, per Viscount Simon at page 474.

not such a "natural" use of the land as to take the facts outside of the doctrine. The application of the doctrine to sewage allowed to escape from sewer mains has been recognized in such cases as *Haigh v. Dendraith, R. P. C.*,[1] per Vaisey J. at page 664, and *Smeaton v. Ilford Corpn.*,[2] per Upjohn J. at pages 929 *et seq.* (compare Salmond on Torts, 14th ed., 1965, page 451). Cases holding that the *Rylands v. Fletcher* doctrine does not apply to water, gas or electricity in domestic installations have no application to cases concerning water, gas or sewage in mains or reservoirs where "these dangerous things were being handled in bulk and in large quantities".[3] Compare *Collingwood v. Home and Colonials Stores Ltd.*[4] per Lord Wright at page 208, referred to in *Crown Diamond Paint Co. v. Acadia Holding Realty Co.*[5] per Rand J. at page 173. See also *Western Engraving Co. v. Film Laboratories, Ltd.*[6]

It was contended that the fact that the blockage material included sticks, twigs and a skipping rope showed that the break was the result of a deliberate act of a third party within the defence in such cases as *Rickards v. Lothian.*[7] In my view, this exception has no application because Staff Sergeant Webber's evidence makes it clear that the possibility of such material getting into their sewer system as a result of childish pranks was the very thing that they foresaw or ought to have foreseen. They knew that they could expect such pranks and must guard against them. In any event, there is no evidence of a deliberate forming of a blockage or creation of a break in the sewer by a third person. Twigs, small sticks, a skipping rope, rags, and other miscellaneous objects, were found in the block. Some of such things probably got in the sewer system as a result of childish pranks which the design of the system apparently seemed to invite. Whether the things that got in in that way were essential to the formation of the blockage we do

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[1] [1945] 2 All E.R. 661.
[2] [1954] 1 All E.R. 923.
[3] While the point has not been raised by the respondent, it should be noted that the *Rylands v. Fletcher* doctrine applies where the person bringing fluids into a main has only a license to have its main in the land. See *Charing Cross Electricity Supply Company v. Hydraulic Power Company*, [1914] 3 K.B. 772, cited with approval by the Privy Council in the *Northwestern Utilities* decision in 1936 (*supra*).
[4] [1936] 3 All E.R. 200.
[5] [1952] 2 S.C.R. 161.
[6] [1936] 1 All E.R. 106.
[7] [1913] A.C. 263.

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not know. Assuming that they were, the children did not create the blockage but rather the National Defence sewer system operating on material properly in it and material that should not have been in it brought about the blockage. The "plugging up" here was not "a deliberately mischievous act of some outsider" as it was in *Rickards v. Lothian, supra.* The respondent has, therefore, failed to discharge the onus of showing that the escape was due to the deliberate or conscious act of a stranger over whom he had no control and against whose acts he could not reasonably be expected to have taken precautions. See Salmond on Torts, 14th ed., (1965) page 460, and Winfield on Tort, 7th ed. (1963) page 457.

In my view, therefore, if the construction, operation and maintenance of the National Defence lateral had, during the relevant period, been carried out by a private person instead of the Crown, such person would be liable to the suppliants by virtue of the doctrine in *Rylands v. Fletcher.* As that doctrine is based on a legal duty arising out of the concept that one must so use his property as not to injure the property of others,[1] this is clearly a case in which "if it were a private person of full age and capacity", the Crown would be liable "in respect of a breach of duty attaching to the ownership, occupation, possession or control of property". The Crown is therebore liable, by virtue of paragraph (*b*) of subsection (1) of the *Crown Liability Act.*

The same conclusion would be reached on the basis of the tort of nuisance. See *City of Portage La Prairie v. B.C. Pea Growers Ltd.*[2] where the appellant municipal corporation was held to be liable for damages to the respondent's property arising from seepage from a sewage lagoon. In particular, see page 508 per Martland J., delivering the judgment of the Supreme Court of Canada: "It was not necessary, in order to fix the appellant with liability for the creation of a nuisance, for the respondent to establish negligence on the part of the appellant or of its engineers in the construction of the lagoon."

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[1] See *Rylands v. Fletcher, supra,* L.R. 3 H.L. at page 341, per Lord Cranworth, "For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum.*"

[2] (1966) 54 D.L.R. (2d) 503.

In any event, I am of opinion that the unknown officer or servant of the Crown who caused the National Defence sewer to be used for the movement of sewage after having been built in accordance with the specifications that were supplied to the contractor, without taking any steps to guard against the dangers inherent in the use of it as built, was guilty of negligence that caused the suppliants' water supply to be polluted by sewage from that sewer from the fall of 1961 until the end of 1964. Such officer or servant may have been the engineering officer who authorized the specification (and thus impliedly authorized the use of the sewer built in accordance with the specification) or it may have been some other officer who authorized the use of the sewer without taking whatever steps were necessary to protect the neighbours against the risks involved in using it as built. For present purposes, it does not matter precisely who he was. It is sufficient to find that there must have been some officer who took responsibility for causing sewage to flow in the National Defence lateral and who was therefore under a duty to those who might be affected to take care for their safety just as much as an officer who operates a National Defence vehicle on the highway at a high speed is under a duty to take care not to injure persons who might be injured by the vehicle if care is not taken. In either case, the officer who fails to take care with resultant injury to a third person draws on himself a personal liability in the tort of negligence and therefore draws on the Crown a liability by virtue of paragraph (*a*) of subsection (1) of section 3 of the *Crown Liability Act*.

Here again, no engineer was called by the Crown to explain or justify the use of these specifications for this installation. In the absence of any such explanation, my conclusion is that what happened was a probable and foreseeable consequence of the use of the lateral constructed as specified. The T tile for the drop connection constituted a trap for sticks, twigs and other material which, it was well known, were likely to get into this sewer system. A blockage at this point was, having regard to the experience in connection with the system, probable and foreseeable. A combination of the fact that the lateral as constructed was only designed to take the pressure from a three-foot head and the fact that a head of nine feet would be developed

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before sewage would be backed up so as to emerge from the first manhole up the hill, which is the first place where it would be noticed, meant that it was probable that the sewer tiles or the joints between them would fail and that the sewage would escape into the ground without there being any indication above ground that there was anything wrong. There is nothing in the evidence to show that, once a good size break was developed, even the flushing out of the sewer by use of a water hydrant would give any indication that there was a break. It is not for me to say what the fault was. It may have been that there should have been stronger pipe and joints or more manholes, or both, or an efficacious system of inspection, or something that does not occur to me.[1]

Quite apart from the *Rylands v. Fletcher* doctrine of strict liability, I am, therefore, of the view that the Crown is liable for the negligence of the officer or servant who authorized the use of a sewer built in accordance with the specifications which were provided to the contractor, without taking adequate precautions against the risks involved, with the result that the suppliants' well was bombarded with sewage from the National Defence sewer for over three years.

Paragraph 7 of the Statement of Defence to the Petition of Right sets up a defence of lack of the notice required by subsection (4) of section 4 of the *Crown Liability Act*. This defence was abandoned by counsel for the Crown during the course of the trial.

I come now to the question of the relief that the suppliants are entitled to. They ask only for damages. It is conceded that the break has been repaired and that there is no threat of a continuation of the *tort* which would justify seeking an injunction, even if an injunction can be obtained in Petition of Right Proceedings, a question concerning which I need express no opinion.

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[1] It is a fair inference from the established facts, in my view, that the break would not have occurred without the negligence of an officer or servant of the Crown. In the circumstances, it was for the Crown to show that it could have happened without negligence. See *Gauthier & Company, Ltd. v. The King*, [1945] S.C.R. 143 at page 157, per Kellock J., delivering the judgment of the majority.

In considering the quantum of damages, it is necessary to appraise precisely what it was that the suppliants had in the fall of 1961 before their water supply was attacked by Department of National Defence sewage. To do this, I propose now to bring together all the evidence bearing on that question even though most of it has already been referred to.

The water from the suppliants' well until the fall of 1961, to all outward appearances, was just as good as water from any city main. It looked the same. It had no noticeable odour. It had no physical characteristic that detracted in any way from its acceptability for domestic use.

Nevertheless, it was obtained from a well located in a fairly highly populated area that had been bored in limestone and as such was a subject of apprehension. While an ordinary householder would, as far as his own observations were concerned, have no reason for apprehension, nevertheless, information or advice, emanating, presumably, from public health or sanitary engineering sources, would make him realize that it was not safe to accept well water from such a source at face value. Indeed, the evidence shows that the Ontario Water Resources Commission looks with disfavour on a well and septic tank system being on the same premises in this area. So, Dr. Shortliffe, when he first started using the well, when there were practically no neighbours close by, had tests made of the water every month. When such tests showed no bacillus count, he decreased the frequency of the tests to twice a year and finally to once a year. Until he sold the place in 1958, he was so fortunate as to have a consistent result of no bacillus content. Nevertheless, he realized that water from such a source had to be watched.

By the time the suppliants bought from Dr. Shortliffe in 1958, the surrounding area had become relatively heavily populated.

The suppliants did not, after they purchased in 1958, at first realize that their water, by reason of its source, required to be tested from time to time. However, this hard fact of life was before long brought home to them and they also made a point of having periodic tests made. During the period from the time they acquired the property in 1958 until the fall of 1961, the reports on these tests that they

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were able to find when preparing for the trial of this case showed the following results:

July 20, 1959—nil
Nov. 23, 1960—nil
Feb. 28, 1961—2.0 E. COLI
Mar. 1, 1961—39+E. COLI

There were, apparently, other tests performed in 1960, because, according to the evidence there was, in that year, a report of some slight pollution or "some trace of pollution" which was subsequently cleared up. This did not unduly alarm the suppliants because they had been told that wells did have periodic pollution. A further test on their water was performed as a result of the survey by the Ontario Water Resources Commission on April 5, 1961. It showed forty-three Membrane Filter Coliform Count per 100 ML, which, according to the evidence indicates that the water was not fit for human consumption. Another fact that must not be left out of account in assessing the confidence that the suppliants might be expected to have had in their water supply during the relevant period is the fact that, while the female suppliant was abroad in the summer of 1960, the male suppliant and their son each had the sort of stomach upset that one associates with bad water. When this happened, between the middle of August and the middle of September, the male suppliant was in Nova Scotia and the son was at home. It is not without significance that, when asking for a report on a sample of their water after this, that is, on November 23, 1960, a request was endorsed on the form to "Please state if drinkable".

Another indication of the degree of confidence the suppliants had in their well water during this period is the fact that commencing in the fall of 1960, they started using "Halozone pills", which, they understood, would protect the user of the water against any dangerous organisms that might possibly be in it.

Finally, in appraising the character of the suppliants' water supply at the time that that break developed in the National Defence lateral, it must be noted that the suppliants and their neighbours had had so many bad reports on samples from their respective water wells and had had so much sickness apparently due to bad water that they employed a solicitor who made a complaint on their behalf, by

letter dated March 6, 1961, to the Ontario Water Resources Commission which stated, *inter alia*, that the suppliants' well and the wells of the others showed "serious contamination" and that "there has been some serious sickness" as a result of this contamination.

Having regard to all the above circumstances, I am of the view that the suppliants did not in September, 1961, have, in their well water, a source of domestic water in which they could, as reasonably prudent persons, have complete and absolute confidence. On the other hand, they had a source of water which looked all right and smelled all right and which they could use with a reasonable feeling of safety as long as they took the precautions which they were in fact taking at that time.

Such a source of water, while far from satisfactory, made the use of their residence acceptable during the period after the increase in the number of neighbours made the acquisition of a proper source of water inevitable and before the time when such a source could actually be acquired; or it would have done so if the National Defence sewer break had not occurred.

Counsel for the Crown conceded that, if there is liability, the suppliants are entitled to $500 a year for the period during which they had to carry water. Whether or not that amount is the right amount for carrying water, I should have thought that all other aspects of the disagreeable situation created in their home by foul smelling, nauseating appearing water have to be considered in determining damages.[1] Furthermore, there is an indefinite period in the future in respect of which the effects inevitably linger on in a way that must receive some consideration.[2] On the other hand, money cannot compensate for everything and damages must not be inflated in an attempt to do the

[1] Counsel for the suppliants made it clear during the trial that no claim was being made for illness of the suppliants or their family.

[2] Evidence for the Crown by a bacteriologist indicates that it is unlikely that E. Coli from the National Defence sewer would survive in the well or the soil for more than 200 days. It cannot be said with certainty, however, that there is any set period beyond which E. Coli or certain disease organisms could not survive. Certainly it would be some considerable time before the suppliants or their local advisors would have confidence that the effect of the massive invasion of National Defence sewage had completely disappeared. See, for example, the evidence of the sanitary engineer, Mr. J. D. Lee

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impossible.[1] Finally, it must be borne in mind that the damages are for injury to a very imperfect water supply and not to a safe and sound water supply.

In all the circumstances, the best estimate I can make of a fair compensation is $5,000. There will therefore be judgment that the suppliants are entitled to be paid by the respondent the sum of $5,000 and their costs to be taxed.

[1] Compare *Liesbosch Dredger v. S.S. Edison,* [1933] A.C. 449 per Lord Wright at page 460.

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Ottawa Dec. 15

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Jan. 25

BETWEEN:

METROPOLITAN LIFE INSURANCE COMPANY ..... APPELLANT;

AND

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND THE GRAPHIC ARTS INDUSTRIES ASSOCIATION ..... RESPONDENTS.

AND BETWEEN:

METROPOLITAN LIFE INSURANCE COMPANY ..... APPELLANT;

AND

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND THE GRAPHIC ARTS INDUSTRIES ASSOCIATION ..... RESPONDENTS.

Revenue—Customs Tariff, R.S.C. 1952, c. 60—Customs Act, S. of C. 1958, c. 26, s. 44—Tariff items 170, 171, 178—Appeal under s. 45 of the Customs Act is limited to a "question of law"—No appeal upon a question of fact.

Appellant's position before this Court was that the unbound books should have been classified under Items 170 and 171 respectively under the *Customs Tariff,* R.S.C. 1952, c. 60, of the unbound pages of a book in

English entitled "Rate Book", imported on July 10, 1963, and of the unbound pages of a book in French entitled "Recueil de Tarifs", imported on Sept. 23, 1963, respectively.

The Tariff Board declared that the rate book pages, both in the English language and in the French language, were properly classified in Tariff Item 178

The appeal to this Court from that declaration under s. 45 of the *Customs Act* is limited to a "question of law". There is no appeal upon a question of fact as such, because the appellant accepted the description of the "Rate Book" and the "Recueil de Tarifs" as set out in the Tariff Board's decision except the part thereof that states that "As its title implies, by far the greater part of the book is devoted to premium rates and their variations according to different circumstances".

Held, that it is not possible to find a clear cut demarcation between certain parts of the books that deal with rates and other parts that do not.

2 That there are two quite different ways of appraising the books. One appraisal might be that the books are largely devoted to enabling the company's employees to know all the different types of insurance contracts that the company is prepared to make with prospective customers and that the information as to rates in the book is incidental information that plays a relatively minor role in the books.

3. That this Court cannot interfere with the finding of the Tariff Board decision, which conclusion is one open to the appraisal of the character of the books.

4 That these rules upon which the appellant relies cannot be applied in any mechanical or artificial way but must be used as tools to ascertain what Parliament intended c f. *Johnson et al v Canadian Credit Men's Trust Ass'n.* [1932] S C R. 219 at 220

5. That when the various specific classes of goods set out in Item 178 are examined they are found to be either "advertising" or "printed" matter. The rate books in issue have an advertising character.

6 In the general usage the word "price" has come to have a meaning that includes insurance premiums

7. That Items 170, 171 and 178, show that the letters "n o.p " appear in Items 171 and 178 but do not appear in Item 170 These letters mean "not otherwise provided".

8 While the matter is not free from doubt, having regard to the manner in which the wording of Item 170 follows the wording of Item 171, in the Court's view what Parliament intended to admit free is that portion of the class of books, etc previously covered by Item 171 that are not in the English language

9. That the rate books in issue in this case not only fall within the meaning of the words in Item 178 "Advertising and printed matter" but also fall within the meaning of the words "Books ... periodicals and pamphlets", which appear in Item 171.

10 That the "n o p " (not otherwise provided) applies to the whole of Item 178 as well as to the whole of Item 171. Items 169 to 173 inclusive deal with what may be referred to as "Book" items.

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11. That Item 171 provides for a relatively small duty for books, etc. "not otherwise provided for". Each of the other items provides for a higher duty or free entry for the books, etc. specifically described in it without any exception (that is they are not "n.o.p." items). Item 178 is another "n o.p." item and it begins "Advertising and printed matter".

12. That the Court has reached the conclusion that the words employed in Items 170 and 171 must be so interpreted as not to extend to the advertising and printed matter referred to in Item 178 c.f. *Accessories Machinery Ltd. v. The Deputy Minister of National Revenue for Customs and Excise et al,* [1957] S.C.R. 358.

13. That the Court rejects the appellant's argument that by reason of the "n.o.p." symbol in Item 178 and the absence of an "n.o.p." symbol in Item 170 the "Recueil de Tarifs" should have been classified under Item 170.

14. That the appeals be dismissed.

APPEALS from decisions of the Tariff Board.

John D. Richard for appellant.

R. A. Wedge and *H. A. Newman* for respondent The Deputy Minister of National Revenue for Customs and Excise.

D. D. Diplock, Q.C. for respondent The Graphic Arts Industries Association.

JACKETT P.:—These are appeals, under section 45 of the *Customs Act* (Chapter 26 of 1958), from decisions by the Tariff Board under section 44 of the *Customs Act*, dismissing appeals from two decisions of the Deputy Minister of National Revenue for Customs as to the classification under the *Customs Tariff*, R.S.C. 1952, chapter 60, of the unbound pages of a book in English entitled "Rate Book", imported on July 10, 1963, and of the unbound pages of a book in French entitled "Receuil de Tarifs", imported on September 23, 1963, respectively.

The two books differ only in that one is in French and the other is in English.

The appellant's position, before this Court as well as before the Tariff Board, was that the unbound books should have been classified under Item 170 and Item 171, respectively, of the *Customs Tariff*. Those two items, at the relevant times, read as follows:

Tariff Item.	British Preferential Tariff.	Most-Favoured-Nation Tariff.	General Tariff.
170 Books, periodicals and pamphlets, or parts thereof, printed, bound, unbound, or in sheets (not to include blank account books, copy books, or books to be written or drawn upon) in any other than the English language	Free	Free	Free
171 Books, printed, periodicals and pamphlets, or parts thereof, n.o.p., not to include blank account books, copy books, or books to be written or drawn upon	Free	10 p.c.	10 p.c.

The respondents' position was that both importations were properly classified under Item 178, which, at the relevant time, read as follows:

Tariff Item.	British Preferential Tariff.	Most-Favoured-Nation Tariff.	General Tariff.
178 Advertising and printed matter, viz.:— Advertising pamphlets, advertising show cards, illustrated advertising periodicals; price books, catalogues and price lists; advertising almanacs and calendars; patent medicine or other advertising circulars, fly sheets or pamphlets; advertising chromos, chromotypes, oleographs or like work produced by any process other than hand painting or drawing, and having any advertisement or advertising matter printed, lithographed or stamped thereon, or attached thereto, including advertising bills, folders and posters, or other similar artistic work, lithographed, printed or stamped on paper or cardboard for business or advertisement purposes, n.o.p. .....per pound	5 cts.	10 cts.	15 cts.
but not less than		25 p.c.	35 p.c.

The evidence given before the Tariff Board was common to both appeals and it was common ground that the appeals to this Court are appeals on the evidence that was before the Tariff Board.

That part of the Tariff Board's reasons that summarizes the factual position, as the Board found it to be, reads as follows:

A copy of each rate book was filed as an exhibit and evidence was given by the staff supervisor of a division of the appellant company's Ottawa office concerning its use.

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The contents of the rate book are described on the first page of text; a summary of this description follows

Section A: Information on two series of policies, rules for computation of premiums, underwriting instructions and procedures, plans and supplemental benefits, dividend information, etc

Section B: Information on personal health policies.

Section C: Rates and non-forfeiture values for different policies

Section D: Information on modes of settlement and interest tables

Section E: Descriptive text, underwriting rules and rates for annuity contracts and certain life insurance policies and non-forfeiture values for deferred annuity contracts

Section F: Description, underwriting rules, applications, rates and values for weekly premium policies

Section G: Occupational ratings and health criteria for premium determination

Section H: Information, premium rates, mortality table, income tax provisions, insurance regulations, etc, relating to certain types of insurance

The rate book was described in evidence as a reference book on life insurance for the use of agents or salesmen and other officers or employees of the appellant company, but not for the use of the public; it was stated in evidence that agents of the appellant company took a training course which included the subject matters of the rate book and that without such training, the rate book could not be used effectively.

From the foregoing it is clear that the rate book is basically a compilation of information pertaining to the types of insurance which the appellant company offers to the public, to information that an adequately informed agent must possess, to premium rates, to dividends and to other insurance matters. As its title implies, by far the greater part of the book is devoted to premium rates and their variations according to different circumstances

The rate book is descriptive of the insurance which the appellant company offers to the public and is largely devoted to setting out the premium rates, on a time basis of a year or shorter periods, to be paid to obtain the insurance. . . .

. . . It is true that the rate book cannot give the total amount that will be paid for most types of insurance because of the fortuity of the insured's death at any time The contract of life insurance provides insurance coverage, and often other benefits as well, in return for the payment of certain sums of money each year; the contract is terminable upon the death of the insured or at some other specified time when certain agreed sums of money become payable to the beneficiary of the policy The total price is often unascertainable until the death of the insured Nevertheless, the rate book, properly used, does establish the premium to be paid in each period for the duration of the insurance . . .

The Tariff Board expressed the opinion that, in the general usage of the word "price", the premium is the price of the insurance expressed in dollars and cents and made a finding "that the rate books are properly classified in the second grouping of Tariff Item 178: 'price books, catalogues

and price lists' ". The Board thereupon declared that the rate book pages, both in the English language and in the French language, were properly classified in Tariff Item 178.

The appeal to this Court from that declaration, under section 45 of the *Customs Act,* is limited to a "question of law". There is no appeal upon a question of fact as such.

The appellant in this Court accepted the description of the "Rate Book" and the "Recueil de Tarifs" as set out in the Tariff Board's decision except the part thereof that states that "As its title implies, by far the greater part of the book is devoted to premium rates and their variations according to different circumstances".

In my opinion, this conclusion by the Board is a conclusion on a question of fact. While the books in question are written documents, the conclusion of the Board that is attacked by the appellant is not an interpretation of the meaning of those documents, which would be a question of law, but is an appraisal of the true nature or character of the document having regard to the question whether, or not, it falls within the words of Item 178. This in my view is a question of fact as to the proper inferences to be drawn from the basic facts. As long as the Board's conclusion can be supported by the basic facts, it cannot be attacked in this appeal which is limited to questions of law[1].

In my opinion, the Tariff Board's conclusion that the greater part of the "Rate Book" or "Recueil de Tarifs" in question is devoted to premium rates and their variations can be supported on the basic facts. It is not possible to find a clear cut demarcation between certain parts of the books that deal with rates and other parts that do not. It is impossible, therefore, to survey the books on a quantity basis and say that the Board was clearly wrong in its conclusion. There are at least two quite different ways of appraising the books from the relevant point of view. One appraisal might be that the books are largely devoted to enabling the company's employees to know all the different types of insurance contracts that the company is prepared

[1] Compare *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise,* (1956) 1 D.L.R. (2d), 497 at p. 498 (Supreme Court of Canada), and *Dominion Engineering Works Ltd. v. Deputy Minister of National Revenue (Customs and Excise),* [1958] S.C.R. 652.

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to make with prospective customers, including the various incidental rights and privileges that may be attached to various contracts, and that the information as to rates in the book is incidental information that plays a relatively minor role in the books. Another appraisal might be that the primary purpose of the books is, as their names suggest, to inform employees as to the rates at which the various kinds of insurance contracts may be written and that the major part of the information in the books is necessarily incidental to conveying that rate information. Which is the correct appraisal of the character of the books is a question of fact that the Tariff Board had to decide and, as its conclusion is a conclusion open to it on the basic facts, this Court cannot, on this appeal, interfere with that finding.

The appellant made two further attacks on the Board's decisions that the books fall within the wording of Item 178. These are, in effect, as I understand them:

(*a*) having regard to the introductory words of Item 178 "Advertising and printed matter, viz.", the words "price books, catalogues and price lists" must be restricted to "price books, catalogues and price lists" of an advertising character and do not therefore include the books that are the subject matter of these appeals in that they are not intended to come to the attention of potential customers; and

(*b*) even if the words "price books, catalogues and price lists" are read by themselves they do not, properly construed, extend to the books that are the subject matter of these appeals.

Dealing with the first of these questions first, I do not find any assistance in the cases that apply such principles of construction as the *Ejusdem Generis* rule upon which the appellant relies. These rules cannot be applied in any mechanical or artificial way but must be used as tools to ascertain what Parliament intended[1]. Here, it seems reasonably clear that by Item 178 Parliament has provided certain rates of duty for certain "Advertising and printed matter", such advertising and printed matter being nothing more or less than what is enumerated in the following words of the item. This is clearly indicated by the use of the word "viz.", which is an abbreviation for "videlicet", which means "That is to say; namely; to wit" and is "used to introduce an amplification or more precise explanation of a previous statement or word". See Shorter Oxford Dictionary, Third Edition, Volume II, pages 2355 and 2367.

[1] Compare *Johnson et al. v. Canadian Credit Men's Trust Association*, [1932] S.C.R. 219 at p. 220

When the various specific classes of goods set out in Item 178 are examined, they are found to be either "advertising" or "printed" matter. I see no justification for introducing a further limitation on a particular specific class that it must be in the nature of advertising. In any event, the rate books in issue here have, in my view, an advertising character. When "price books, catalogues and price lists" are communicated to the potential customers of a commercial firm as part of the effort to sell its wares, they are unquestionably advertising matter in the sense in which the word is employed here. In my view, it follows that "price books, catalogues and price lists", when used by employees of a commercial firm to aid them in selling their employer's wares to customers, are only one step short of being advertising communicated to the customers and have therefore an advertising character. I therefore reject the first of the two attacks on the Board's decision based on the interpretation of Item 178.

With reference to the second attack based on the interpretation of Item 178 (that the words "price books, catalogues and price lists" read by themselves do not extend to the subject matter of the appeals), once the Board's conclusion that the greater part of the books in question are devoted to premium rates is accepted, the appellant's contention, which is in effect that the books are a sort of insurance man's manual or "Bible" and not a mere price book or list, loses its force. I have more difficulty in applying the word "price", which in its normal sense means the consideration for the sale of property, to the business of life insurance, which does not consist in selling property but rather in entering into contracts whereby the insurance company binds itself, in consideration of certain payments—premiums—being made to it, to make specified benefit payments upon the happening of specified events. I have come to the conclusion, however, that the Board was right in its conclusion that "In the general usage" the word "price" has come to have a meaning that includes insurance premiums. I therefore reject the appellant's second attack on the Board's interpretation of Item 178.

This brings me to the appellant's final attack on the decision appealed from. This attack is restricted to the Board's decision concerning the French language "Recueil de Tarifs".

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An examination of Items 170, 171 and 178, quoted above, shows that the letters "n.o.p." appear in Items 171 and 178 but do not appear in 170. These letters mean "not otherwise provided". See paragraph (*g*) of subsection (1) of section 2 of the *Customs Tariff*. The appellant says that if the French language "Recueil de Tarifs" falls in Item 178, it also falls in Item 170 and that, as Item 178 only covers goods that fall in it when they are "not otherwise provided"—i.e., not covered by some other item—it follows that Item 178 does not apply to the French language book. (It would seem to be clear that, if the "n.o.p." symbol does not apply to the relevant part of Item 178, that item prevails because it is of a more specific character than Item 170.)

As something may turn on the physical arrangement as well as the words, figures and punctuation used, I here reproduce a photocopy of the three items to which I have referred as they appear in the schedule to chapter 60 of R.S.C. 1952, together with part of the context in which they appear:

Sch. *Customs Tariff* Chap. **60.**

GOODS SUBJECT TO DUTY AND FREE GOODS—*Continued*

Tariff Item.	—	British Preferential Tariff.	Most-Favoured-Nation Tariff.	General Tariff.
	GROUP V. *Pulp, Paper and Books.*			
169	Books, viz.:—Novels or works of fiction, or literature of a similar character, unbound or paper bound or in sheets, but not to include Christmas annuals, or publications commonly known as juvenile and toy books.....	Free	22½p.c.	25 p.c.
170	Books, periodicals and pamphlets, or parts thereof, printed, bound, unbound, or in sheets (not to include blank account books, copy books, or books to be written or drawn upon) in any other than the English language.....	Free	Free	Free
171	Books, printed, periodicals and pamphlets, or parts thereof, n.o.p., not to include			

GOODS SUBJECT TO DUTY AND FREE GOODS—*Continued*

Tariff Item.	—	British Preferential Tariff.	Most-Favoured-Nation Tariff.	General Tariff.
	blank account books, copy books, or books to be written or drawn upon.....	Free	10 p.c.	10 p.c.
172	Books, pamphlets and charts, printed or published by any government abroad; official financial and business reports and statements issued by companies or associations abroad; books, pamphlets and reports, for the promotion of religion, medicine and surgery, the fine arts, law, science, technical training, and the study of languages, not including dictionaries. Scripture and prayer cards, and religious pictures and mottoes, not to include frames; books, bound or unbound, which have been actually printed and manufactured more than twelve years; manuscripts; insurance maps; freight rates, passenger rates and timetables issued by transportation companies abroad and relating to transportation outside of Canada, in book or in pamphlet form	Free	Free	Free
172*a*	Tourist literature issued by national or state governments or departments thereof, boards of trade, chambers of commerce, municipal and automobile associations, and similar organizations.....	Free	Free	Free
172*b*	Prayer books, missals, psalters, religious pictures and mottoes, not to include frames	Free	Free	Free
173	Books which are included in the curriculum of any university, college or school in Canada for use as text books or as works of reference, not to include dictionaries; printed books, pamphlets and cards for use in schools to test the degree of intelligence of pupils; all books for bona fide libraries, and being the property of the organized authorities of such libraries and not in any case the property of individuals or business concerns, under such regulations as may be prescribed by the Minister; directories for free reference libraries; books received from free lending libraries abroad, subject to return under Customs supervision within sixty days.....	Free	Free	Free
178	Advertising and printed matter, viz.:— Advertising pamphlets, advertising show cards, illustrated advertising periodicals; price books, catalogues and price lists; advertising almanacs and calendars; patent medicine or other advertising circulars, fly sheets or pamphlets; advertising chromos, chromotypes, oleographs or like work produced by any process other than hand painting or drawing, and having any advertisement or advertising matter printed, lithographed or stamped thereon, or attached thereto, including advertising bills, folders and posters, or other similar artistic work, lithographed, printed or stamped on paper or cardboard for business or advertisement purposes, n.o.p.....per pound but not less than	5 cts.	10 cts. 25 p.c.	15 cts. 35 p.c.

GOODS SUBJECT TO DUTY AND FREE GOODS—*Continued*

Tariff Item.	—	British Preferential Tariff.	Most-Favoured-Nation Tariff.	General Tariff.
	Goods specified in this Item shall be exempt from customs duty when produced in countries entitled to the British Preferential Tariff and relating exclusively to products or services of such British countries, but not relating to Canadian products or services. On goods specified in this Item when forwarded to Canada by mail, duties may be prepaid by customs duty stamps, under regulations by the Minister, at the rate specified in the Item, except that on each separate package weighing not more than one ounce, the duty shall be each.....	1 ct.	2 cts.	2 cts.
	Bona fide trade catalogues and price lists not specially designed to advertise the sale of goods by any person in Canada, when sent into Canada in single copies addressed to merchants therein, and not exceeding one copy to any merchant for his own use, but not for distribution, shall be exempt from customs duty under all Tariffs.			
	Advertising and printed matter, whether imported by mail or otherwise, when in individual packages valued at not more than $1.00 each and when not imported for sale or in a manner designed to evade payment of customs duties, shall be exempt from customs duty when produced in countries entitled to the British Preferential or the Most-Favoured-Nation Tariff.			
179	Labels for cigar boxes, fruits, vegetables, meats, fish, confectionery or other goods or wares; shipping, price or other tags, tickets or labels, and railroad or other tickets, whether lithographed or printed, or partly printed, n.o.p.....	17½ p.c.	22½ p.c.	35 p.c.
	Tickets issued by railway systems in the British Commonwealth (not including railway systems operating in Canada), shall be exempt from customs duty, when produced in countries entitled to the benefits of the British Preferential Tariff.			
180	Photographs, chromos, chromotypes, artotypes, oleographs, paintings, drawings, pictures, decalcomania transfers of all kinds, n.o.p., engravings or prints or proofs therefrom, and similar works of art, n.o.p.; blueprints, building plans, maps and charts, n.o.p.....	12½ p.c.	22½ p.c.	22½ p.c.
180*a*	Photographs for use only as news illustrations, under regulations by the Minister.....	Free	Free	Free
180*b*	Artists' proof etchings unbound, such as are printed by hand from plates or blocks etched or engraved with hand tools and not such as are printed from plates or blocks etched or engraved by photo-chemical or other mechanical processes...	Free	Free	Free

GOODS SUBJECT TO DUTY AND FREE GOODS—*Continued*

Tariff Item.	—	British Preferential Tariff.	Most-Favoured-Nation Tariff.	General Tariff.
180*c*	Decalcomania transfers, when imported exclusively for use in the manufacture of vitreous enamelled products or of table ware of china, porcelain or semi-porcelain.....	Free	10 p.c.	12½ p.c.
180*d*	Photographs, paintings, pastels, drawings and other art work and illustrations of all kinds, n.o.p., whether originals, copies or proofs, for reproduction in periodical publications enjoying second-class mailing privileges.....	Free	9 p.c.	25 p.c.
	Goods which are entitled to entry free of duty or at a lower rate than as indicated in this item shall not be entered at the rates specified in this item.			
180*e*	Engineers' plans, drawings or blue-prints of machines and plant equipment, plant layouts, foundations for machinery and other plant equipment, structural supports and towers and similar outside structures, dams, spillways and other hydro construction, wiring, piping, platforms, ladders, stairs, etc., not to include office or other buildings.	Free	Free	Free
181	Bank notes, bonds, bills of exchange, cheques, promissory notes, drafts and all similar work, unsigned, and cards or other commercial blank forms printed or lithographed, or printed from steel or copper or other plates, and other printed matter, n.o.p.....	22½ p.c.	32½ p.c.	35 p.c.

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The respondents argue that the letters "n.o.p." in Item 178 apply only to the last of the specific classes of goods covered by Item 178 and do not, therefore, apply to the goods in question here. I see some basis for this in that the other specific classes of goods in Item 178 are each separated from what follows, including the "n.o.p." symbol, by a semicolon, whereas the "n.o.p." symbol is apparently a part of the description of the last specific class. This somewhat slender basis for curtailing the effect of the "n.o.p." character to the last part of Item 178 receives some support from a comparison of Item 178 with Item 180 where the "n.o.p." is repeated at the end of each of the three classes of goods of which that item consists.

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Such a line of reasoning for the determination of a problem in the interpretation of the Schedule to the *Customs Tariff* is not very satisfying. It is, I think, possible to find many quite inconsistent formulae followed in the construction and punctuation of the various items in that Schedule. This is not surprising when the history of this document is examined and it is appreciated that it is the product of many many different brands of draftsmanship over a period of many decades. In these circumstances, I doubt the soundness of drawing conclusions from a minute examination of the form of an item and a comparison of it with other items without regard to the relevant history of the amendment of the Schedule[1].

An alternative approach to the problem is to look at the state of the relevant items as they were immediately before Item 170 was added in 1939 and then to consider what effect Parliament intended by the addition of Item 170.

Items 171 and 178 appeared in the Schedule to the *Customs Tariff* prior to 1939 in substantially their present state. See R.S.C. 1927, chapter 44. Assuming, for purposes of this approach to the problem, that the "n.o.p." symbol in Item 178 applied to the whole of that item, nevertheless, there being a similar "n.o.p." in Item 171 and Item 178 being, relatively, much more specific than Item 171, Item 178 clearly prevailed over Item 171 to the extent that there was overlapping in the application of the two items. In other words, while Parliament, as of that time, provided that, as a general rule, books, periodicals and pamphlets were subject to a customs rate of 10 per cent., the advertising and printed matter specifically described in Item 178 was subject to the higher rates therein set out.

While that was the state of the law, Parliament, by chapter 41 of the Statutes of 1939, amended the Schedule by adding Item 170 in substantially its present form. In terms, a further exception was created by this new item from the general rule that "Books . . . periodicals and pamphlets" were subject to a duty or 10 per cent., the exception being that if the "Books, periodicals and pamphlets" were "in any other than the English language" they should be entered "Free". The question is whether this exception was carved out of what was immediately prior thereto covered

[1] Compare *Kensington Commissioners v. Aramayo*, [1916] 1 A.C. per Lord Wrenbury at page 227-9, and Earl Loreburn at page 236.

by Item 171 or whether it was carved out of what was then covered by Item 171 and also out of what had already been carved out of Item 171 by Item 178. In other words, having already provided a higher protective rate for the Item 178 goods, can Parliament be assumed, when it was providing for the free entry of books, etc., that are not in English, to have intended to extend free entry to a substantial portion of the class of goods previously chosen for special protection. While the matter is not free from doubt, having regard to the manner in which the wording of Item 170 follows the wording of Item 171, I am of opinion that what Parliament intended to admit free is that portion of the class of books, etc., previously covered by Item 171 that are not in the English language. In the absence of some more precise indication, I am not prepared to hold that it was intended to remove a substantial part of the special protection previously provided by Item 178[1].

In what I have said so far, I have been assuming that the rate books in issue here not only fall within the words in Item 178, "Advertising and printed matter", but also fall within the words "Books . . . periodicals and pamphlets", which appear in Item 171.

Another approach to this very difficult problem of interpretation is to consider whether it was ever intended that there could be any overlapping in the application of Items 171 and 178. In making this approach, I assume that the "n.o.p." symbol applies to the whole of Item 178 as well as to the whole of Item 171. Items 169 to 173, inclusive, deal with what may be referred to as "Book" items. They all begin with a reference to books except Item 172a which begins with "Tourist literature". Item 171 provides for a relatively small duty for books, etc., "not otherwise provided for". Each of the other items provides for a higher duty or free entry for the books, etc., specifically described in it, without any exception (that is, they are not "n.o.p." items). When we come to Item 178, which is the next item, we have another "n.o.p." item and it begins, "Advertising

[1] Not only must an exemption provision such as Item 170 be read strictly but the rule of interpretation in subsection (2) of section 2 of the *Customs Act*, R.S.C. 1952, chapter 58, should not be overlooked. That subsection provides *inter alia*, in effect, that provisions in the *Customs Tariff* shall receive such fair and liberal interpretation "as will best ensure the protection of the revenue" and the attainment of the purpose for which such law was made.

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and printed matter". In my view, Parliament was not here carving another exception out of Item 171 but was rather looking at advertising and printed matter as specified in Item 178 as falling completely outside the concept of books, periodicals and pamphlets with which it was dealing in Items 169 to 178. Here again, the problem is a difficult one, but I have reached the conclusion that the words employed in Item 170 and Item 171 must be so interpreted as not to extend to the advertising and printed matter referred to in Item 178[1].

For these several reasons, and not without considerable hesitation, I reject the appellant's argument that, by reason of the "n.o.p." symbol in Item 178 and the absence of an "n.o.p." symbol in Item 170, the "Recueil de Tarifs" should have been classified under Item 170.

The appeals are dismissed with costs payable by the appellant to the Deputy Minister.

[1] Compare *Accessories Machinery Limited v. The Deputy Minister of National Revenue for Customs and Excise, et al,* [1957] S.C.R. 358.

Calgary 1966

Mar. 30

Ottawa May 19

BETWEEN:

FARMERS MUTUAL PETROLEUMS LTD. ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Income Tax Act, R.S.C. 1952, c. 148. Sections 12(1)(a)(b) 83A (3)(c)(i)—Deductions—Company holding mineral rights on oil lands—Legal expenses—Defending title to mineral rights—Drilling and exploration expenses allegedly incurred under agreement.

After its incorporation in 1949, the appellant company acquired mineral rights from owners of prospective oil lands in Saskatchewan.

In exchange, the landowners received shares of the company and a percentage interest in any rentals or royalties received by the company.

The company appealed its assessments for 1959 and 1960 to this Court on several grounds but, following an agreement between the parties, only two issues remained in dispute.

A number of landowners being dissatisfied with the arrangement made with the appellant company, took action in the courts in an attempt to obtain declarations that the agreements made with the company

had been induced by misrepresentation and were accordingly invalid and void The company incurred legal expenses in successfully defending all such actions. The landowners then sought and obtained legislation calling for the establishment of a special board with power to renegotiate contracts when it was shown that landowners had been deprived of their mineral rights through misrepresentation.

The company sought to deduct all its legal expenses from its income, but the Minister refused to allow the deduction which gives rise to the first issue.

The second issue involved an arrangement between the appellant and Scurry-Rainbow Oil Ltd., the major shareholder of the appellant.

In 1959 and 1960 the operator of a joint program invoiced Scurry for its share of the exploration and drilling costs. The appellant was invoiced by Scurry for the same amounts and, during the two years, paid Scurry a total of $200,000. This amount was claimed by the appellant as a deduction under section 83A (3).

The Minister disallowed the deduction on the ground that the drilling and exploration expenses had been incurred by Scurry and not by the appellant.

Held, That the appellant company was not entitled to the deduction claimed under section 83A(3) What the appellant paid for and received under its agreement with Scurry was the transfer of an interest in lands, it did not pay any exploration and drilling expenses.

2. That the company's legal expenses were payments on account of capital made "with a view of preserving an asset or advantage for the enduring benefit of a trade" within the test so propounded by the Supreme Court of Canada in *M.N.R. v. Dominion Natural Gas Co. Ltd.* [1941] S.C.R. 19.

3. That the 1959 agreement did not effect an assignment of Scurry's interest in the pooling agreement to the appellant but that interest, and the obligation to contribute a share of the expenses, were retained by Scurry.

4. That the legal expenses incurred in making representations respecting proposed legislation and in dealing with the Board were incurred for basically the same purpose and were also capital expenditures within the meaning of section 12(1)(*b*).

5. That the appeal on the two issues remaining in dispute was dismissed. The assessments were referred back to the Minister for reassessment in accordance with the agreement between the parties.

APPEAL from assessment of the Minister of National Revenue.

J. H. Laycraft, Q.C. for appellant.

D. G. H. Bowman and *R. F. Lindsay* for respondent.

CATTANACH J.:—These are appeals from the appellant's income tax assessments for its 1959 and 1960 taxation years.

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Certain of the issues arising in these appeals were settled by consent of the parties, but two issues remain for determination, which issues involve (1) legal expenses incurred by the appellant and (2) expenses alleged by the appellant to have been laid out by it for drilling and exploration for petroleum or natural gas in Canada within the meaning of section 83A of the *Income Tax Act*.

Both such items were disallowed by the Minister as deductions from the appellant's income. The legal expenses were disallowed on the ground that they were outlays on account of capital within the meaning of section 12(1)(*b*) of the *Income Tax Act* whereas the appellant contends that such expenses were incurred for the purpose of gaining or producing income from the appellant's property or business and were not capital outlays. With respect to the drilling and exploration expenses the Minister contends that such costs were incurred by Scurry-Rainbow Oil Limited and not by the appellant.

The appellant was incorporated under the laws of the Province of Saskatchewan as a public joint stock company on December 1, 1949 for the object, *inter alia,* of acquiring mineral rights and exploring for petroleum and natural gas. The authorized capital stock consisted of 1,000,000 shares without nominal or par value, the maximum price or consideration permitted being $1.00 per share.

Forthwith upon its incorporation the appellant began a vigorous and successful campaign to acquire mineral rights from land owners. As a matter of policy the appellant directed its efforts exclusively to acquiring mineral rights from those land owners who had previously granted leases of their petroleum and natural gas rights to other lessees, in all instances a major oil producing company. The leases in effect were uniform and standard. They were for a period of 10 years providing to the land owner an annual rent of 10 cents per acre and reserving a royalty of 12½ percent to the land owner in the event of a producing well or wells being brought into existence.

The land owner was induced by the appellant to transfer to it the entire estate and interest in the mineral rights, to give absolute ownership and control thereof and benefits to be derived therefrom to the appellant, and to assign his benefits under the existing lease to the appellant. In exchange therefor the land owner received one fully paid

share in the capital stock of the appellant for each acre so transferred and a trust certificate in evidence of the land owner's right to receive one-fifth interest in the land and benefits therefrom so transferred to the appellant and held in trust by the appellant for the land owner.

In pursuance of this campaign the appellant acquired the mineral rights in approximately 750,000 acres in south eastern Saskatchewan and issued approximately 2,500 trust certificates. The appellant received as income four-fifths of the rentals payable thereon and four-fifths of any royalties from producing lands.

In 1955 when oil was being discovered in south eastern Saskatchewan the land owners became disenchanted with their arrangement with the appellant and instituted actions in the Court of Queen's Bench of Saskatchewan for declarations that the agreements between them and the appellant were induced by fraudulent misrepresentation and were accordingly void, for orders revesting the mineral rights and the interest in the leases which had been transferred and assigned respectively to the appellant, in and to the land owners.

In all about 250 such actions were begun.

The appellant successfully defended such of those actions as came to trial, in the Queen's Bench, in the Court of Appeal and in the Supreme Court of Canada, so that it remained possessed of the mineral rights and benefits under the contracts above described.

The legal expenses so incurred by the appellant constitute part of the amounts that were claimed by it as a deduction from income and that were disallowed by the Minister.

After the decisions in the Courts became known as favourable to the appellant herein and adverse to the land owners, the land owners who had entered into the arrangements with the appellant and those who had entered into similar arrangements with other companies formed a mineral owners protective association to advocate and obtain legislative relief from their predicaments.

A "Royal Commission on Certain Mineral Transactions" was appointed by the Saskatchewan Government to inquire into allegations that many owners of freehold mineral rights in Saskatchewan had been deprived of such rights by means of fraud or misrepresentation.

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This Commission recommended that a Board be constituted for the purpose of achieving, if possible, the voluntary re-negotiation of contracts whereby the owners were deprived of their freehold mineral rights through misrepresentation, whether innocent or fraudulent.

Chapter 102, Statutes of Saskatchewan, 1959, entitled "The Mineral Controls Renegotiation Act, 1959" was enacted to implement the recommendations of the Commission and established a Board. Any grantor of mineral rights who alleged that he was induced to enter into a mineral contract through misrepresentation on the part of another person as to the purpose and effect of the mineral contract or that the mineral contract was unconscionable could apply to the Board for re-negotiation of the contract upon receipt of which application the Board was authorized to make preliminary inquiries. If as a result of such inquiries the Board was reasonably satisfied that there was *prima facie* evidence of the allegations of the applicant the Board would then renegotiate the contract. If not so satisfied the Board would take no action and notify the applicant accordingly.

This legislation was followed by legislation in 1960 and 1961 extending the time within which applications might be made and providing for the alteration of the terms of such mineral contracts.

The appellant employed counsel to make representations on its behalf to the legislators opposing the proposed legislation, suggesting variations in the terms thereof and making representations to the Board later established pursuant to legislation enacted with respect to contracts entered into by it which were sought to be re-negotiated.

The ultimate result was that the appellant did not lose any of the mineral rights it had acquired by virtue of the contracts it had entered into with land owners and the contracts under which such mineral rights were acquired by the appellant remained substantially in the form in which they were originally negotiated with the land owners.

The appellant claimed as a deduction from income the legal expenses so incurred by it which claim was also disallowed by the Minister.

From the outset the appellant derived income by way of rentals under the leases and royalties from oil and gas

producing lands. During the process of the litigation as to the validity of the mineral contracts the income received was held in trust pending the outcome of the litigation.

In the latter part of 1958 the appellant began to engage in exploration for oil and gas. As the ten year prime leases granted by the land owners to major oil companies expired, the appellant, in agreement with another company, undertook joint exploration and development.

By an agreement dated May 19, 1954, introduced in evidence as Exhibit "6", between Canada Southern Petroleum, Ltd., West Canadian Petroleums Ltd., Canadian Pipe Lines Producers Ltd., Trans Empire Oils Ltd., and British Empire Oil Co., Ltd. it was agreed that the entire legal and beneficial interest in British Columbia crown petroleum and natural gas permits covering approximately one million five hundred thousand acres, would be held jointly.

Scurry-Rainbow Oil Limited (hereinafter referred to as Scurry) became the successor in title to Canadian Pipe Line Producers Ltd., a party to the agreement dated May 19, 1954 and as such held a beneficial interest of 22 percent of the reservations covered by the agreement. Scurry is the major shareholder of the appellant, with some common directors and occupies the same accommodation.

This type of agreement is common in the industry whereby two or more companies join together to conduct exploratory work. The risk incurred is thereby divided. While the same amount of money to be expended by one company remains constant it is extended over a much wider area.

By this agreement the parties thereto agreed to conduct a seismic program and, contingent upon the results thereof, to drill a well on the reservations for the joint account and at the joint expense of the parties thereto in proportion to their respective interests.

A manager-operator was designated being Canadian Southern Petroleum Ltd., which company was succeeded by Phillips Petroleum Ltd.

The manager-operator was given the sole and exclusive management and control of the exploration, drilling and producing operations on the lands.

The agreement contained provisions for the right of the parties to receive information as to progress and to inspect

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and examine the books and records of the manager-operator, for meetings and consultations among the parties, for the surrender, sale or assignment of the whole or any part of a party's interest in the lands.

By an agreement dated January 2, 1959 between Scurry and the appellant, introduced in evidence as Exhibit "7", the appellant agreed to pay all the costs incurred by Scurry in the performance of the seismic program undertaken by Phillips Petroleum Ltd., the manager-operator under the agreement dated May 19, 1954 (Exhibit 6). Upon payment of such costs it was agreed that the appellant shall have neared an undivided three percent (3%) interest in the lands and the interests therein owned by Scurry.

It was also agreed under the agreement between Scurry and the appellant dated May 19, 1954 (Exhibit 6), that after the appellant shall have earned the three percent interest above mentioned by payment of the (22%) twenty-two percent proportion of Scurry under the agreement dated January 2, 1959 with respect to the seismic program, the appellant would have the option to earn an additional eight percent (8%) in the said lands on the condition that the appellant pay the entire proportion of Scurry's costs of drilling a well on the lands.

Under the terms of the agreement dated May 19, 1954 (Exhibit 6), the manager-operator conducted a seismic program in 1959 on the lands in question. In 1960 it continued the seismic program and in addition drilled a well.

The manager-operator invoiced Scurry as a party to the agreement of May 19, 1954 for its twenty-two percent (22%) proportionate share of the seismic and drilling program.

Scurry, upon receipt of its invoice, would in turn invoice the appellant for the amount it was obliged to pay the manager-operator which the appellant would then pay to Scurry. There were twelve such payments in 1959 and 1960, totalling $53,273.38 in 1959 and $145,962.85 in 1960. In ten instances the appellant paid the amounts invoiced to it by Scurry directly to Scurry which Scurry then paid to the manager-operator. In the two other instances Scurry sent the invoices it received from the manager-operator to the appellant and the appellant remitted the amounts thereof to the manager-operator. In no instance was the appellant invoiced directly by the manager-operator.

The foregoing payments represent Scurry's portion of the cost of the seismic program and were paid by the appellant to Scurry as a result of which the appellant became owner of a three percent (3%) interest in the lands.

On October 5, 1959 the appellant by resolution of its directors exercised its option to acquire an additional eight percent interest by paying Scurry's proportionate share of the drilling costs. The payments above mentioned also include the drilling costs so that the appellant became the owner of an additional eight percent (8%) interest in the lands, a total of eleven percent (11%) in all.

By an agreement dated December 18, 1959 Scurry sold ten of its remaining eleven percent interest in the permits to Sunray Oil Company so that the twenty-two percent interest originally held by Scurry became divided as follows: Scurry 1%, the appellant 11% and Sunray 10%.

The reports and information as to progress under the seismic and drilling programs and like information in accordance with the agreement of May 19, 1954 were supplied by the manager-operator to Scurry and because of the close relationship between Scurry and the appellant such information was available to the appellant. In 1960 the appellant expended the sum of $2,381.75 in employing geologists and engineers to inspect the seismic and drilling operations carried on by the manager-operator without objection by the manager-operator but the manager-operator invariably dealt directly with Scurry. By the consent of the parties above referred to this amount is to be allowed as a proper deduction.

With respect to the second issue, the Minister disallowed as a deduction the sums which the appellant paid to Scurry pursuant to the terms of the agreement between the appellant and Scurry dated January 2, 1959 on the ground that they were not drilling or exploration expenses incurred by it on or in respect of exploring or drilling for petroleum or natural gas in Canada within the meaning of subsection (3) of section 83A of the *Income Tax Act*[1] reading as follows:

> 83A. (3) A corporation whose principal business is
>
> (a) production, refining or marketing of petroleum, petroleum products or natural gas, or exploring or drilling for petroleum or natural gas, or

[1] [1952] R.S.C., c. 148.

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(*b*) mining or exploring for minerals,

may deduct, in computing its income under this Part for a taxation year, the lesser of

(*c*) the aggregate of such of

(i) the drilling and exploration expenses, including all general geological and geophysical expenses, incurred by it on or in respect of exploring or drilling for petroleum or natural gas in Canada, and

(ii) the prospecting exploration and development expenses incurred by it in searching for minerals in Canada,

as were incurred after the calendar year 1952 and before April 11, 1962, to the extent that they were not deductible in computing income for a previous taxation year, or

(*d*) of that aggregate, an amount equal to its income for the taxation year

(i) if no deduction were allowed under paragraph (*b*) of subsection (1) of section 11, and

(ii) if no deduction were allowed under this section,

minus the deductions allowed for the year by subsections (1), (2), (8a) and 8(*d*) of this section and by section and by section 28.

The question for determination is whether the appellant incurred drilling and exploration expenses within the meaning of subparagraph (i) of paragraph (*c*) of subsection (3) of section 83A as above quoted.

There is no question whatsoever that exploration and drilling work was done by the manager-operator under the agreement of May 19, 1954 and that the appellant paid to Scurry an amount equivalent to the proportionate share of Scurry's obligation under that agreement.

The question which follows from such circumstances is whether Scurry was reimbursed by the appellant for the exploration expenses so incurred by it under the 1954 agreement. In my view the answer to the question posed is dependent upon the proper interpretation of the agreement dated January 2, 1959 between Scurry and the appellant.

Scurry was a party to the agreement of May 19, 1954 and the appellant was not. Therefore, the appellant had neither rights nor obligations under that agreement. While the agreement contained a provision for the sale or assignment, a specific procedure was prescribed. The party desiring to dispose of its interest or any part thereof is obligated to notify the other parties to the agreement who are entitled to purchase the interest desired to be sold upon the identical terms as the interest was offered to the proposed purchaser. The provision contains an exception when the

entire interest is sold to a subsidiary company. The exception does not apply in the circumstances of the present appeals, nor was there any evidence adduced that the foregoing provisions were complied with. Therefore, I assume that they were not. However, the agreement did provide that the provisions thereof should enure to the successors and assigns of the parties thereto.

I cannot construe the agreement of January 2, 1959 between Scurry and the appellant as an assignment, nor does the conduct of the parties lead to that conclusion. The manager-operator invariably looked to Scurry for payment. Information was supplied to Scurry and not the appellant. In short the appellant did not occupy the place and stead of Scurry. There was no contractual relationship between the manager-operator and the appellant, nor were the obligations of Scurry under the 1954 agreement in any way diminished by its 1959 agreement with the appellant. The manager-operator was not the agent for the appellant in expending the amounts on exploration and drilling but remained the agent of Scurry.

The submission on behalf of the appellant, as I understand it, is that by the agreement between Scurry and the appellant dated January 2, 1959 the appellant reimbursed Scurry for its outlay for exploration and drilling expenses. Since an expense cannot be incurred by a party who is truly reimbursed, therefore it cannot be said that the expenses were incurred by Scurry but rather they must have been incurred by the appellant which was out of pocket in the precise amount of the expenses and that Scurry was merely the conduit between the appellant and the manager-operator.

In my opinion the agreement between Scurry and the appellant is not susceptible of such interpretation. The substance of that transaction, as I see it, was that the appellant purchased an interest in lands from Scurry and that the price to be paid therefor was determined and measured by the cost of the exploration and drilling expenses incurred by Scurry. It was a condition precedent to any payment to Scurry by the appellant that Scurry should have incurred exploration and drilling expenses and I can entertain no doubt that the money paid by the appellant to Scurry was in consideration for a transfer of an interest in

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land from Scurry to the appellant although that consideration was measured by the yardstick of the costs incurred by Scurry. What Scurry received was payment for an asset sold by it to the appellant and accordingly Scurry was not reimbursed for the exploration expenses incurred by it. Conversely what the appellant paid for and received was the transfer of an interest in lands and therefore did not pay for exploration and drilling expenses.

It follows that the appellant is unsuccessful on this issue.

I turn now to a consideration of the first issue of the two issues involved in these appeals, that is, the deductibility of the legal expenses incurred by the appellant as a consequence of the circumstances outlined above. These legal expenses are themselves divisible into two categories: (1) those incurred in defending the law suits brought against the appellant seeking orders revesting the mineral rights and interest in the leases acquired by the appellant in the transferors and (2) those incurred in making representations respecting proposed legislation and, when that legislation became effective, opposing any renegotiation of the contracts entered into by the appellant which were sought to be renegotiated.

The questions so raised are to be determined by a consideration of the facts above outlined and the provisions of paragraphs (*a*) and (*b*) of subsection (1) of section 12 of the *Income Tax Act*[1] which read as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,
>
> . . .

Section 12(1)(*a*) and (*b*) were derived from section 6(1)(*a*) and (*b*) of the *Income War Tax Act* which provided as follows:

> 6. (1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;
>
> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

[1] 1952 R S C, c. 148

It will be observed that in section 6(1)(*a*) the words "wholly, exclusively and necessarily" appeared and that such words are omitted from section 12(1)(*a*).

In *B.C. Electric Ry. Co. Ltd. v. M.N.R.*[1] Abbott J. said "The less stringent provisions of the new section should, I think, be borne in mind in considering judicial opinions based upon the former sections". I am impelled, however, to point out that section 12(1)(*b*) has been enacted substantially in the language of its predecessor, section 6(1)(*b*).

In *The Royal Trust Company v. M.N.R.*[2] Thorson P., a former President of this Court, had this to say at page 80,

> . . .Thus, it may be stated categorically that in a case under *The Income Tax Act* the first matter to be determined in deciding whether an outlay or expense is outside the prohibition of section 12(1)(*a*) of the Act is whether it was made or incurred by the taxpayer in accordance with the ordinary principles of commercial trading or well accepted principles of business practice If it was not, that is the end of the matter. But if it was, then the outlay or expense is properly deductible unless it falls outside the expressed exception of section 12(1)(*a*), and therefore, within its prohibition

However the primary test of deductibility so outlined is not the sole test. If the outlay in question passes the test of the excepting portion of paragraph (*a*) of section 12(1) its deduction will be denied if it be specifically excluded by any other provision of the Act.

Later in *B.C. Electric Ry. Co. Ltd. v. M.N.R.* (*supra*) Abbott J. also had this to say, "Since the main purpose of every business undertaking is presumably to make a profit, any expenditure made 'for the purpose of gaining or producing income' comes within the terms of section 12(1)(*a*) whether it be classified as an income expense or as a capital outlay."

If, however, these legal expenses were a payment on account of capital then the expenditure thereof by the appellant would be barred as a deduction by the provisions of paragraph (*b*) of section 12(1). If this were so that would end the matter and paragraph (*a*) need not be considered. The question to be decided is thus narrowed down to whether or not these legal expenses were an outlay of capital.

[1] [1958] S C.R. 133 [2] [1956-1960] Ex. C R. 70

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The general principles to be applied to determine whether an expenditure, which might be allowable under section 12(1)(*a*), is an outlay of capital, are now fairly well established.

In *M.N.R. v. Dominion Natural Gas Co., Ltd.*[1] the respondent company had incurred legal expenses in defending its right, under a franchise, to supply gas in the City of Hamilton and sought to deduct such expenses from its income. Duff C.J., for himself and Davis J. held the legal expenses were not deductible on two grounds; one, that they were not expenses incurred in the process of earning the "income", and the other, that the expenditure was a capital expenditure incurred "once and for all" for the purpose and with the effect of procuring for the Company "the advantage of an enduring benefit." Kerwin J. as he then was, speaking for Hudson J. as well, agreed that the payment of the legal costs was not an expenditure laid out as part of the process of profit earning. His view was that it was a "payment on account of capital as it was made (to use Viscount Cave's words) with a view of preserving an asset or advantage for the enduring benefit of a trade". It will be observed that Kerwin J. departs slightly from the words of the classical test laid down by Viscount Cave in *British Insulated and Helsby Cables Ltd. v. Atherton*[2] at page 213 which reads as follows:

> But when an expenditure is made, not only once and for all, but with a view to *bringing into existence* an asset or advantage for the enduring benefit of a trade, I think there is a very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

Kerwin J. substituted the word "preserving" for Viscount Cave's words "bringing into existence" but I think it is clear that he did so with the deliberate intention of extending the test of Viscount Cave to include the preservation or protection of an asset or advantage within its ambit. In any event the language used by Kerwin J. was subsequently cited in its precise terms with approval by the Supreme Court of Canada (*vide* Duff C.J. in *M.N.R. v. The Kellogg Company of Canada, Limited*[3]).

All judges of the Supreme Court of Canada have adopted as a useful guide in determining whether an expenditure is

[1] [1941] S.C.R. 19.
[2] [1926] A.C. 205.
[3] [1943] S.C.R. 58.

one made on account of capital, the test formulated by Viscount Cave as quoted above. See *Montreal Light, Heat & Power Consolidated v. M.N.R.*[1] affirmed by the Privy Council[2] and *B.C. Electric Ry. v. M.N.R.* (*supra*).

In my view, it is established by the *Dominion Natural Gas case (supra)* that legal expenses incurred by a taxpayer in maintaining the title to this property and by the *Montreal Light, Heat & Power Consolidated case (supra)* that expenses in connection with the financing of his business are not expenses directly related to the earning of his income and are not allowed as deductions in computing the gain or profit to be assessed.

However, the English and Canadian authorities are not in agreement. In *Southern v. Borax Consolidated Ltd.*[3] the taxpayer incurred legal expenses in defending the title to real estate in California owned by one of its subsidiaries but which for income tax purposes was considered to be carrying on the business of the taxpayer. The Commissioner held the monies paid were laid out for the purpose of the trade. This decision was held to be right by Lawrence J. who said at page 120:

> It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses which were incurred in the ordinary course of maintaining the assets of the company and the fact that it was maintaining the title and not the value of the company's business does not, in my opinion, make it any different.

Reference was also made to *Morgan v. Tate and Lyle Ltd.*[4] where the taxpayer had expended a large amount in a campaign opposing the nationalization of its sugar business. It was held that the sums were deductible as monies spent to preserve the very existence of the company's trade. *Southern v. Borax Consolidated Ltd.* (*supra*) was therein cited with approval as well as a statement by Lord Greene, M.R. that "the money you spend in defending your title to a capital asset, which is assailed unjustly, is obviously a revenue asset".

But in *Siscoe Gold Mines v. M.N.R.*[5] Thorson P. the then President of this Court, declined to follow the decision in the *Borax case (supra)* in view of the principles laid down in the *Dominion Natural Gas Company case (supra)*

[1] [1942] S.C.R. 89.
[2] [1944] A.C. 126.
[3] [1941] 1 K.B. 111.
[4] [1955] A.C. 21.
[5] [1945] Ex. C.R. 257.

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and the *Montreal Light, Heat & Power Consolidated case (supra)* which are binding on this Court. He held that the legal expenses incurred by the taxpayer therein in maintaining the title to certain mining properties were not expenditures directly related to the earning of his income, but rather considered them to be capital outlays or payments on account of capital and as such within the prohibitions of section 6(*b*), now section 12(1)(*b*).

Counsel for the appellant placed much reliance on the decision in *Evans v. M.N.R.*[1] reversing a decision of this Court[2]. The appellant spent a considerable amount in a successful effort to convince the courts that she was entitled to an annual income from her late father-in-law's estate. The Minister refused to allow the deduction of the fees so paid on the ground that they were a payment on account of capital within the meaning of section 12(1)(*b*). Cartwright J. speaking on behalf of the majority, held that the appellant's claim in regard to which the expenses were incurred was a claim to income to which she was entitled and accordingly the expenses were properly deductible as having been incurred to obtain payment of that income. In reaching that conclusion Cartwright J. pointed out that the appellant had the right for her life-time to be paid the income from one-third of the estate, the legal ownership of which remained in the trustee; that her right was solely to require the trustee to pay the income arising from the estate to her and that the payment of the legal fees did not bring this right into existence but rather that her right arose from the will of which she was beneficiary and not from the judgment of the court. He also pointed out that the mere fact the right could be sold or valued on an actuarial basis did not constitute the right a capital asset.

Counsel for the appellant frankly admits that the mineral rights here involved are capital assets but points out that they also have an income aspect. The appellant, by its preconceived policy of taking transfers of mineral rights, which were subject to leases under which rentals were payable, thereby assured itself of income in the form of rentals under the leases. In this respect he sought to distinguish the *Dominion Natural Gas case (supra)* in that the franchise there involved did not of itself yield any income to the company which held it.

[1] [1960] S.C.R. 391.

[2] [1959] Ex. C.R. 54

In *M.N.R. v. Goldsmith Bros., Smelting and Refining Co. Ltd.*[1] Rand J. explained the judgment in *Dominion Natural Gas (supra)* as having been based on the view that the legal fees there in question were "expenses to preserve a capital asset in a capital aspect."

In the present appeals, counsel for the appellant points out that in addition to the capital aspect there was also an income aspect involved.

In commenting on the *Dominion Natural Gas case (supra)* Cartwright J. had this to say in the *Evans case (supra)*:

> The "asset" or "advantage" under consideration in *Dominion Natural Gas* was a valuable, exclusive perpetual franchise; this franchise did not of itself yield any income to the Company which held it; it was a permanent right used and useful in the earning of the company's income by the sale of its product to the persons residing in the territory covered by the franchise; it was rightly regarded as an item of fixed capital.

The distinction between circulating and fixed capital is set forth by Lord MacMillan in *Van den Berghs Ltd. v. Clark*[2] in these words:

> Circulating capital is capital which is turned over, and in the process of being turned over yields profit or loss Fixed capital is not involved directly in that process, and remains unaffected by it.

I cannot escape the conclusion that the items involved in these appeals are items of fixed capital. They were interests in lands, they were carried as such in the appellant's balance sheet and most significantly they were not traded in. The income received by the appellant was income from property and that property is therefore a fixed capital asset.

While it is true as Abbott J. pointed out in the *B.C. Electric Ry. Co. Ltd. case (supra)* that since the purpose of every business undertaking is presumably to make a profit and so every expenditure in respect of a business is directed to that end, nevertheless the distinction still remains to be made whether the expense is a current expense or a capital outlay. The coal that a coal merchant buys and sells in the course of his trade, is his circulating capital, but if, instead of buying his coal from outside sources he purchases a coal mine, it seems clear to me that the purchase of the mine is not a purchase of coal, but a purchase of land with the right of extracting coal from it and the land constitutes part of his fixed capital.

[1] [1954] S.C.R. 55. [2] 19 T.C. 390.

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I can perceive no distinction between the assets acquired by the appellant herein and the coal mine purchased by the supposititious coal merchant in the above circumstances. Without the mineral rights transferred to the appellant and the leases assigned to it the appellant's whole business comes to nought.

In the numerous actions brought against the appellant, title defects were alleged. If the actions were successful the appellant would have been deprived of all its assets. In my view the effect of the appellant's defence of these actions was to establish an uncontroverted legal title to those assets. The purpose was to repel an attempt to deprive it of its property and not to protect a right to income except incidentally. As a result of the appellant's successful defence of this litigation, it emerged with its titles intact.

Therefore I am of the opinion that the legal expenses incurred by the appellant in defending the actions brought against it were a "payment on account of capital" made "with a view of preserving an asset or advantage for the enduring benefit of a trade" within the test so propounded by Kerwin J. in the *Dominion Natural Gas case* (*supra*).

I do not think that the effect of that case on the facts of this case is altered by the subsequent decisions of the Supreme Court in *M.N.R. v. The Kellogg Company of Canada, Limited* (*supra*), *M.N.R. v. Goldsmith Bros. Smelting and Refining Co., Ltd.* (*supra*) or *Evans v. M.N.R.* (*supra*).

In the *Kellogg case*, Duff C.J. held that "the right upon which the respondents relied was not a right of property, or an exclusive right of any description, but the right (in common with all members of the public) to describe their goods in the manner in which they were describing them." The Chief Justice pointed out that the payment of the cost of the legal expenses in the *Dominion Natural Gas case* (*supra*) was not an expenditure "laid out as part of the process of profit earning", but was an expenditure made "with a view of preserving an asset or advantage for the enduring benefit of a trade", and, therefore, capital expenditure. No reflection whatsoever was cast upon the correctness of that decision.

In the Goldsmith Bros. case legal expenses were incurred in a successful defence against charges laid under the

Combines Act. Such legal expenses were held to have been expended to defend their trade practices and the payment thereof was therefore a beneficial outlay to preserve what helped to produce income. The legal fees so paid were necessary in a commercial sense and were wholly and exclusively laid out or expended for the purpose of earning the income within the meaning of section 6(1)(*a*) whereas the *Dominion Natural Gas case* (*supra*) was distinguished as having been a case of expenses to preserve a capital asset in a capital aspect.

Similarly in the *Evans case* (*supra*) the right involved was held to be a right to income which was being wrongfully withheld by the trustee in whom legal ownership was vested. It followed therefore that the legal expenses were incurred to collect that income and was accordingly an expense within section 12(1)(*a*). Again the *Dominion Natural Gas case* was distinguished in that the franchise there sought to be protected was rightly regarded as an item of fixed capital.

While the foregoing remarks have been directed to those legal expenses incurred in the successful defence of the court actions brought against the appellant, I am of the opinion that the same considerations apply to those legal expenses incurred in making representations respecting the proposed legislation and in appearing before the Board set up when the legislation came into effect to oppose the renegotiation of the contracts entered into by the appellant with land owners.

The basic purpose of the appellant in making such representations was, in my view, identical to that for which it defended the litigation against it, that is to preserve its capital assets intact and this the appellant, in the result, succeeded in doing. Therefore, these expenditures, too, should be regarded as outlays on account of capital within the meaning of section 12(1)(*b*) and their deduction is accordingly prohibited thereby.

The appellant is, therefore, also unsuccessful on this issue in its appeals.

At the outset of the hearing of these appeals the parties by their respective counsel agreed to settle certain of the issues as follows:

1. The parties hereto consent to judgment allowing in part the appeal for the 1960 taxation year and referring the assessment back to the

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Minister of National Revenue for reassessment for the purposes of allowing as a deduction under s 83A(3) of the *Income Tax Act* the sum of $2,381.75 referred to in paragraph 16 of the 1960 Notice of Appeal.

2. The parties hereto consent to judgment allowing the appeals from the assessments for the 1959 and 1960 taxation years and referring the assessments for those years back to the Minister of National Revenue for reassessment on the basis that such portions of the sums of $9,199.00 (referred to in paragraph 12 of the 1959 Notice of Appeal) and of $15,310.53 (referred to in paragraph 13 of the 1960 Notice of Appeal) as were paid in each of the 1957 to 1960 taxation years, may be deducted in computing the Appellant's income in the years in which the said portions were paid. It is further agreed that to the extent that any part of the said amounts were paid in years prior to the 1959 taxation year the appropriate adjustment will be made to the 1959 and 1960 assessments for the purpose of giving effect to the provisions of s 27(1)(*e*) of the Income Tax Act.

The parties agreed that there are to be no costs to either party with respect to the issues which were settled by agreement.

Accordingly the assessments for the 1959 and 1960 taxation years are referred back to the Minister for reassessment in accordance with the agreement between the parties. Subject thereto the appeals are dismissed.

The Minister shall be entitled to his costs of the appeals except any cost related exclusively to the issues that were settled by agreement.

Calgary 1966

Mar 30

Ottawa May 19

BETWEEN:

FREEHOLDERS OIL COMPANY LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Income Tax Act, R.S.C. 1952, c. 148, Section 12(1)(a)(b)—Legal expenses—Revenue expenditure vs. capital expenditure.

This appeal was heard immediately following that of *Farmers Mutual Petroleums Ltd. and The Minister of National Revenue, ante p. 1126.* The sole issue concerned the deductibility of legal expenses in circumstances substantially the same as in the *Farmers Mutual Petroleums Ltd.* case.

Held, That for the same reasons, as in the *Farmers Mutual Petroleums Ltd.* case, the legal expenses were payments on account of capital.

2. That the appeal was dismissed subject to the allowance of certain items as agreed between the parties.

APPEAL from assessments of the Minister of National Revenue.

J. H. Laycraft, Q.C. for appellant.

D. G. H. Bowman for respondent.

CATTANACH J.:—These are appeals from assessments to income tax for the appellant's 1959, 1960 and 1961 taxation years.

At the outset of the trial the parties hereto, by their respective counsel, agreed to the settlement of certain of the issues arising in these appeals as follows:

1. The parties hereto consent to judgment allowing in part the appeal from the assessment for the 1960 taxation year and referring the said assessment back to the Minister of National Revenue for reassessment for the purpose of deducting in computing the Appellant's income for the 1960 taxation year the sum of $630 30 referred to in paragraph 11 of the 1960 Notice of Appeal

2. The parties hereto consent to judgment allowing in part the appeals from the assessments for the 1959, 1960 and 1961 taxation years and referring the said assessments back to the Minister of National Revenue for the purpose of allowing as a deduction in the years paid such portion of the sum of $27,584 94 (referred to in paragraph 13 of the 1961 Notice of Appeal) as was paid in each of the said taxation years 1959, 1960 and 1961.

The sole issue remaining in controversy between the parties is with respect to the deductibility of legal expenses incurred in defending actions brought against the appellant disputing the validity of mineral leases entered into between the appellant and the landowners in circumstances closely parallel to those entered into between Farmers Mutual Petroleum Limited (hereinafter referred to as "Farmers Mutual") and certain landowners.

The appeals of Farmers Mutual were heard immediately prior to the hearing of the present appeals. The argument of counsel directed to the deductibility of legal expenses in the appeals of Farmers Mutual were adopted by them as applying to the present appeals with such variation as was dictated by minor differences in the facts of the respective sets of appeals.

There is no substantial difference between the issue here involved and the issue of deductibility of legal expenses in the Farmers Mutual appeals.

In the case of Farmers Mutual the landowner held the mineral rights in fee simple which rights were transferred

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to Farmers Mutual. Further, Farmers Mutual, as a preconceived policy, only dealt with those landowners who had already granted a mineral lease to other oil exploration and producing companies and the arrangement was that four-fifths of the rental income accrued forthwith to Farmers Mutual. The rights of the landowners, who transferred their mineral rights were as beneficiaries under trust certificates evidencing their right to own shares in the capital stock of Farmers Mutual, one-fifth of the rentals and one-fifth of the royalties on oil or gas producing lands accruing to Farmers Mutual.

In the case of the present appellant, (sometimes referred to herein as Freeholders) the landowner retained the fee simple to the mineral rights throughout.

Freeholders, like Farmers Mutual, was incorporated under the laws of the Province of Saskatchewan, and like Farmers Mutual vigorously campaigned to obtain mineral rights from landowners in Saskatchewan, but unlike Farmers Mutual did not obtain transfers of the fee simple in mineral rights, nor did it restrict its dealings to landowners who had previously granted leases of their mineral rights to other lessees.

Freeholders proceeded to acquire leases of mineral rights (1) from landowners, some of whom had not granted leases of those rights and (2) some of whom had already done so. The greater number of the leases acquired by Freeholders were in the second category above.

With respect to the first category (i.e. no prior leases) Freeholders would obtain the grant of a mineral lease for a term of 99 years renewable at Freeholder's option. The consideration paid by Freeholders for such a lease consisted of the allotment to the lessor of one fully paid share in its capital stock for each acre of land involved. It also covenanted to pay and deliver to the lessor an undivided one-fifth of the benefits or proceeds received by Freeholders from any disposition made by it of such minerals.

With respect to the second category (i.e. where prior leases existed), Freeholders would take from the landowner an assignment of the royalties payable to him under his existing lease together with a 99 year lease running from the date of the assignment, which, however, would only take effect upon the termination of the existing lease. The

consideration from Freeholders for such an assignment consisted of a covenant for the allotment of one fully paid share in its capital stock for each acre of land involved, of which one-half of the shares would be allotted forthwith and the other half only when the mineral lease to Freeholders should take effect. Freeholders was to have the right to deal with and dispose of the assigned royalties, but covenanted to pay to the assignors one-fifth of the benefits received by Freeholders from such dispositions.

The campaign for the acquisition of mineral rights and royalties for Freeholders was completed by August 1950. By that time it had acquired leasehold interests in some 23,000 acres and assignments of royalties in respect of previously leased lands of approximately 613,000 acres.

Freeholders received income during the taxation years in question. It first received income from royalties and as the leases producing royalties expired it then drilled oil and gas wells on the leases then vested in it from which wells it also derived income.

In 1955 when the prospect of discovering oil became more likely, the farmers, as did those in the Farmers Mutual case, became disenchanted with their agreements. The landowners instituted actions for an order declaring that the interests granted to Freeholders by such landowners were invalid and void. As was the case of Farmers Mutual, Freeholders successfully defended those actions against it and Freeholders was also successful, in actions instituted by it, in substantiating caveats filed by it.

There were approximately 100 separate law suits.

Pending the outcome of the litigation the monies received by Freeholders from royalties and from the production of oil and gas were paid to a trust company to be held by it for distribution to the persons entitled thereto following the decisions of the court. As Freeholders was successful in the litigation the monies so deposited in trust were ultimately paid to it.

Freeholders also incurred legal expenses in connection with the renegotiation legislation as were incurred by Farmers Mutual in circumstances similar to those outlined in the reasons for judgment in that Company's appeals.

For the reasons which I have outlined in the appeals of Farmers Mutual, which are being filed concurrently with the reasons for judgment herein, I am of the opinion that,

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the legal expenses incurred by Freeholders in defending the actions brought against it and in prosecuting those actions instituted by it to preserve caveats lodged by it, as well as those expenses incurred in making representations respecting the proposed renegotiating legislation and in appearing before the Board set up when that legislation came into effect to oppose the renegotiation of contracts entered into between Freeholders and landowners, were payments on account of capital.

Accordingly, the assessments for the 1959, 1960 and 1961 taxation years are referred back to the Minister for reassessment in accordance with the agreement between the parties. Subject thereto the appeals are dismissed.

As the parties agreed that there are to be no costs to either party with respect to those issues that were settled by agreement, the Minister will be entitled to his costs of the appeals, except any cost related exclusively to the issues that were settled by agreement.

Calgary 1966 Apr. 5 — Ottawa June 6

BETWEEN:

ALPINE DRYWALL AND DECORATING LTD. ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income—Income Tax Act, R.S.C. 1952, c. 148, Section 39(1)(2)(4)(b)—Associated corporations—Meaning of "control"—Whether corporation is "controlled" by fifty per cent shareholder with casting vote—Effect of casting vote of chairman.

The issue in the disposition of this action was whether the appellant was "controlled", as contended by the Minister, by one of two equal shareholders. The articles of association gave the right to the chairman as president, to exercise a casting vote in case of a tie. If so, the appellant would be "associated" with another corporation which was controlled by the same shareholder and the assessment would be well founded

Held, That while the right to a casting vote residing in the named shareholder by reason of his office as chairman gave control of the appellant to that shareholder for all practical purposes and for the purposes of the relevant companies legislation, it did not follow that it conferred control within the meaning of the *Income Tax Act.*

2. That, as in the *Buckerfield's Ltd. et al* case, rejecting the test of *de facto* control for the purpose of section 39(4) and following
   (a) the implication inherent in the judgment in that case that "controlled" contemplated the right of control that rested in ownership of shares, and
   (b) the dicta of Noël J in the *Pender Enterprises Ltd* case that the power to exercise a casting vote did not constitute "control" within the meaning of section 39.
3. That it followed that the appellant was not controlled by the shareholder in question and was not "associated" with the other corporation.
4. That the appeal be allowed with costs.

APPEAL from assessments of the Minister of National Revenue.

R. A. F. Montgomery for appellant.

Bruce Verchère for respondent.

CATTANACH J.:—These are appeals from the assessments of the appellant under the *Income Tax Act*, R.S.C. 1952, chapter 148 for its taxation years 1961, 1962 and 1963.

The sole question in each of the appeals is whether the appellant was "associated" with another company known as Jager Holdings (Calgary) Ltd. (hereinafter referred to as "Jager Holdings") within the meaning of the word "associated" as used in section 39 of the *Income Tax Act* so as to authorize the Minister to assess the appellant as he did and thereby deprive it of the advantage of the lower rate of tax of 18 percent on the initial $35,000 of its income in each of the taxation years in question as contrasted with a tax at the rate of 47 percent on the appellant's taxable income in each year.

The pertinent provisions of section 39 read as follows:

39. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada as the case may be, (in this section referred to as the "amount taxable") for a taxation year is, except where otherwise provided,

(a) 18% of the amount taxable, if the amount taxable does not exceed $35,000, and

(b) $6,300 plus 47% of the amount by which the amount taxable exceeds $35,000, if the amount taxable exceeds $35,000

(2) Where two or more corporations are associated with each other in a taxation year, the tax payable by each of them under this Part for the year is, except where otherwise provided by another section, 47% of the amount taxable for the year.

It is common ground that the question whether the appellant was associated with Jager Holdings depends upon the

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application, to the relevant facts, of section 39(4)(*b*), which reads as follows:

> 39. (4) For the purpose of this section, one corporation is associated with another in a taxation year if, at any time in the year;
>
> . . .
>
> (*b*) both of the corporations were controlled by the same person...,
>
> . . .

The facts are relatively simple and straight forward.

The appellant was incorporated pursuant to the laws of the Province of Alberta on June 9, 1960 at the instigation of William Jager and Clarence Wagenaar, with head office at Calgary, Alberta. Only 100 shares of the appellant's authorized capital stock had ever been issued at all times material to these appeals, 50 shares belonged to Mr. Wagenaar and 50 shares belonged to Mr. Jager. Each share entitled the holder to one vote at meetings of the company.

Mr. Jager was the managing director of a number of companies carrying on business in various branches of the construction industry in the City of Calgary and the area immediate thereto. One of such companies was Jager Holdings which had issued only 100 shares of which, at all times material hereto, 51 shares were held by Mr. Jager and 49 shares were held by his wife. It is common ground that William Jager controlled Jager Holdings.

Mr. Wagenaar came to Canada from Holland in 1950. In 1952 he was employed by a firm of plasterers and decorators specializing in the dry wall method of completing interior walls of buildings. In April 1960 he entered into this type of business on his own behalf. A prospective partnership arrangement was discussed between him and another person, who was a painter and decorator, but this arrangement did not materialize. Meanwhile William Jager had started a dry wall business as part of the construction industry complex in which he was engaged. Because of his other interests he was unable to devote sufficient attention to this phase of his many business interests. For this reason and by reason of the difficulty in obtaining experienced personnel, this dry wall branch of Jager's businesses was not active. Wagenaar, in the course of his work, became known to Jager. It was to their mutual advantage to enter the business of applying this method of finishing walls in buildings. Jager's standing in the industry enabled Wage-

naar to obtain the requisite financing and afforded a voluminous source of work. On the other hand, Wagenaar's experience in this field gave Jager a reliable contractor for this method of construction when he required it. Therefore, the appellant company was formed by them, each of whom contributed an equal amount of capital, and as stated above, 50 shares were issued to each of them.

By agreement of the only shareholders and directors, (Jager & Wagenaar) Jager was elected President of the appellant and as President was entitled to preside as Chairman at all general meetings of the appellant company in accordance with Article 43 of the Articles of Association. Wagenaar was elected secretary-treasurer. This division of offices was agreed upon because of Jager's superior knowledge and familiarity in the conduct of corporate matters. However, Wagenaar was in complete charge of the business operations of the appellant. He solicited work, signed contracts therefor and supervised its completion without direction from Jager.

While the appellant did considerable work for many of Jager's construction companies and purchased supplies from them, the proportion of its total work and purchases represented by such work and purchases varied over the taxation years under review. On the average only 25 percent of the work done by the appellant was done for the Jager companies. The appellant tendered upon work available from the Jager companies and was given that work only when the appellant's bids were competitive. Similarly the appellant purchased supplies from the Jager companies only when their prices were lowest. I am convinced that the appellant, in a business way, conducted its operations quite independently and would so find if it were incumbent upon me to do so, but such finding would not resolve the issue.

The corporate management of the appellant was conducted with a cavalier disregard of the provision of the applicable *Companies Act*. An oranization meeting was held immediately after incorporation at which I would assume that Jager and Wagenaar were elected directors and were elected President and Secretary-Treasurer respectively. Only one annual meeting of shareholders was held during the years 1961 to 1963 inclusive. During those three years there were approximately six casual meetings between Wagenaar and Jager which do not appear to have qualified as either

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director's or shareholders' meetings. Neither Wagenaar nor Jager had read the Articles of Association which governed the internal management of the appellant.

Article 45 of the articles of Association reads as follows:

> 45. Every question submitted to a meeting shall be decided in the first instance by a show of hands, and in the case of an equality of votes the chairman shall, both on a show of hands and on a poll, have a casting vote in addition to the vote or votes to which he may be entitled as a member.

While neither Wagenaar nor Jager were aware that, by virtue of Article 45, Jager was entitled to a casting vote in the event of an equality of votes, by reason of his office as President, and so Chairman of all meetings, nevertheless, he was so entitled even though he at no time exercised that right.

Wagenaar and Jager are not related.

Counsel for the Minister contends that, by reason of the equal number of shares held in the appellant by Wagenaar and Jager and because Jager's shareholdings were reinforced by the position he held as President, which entitled him to a casting vote at company meetings, it follows that Jager controlled the appellant during the relevant taxation years. If this contention is correct then the appellant was, during these years, associated with Jager Holdings within the meaning of section 39(4)(*b*) in that both corporations, Jager Holdings and the appellant, were controlled by the same person, William Jager, and the Minister would have been right in assessing the appellant as he did.

The solution of the question is dependent upon the meaning to be attributed to the word "controlled" as used in section 39(4)(*b*).

Counsel for the appellant contended that *de jure* control was not vested in Jager but rather in Wagenaar and alternatively that *de facto* control was vested in Wagenaar and not in Jager. At this stage I intimated to Counsel for the appellant that the President of this Court had recent occasion to consider the meaning of the word "control" in *Buckerfield's Limited, et al. v. Minister of National Revenue*[1] where he had this to say:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by

[1] [1965] 1 Ex. C.R. 299 at p. 302.

the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that, in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co. v. I. R. C.* ([1943] 1 A.E R. 13) where Viscount Simon L. C., at page 15 says:

> "The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes."

See also *Minister of National Revenue v. Wrights' Canadian Ropes Ld.* ([1947] A.C. 109) per Lord Greene M.R. at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within section 6 of the *Income War Tax Act*.

From the foregoing passage it is quite apparent that the President expressly discarded the test of "*de facto*" control as being the appropriate one to determine the meaning of the word "controlled" as used in section 39.

While I appreciate that the doctrine of *stare decisis* may not have the same application in this Court, which has jurisdiction in the Province of Quebec as well as the common law provinces, as the doctrine does in a common law court, nevertheless, in my view, when a question has been decided by this Court after argument it is in the interest of the certain and orderly administration of justice that the previous decision be followed when the same question subsequently arises in this Court.

I, therefore, stated to Counsel for the appellant that having regard to the view I expressed as above outlined, I proposed to follow the decision rendered by the President in *Buckerfield's Limited, et al v. Minister of National Revenue* (*supra*) to the effect that *de facto* control was not the test and that accordingly he should limit his argument to the question of *de jure* control to which suggestion he readily concurred, on the distinct understanding that his alternative argument on the question of *de facto* control would be properly available to him should the matter come before the Supreme Court of Canada.

As the President has pointed out in the extract from his decision in the *Buckerfield case* (*supra*) quoted above, there are many possible approaches which might be adopted in determining the meaning of the word "controlled" as

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used in section 39 of the *Income Tax Act*. He expressly excludes *de facto* control. While *de facto* control is not susceptible of ready definition, it manifests itself in various forms such as informal agreement, minority control and personal influence. He also excludes control by management or by the Board of Directors and concludes that the word "controlled" in section 39 contemplates:

> The control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors.

In short the ultimate control of a company rests in its shareholders by whose collective will direction or dominion over the affairs of a company is exercised.

The question of whether one corporation was "controlled" by another came before the President in *Dworkin Furs (Pembroke) Limited v. M.N.R.*[1] On the facts of that case it was contended that one corporation controlled a second corporation by holding 50 percent of the shares of the second corporation coupled with circumstance that the directors of the second corporation held their qualifying shares as trustees of the first corporation and were accordingly, in their capacity as directors of the second corporation, subject to the direction of the first corporation, that the first corporation could, by its 50 percent shareholding and by doing nothing, perpetuate the current directors of the second corporation in office and prevent others from being elected and alternatively that this same end could be achieved by a combination of 50 percent of the shares and the fact that a director of the first corporation was the President of the second corporation and thereby had a casting vote.

The person who had the casting vote had that vote by reason of his office as President of the second corporation and in that corporation, but not in the first corporation, alleged to be in control of the second corporation. In the present appeals the question is whether in a specific corporation, i.e. the appellant, where shares are equally held by two persons, a casting vote conferred by the Articles of Association upon one of those persons places the holder thereof in a position to control that very corporation. This is a much different situation from the one which was before the President in the *Dworkin case (supra)*.

[1] [1965] C.T.C. 465.

The President made no finding as to the correctness of the various propositions so advanced but stated that he doubted that the holding of a veto over the replacement of a particular board of directors constituted control in any of the possible senses in which that word may be used. In his view "control of a corporation" means the power to determine its affairs by positive means and not by negative means. He thereupon reiterated the view he had expressed in the *Buckerfield case* (*supra*) that in section 39 of the *Income Tax Act* the word "controlled" contemplates the right of control that rests in *ownership* of such a number of shares as will carry a decision.

The implications inherent in the view so expressed by the President seems to be that control by reason of the ownership of that number of voting shares as will carry a decision is the only method of control.

In *Pender Enterprises Limited v. M.N.R.*,[1] Noël J. in considering whether a disposition or sale was not at arm's length within section 139(5a) had this to say at page 357:

> ...It indeed appears to be clearly settled that control of a corporation requires at least a bare majority in shareholding and as Lee here has not this majority, he cannot be considered as controlling the appellant and I say this notwithstanding the articles of association adopted by the appellant which gives its president a preponderant vote in the case of an equality of votes at every general meeting of the company. Indeed, such a power given to the president of the present corporation, in view of the particular circumstances of the instant case, could not, in my view, give Lee effective control over the appellant corporation which he would not otherwise have by virtue of his shareholdings because any control he would wish to exercise by virtue of his preponderant vote could not, in practice, be implemented. There being two shareholders only, Lee could not hold a general meeting of the appellant corporation without Wong's consent and as one director cannot constitute a meeting he could not use his preponderant vote.

It seems clear that in the opinion of my brother Noël, control of a company requires at least a bare majority in shareholding. Since the party with whom he was concerned held only 50 percent of the shares he concluded that that party could not be considered as controlling the company "notwithstanding the articles of association adopted by the appellant which gives its President a preponderant vote in the case of the equality of votes at every general meeting of the company". Moreover, in the particular circumstances of

[1] [1965] C.T.C. 343.

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the facts before him he concluded that the casting vote could not be implemented in practice because there were only two shareholders, one of whom could render abortive any duly called meeting of shareholders by the simple expedient of not attending. As I read his opinion he was prepared to decide that appeal as he did without reference to this latter consideration and it was probably, therefore, not a necessary part of the reasoning by which he decided that appeal.

On the facts before me in the present appeals I do not think I am entitled to speculate upon the eventuality of the holder of 50 percent of the shares, in whom the casting vote is not vested, namely Wagenaar, not attending a duly called meeting even though, in such event, there were devices readily available to the shareholder, Jager, whereby a meeting could be validly constituted and conducted in the absence of Wagenaar.

In *Aaron's (Prince Albert) Limited v. M.N.R.* recently decided by Thurlow J. and as yet unreported he had this to say:

> In the remaining three particular issues defined in the order the question of control turns on whether the person named in the issue, in addition to the votes to which he was entitled as shareholder, had the right to control the company by the exercise of a casting vote in the case of an equality of the other votes. In each of the three companies the votes of a majority were, under the articles, sufficient to carry an ordinary resolution of shareholders and in each case the articles provided for a casting vote exercisable by the chairman of the meeting in the case of a tie. While this is a point on which opinion may differ, offhand I should have doubted that control arising in that way, if it can be considered to be control at all, was within the meaning of the word "controlled" in section 39(4) of the *Income Tax Act*[1] since the situation seems not to be one of the kind at which I think the provision is aimed and since the casting vote, unlike the votes arising from shareholding, which are exercisable without responsibility to the company or to other shareholders, is, in my opinion, not the property of the holder, but is an adjunct of an office. However, in view of the conclusion which I have reached on the facts respecting the three issues it is not necessary for me to reach a concluded opinion on the question.

[1] *Vide* Jackett P., in *Buckerfield's Ltd. v. M.N.R.* [1965] 1 Ex. C.R. 299 at 303: "I am of the view, however, that, in section 39 of the *Income Tax Act*, the word 'controlled' contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors".

While my brother Thurlow readily conceded that on the question of a casting vote in the event of an equality of votes opinions might differ, nevertheless, he has expressed strong doubts that a casting vote can be considered control at all and even if it could, that it can be considered within the meaning of the word "controlled" in section 39 of the *Income Tax Act*.

In the statutes governing the incorporation and regulation of companies in most of the jurisdictions throughout Canada there is almost invariably a provision that at all meetings of shareholders questions proposed for consideration thereat shall be determined by a majority of the votes cast and that in the event of an equality of votes, the Chairman shall have a casting vote. These provisions are subject to other provisions in the respective statutes that certain matters shall be approved by a greater preponderance of the votes cast than a bare majority. Further it is usually provided that the application of the above provisions may be waived by by-law or by embodiment of an appropriate provision in the Articles of Association. Such a provision is contained in the *Alberta Companies Act* under which the present appellant was incorporated.

While such statutory provisions were undoubtedly intended to ensure that, in the event of a tie vote at a meeting of a company, the Chairman's second or casting vote would resolve the deadlock, nevertheless, in the circumstances such as in the present case, where all shares are held equally by two persons, it does in fact result in the Chairman being in a position to determine the result of all questions that arise at general meetings as long as he continues as Chairman. The power of exercising the casting vote resides in the Chairman, not by reason of the ownership of a share, but by virtue of his position as Chairman and the privileges and rights bestowed on that office by the Articles of Association. While these circumstances would vest control in Jager over the appellant for all practical corporate purposes and for the purposes of the Alberta companies legislation, it does not necessarily follow that it confers control within the meaning of the *Income Tax Act*.

The fact that Mr. Jager has had no occasion to exercise the casting vote vested in him as Chairman, or has not

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chosen to do so, is immaterial. The right was there at all times and might have been exercised at any time. It is a matter of the power and right to do so and not the actual exercise thereof.

Thurlow J. acknowledges that the question of a casting vote conferring control within the meaning of section 39 of the *Income Tax Act* is one upon which opinions may differ.

The contrary line of reasoning was adopted by the Vice-Chairman of the Tax Appeal Board in *Dealers Acceptance Corporation Ltd. v. M.N.R.*[1]. There the shares of the appellant were evenly divided between two groups which had orally agreed to maintain this balance of power. It was held that, in the case of an equality of shareholdings, the right to a casting vote gives its holder control of the corporation concerned.

This decision was followed by another member of the Tax Appeal Board in *Dominion Fibre Drum Corporation v. M.N.R.*[2]. A provision for a casting vote was contained in the *Quebec Corporations Act* and unlike similar provisions in other jurisdictions the casting vote could not be excluded by a by-law to the contrary. The statute in question has been subsequently amended to so provide.

The word "control" is nowhere comprehensively defined in the *Canadian Income Tax Act*. Accordingly the English decisions, which result from an interpretation of definitions in the *Finance Act* and the *Income Tax Act* are not of particular assistance nor are they applicable in the facts of the present appeals. For the purposes of the *United Kingdom Income Tax Act* control, in relation to a company, has been defined by the statute to mean the power to secure by shareholding or voting power, or powers conferred by the Articles of Association or other document regulating any company, that the affairs of the company are conducted in accordance with the wishes of the person concerned.

Before that definition was introduced into the English legislation, Rowlatt J. in *B. W. Noble, Ltd. v. I.R.C.*[3] in considering the meaning of the words "controlling inter-

[1] 37 Tax A.B.C. 33. [2] 40 Tax A.B.C. 79.
[3] 12 T.C. 911.

est", which words, when not expressly defined in a statute, have been held to have essentially the same meaning as "control", said:

...It seems to me that "controlling interest" is a phrase that has a certain well known meaning; it means the man whose shareholding in the Company is such that he is the shareholder who is more powerful than all the other shareholders put together in General Meeting. That is really what it comes to. Now, this gentleman has just half the number of shares, but those shares, in the circumstances of this case, are reinforced by the position that he occupies of Chairman, a position which he occupies not merely by the votes of the other shareholders or of his Directors elected by the shareholders but by contract; and, so reinforced, inasmuch as he has a casting vote, he does control the General Meetings—there is no question about that—...

In the *Noble case* (*supra*) there was an agreement between the Company, Major Noble, and all the other shareholders that all the natural parties thereto should be directors, that Major Noble should be managing director and chairman and upon an equal division of opinion among shareholders he should have a casting or deciding vote. It will be noted that Major Noble had his 50 percent holding of shares reinforced by the casting vote he had as Chairman and that he occupied the position of chairman by virtue of a contract.

For my part I am unable to perceive any basic distinction between occupying the position of chairman, with a casting vote attached to that office, by virtue of a contract as in the *Noble case* (*supra*) and merely being elected to that position, to which a casting vote attaches by reason of the Articles of Association. The Articles of Association bind the shareholders *inter se* with contractual effect. Section 28(1) of the *Alberta Companies Act* provides:

The memorandum and articles, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, and in the case of a corporation, its successors, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

However, I feel constrained to follow the implication which I consider to be inherent in the decision of the President in *Buckerfield's Ltd. v. M.N.R.* (*supra*), that the word "controlled" in section 39 of the *Income Tax Act*

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contemplates the right of control that rests in ownership of shares and the *dicta* of Noël J. and Thurlow J. that a casting vote arising from the Articles of Association in the case of equality of the other votes does not constitute control within the meaning of section 39.

Therefore, it follows that Jager Holdings and the appellant were not controlled by the same person, William Jager, and accordingly the appellant was not associated with Jager Holdings.

The appeals herein are, therefore, allowed with costs.

Calgary 1966

Apr. 5

Ottawa June 6

BETWEEN:

BERT ROBBINS EXCAVATING LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Income Tax Act, R.S.C. 1952, c. 148, section 39(4)(b)—"Associated corporations"—Control by same person—Meaning of "control"—Casting vote of chairman—Effect of casting vote.

This appeal was heard following that of *Alpine Drywall and Decorating Ltd. and The Minister of National Revenue, ante* p. 1148. The issue being substantially the same.

The disposition of this action was whether the right was giving to the chairman, as president, to exercise a casting vote in case of a tie, conferring on him the "control" of the corporation "associated" with another which was admittedly controlled by the same shareholder.

Held, That the fact that the casting vote had never been exercised in practice was immaterial.

2. That the power to exercise a casting vote did not constitute "control" within the meaning of section 39. It followed that the appellant was not controlled by the shareholder in question and was not "associated" with the other corporation.

3. That the appeal is allowed with costs.

APPEAL from assessments of the Minister of National Revenue.

R. A. F. Montgomery for appellant.

Bruce Verchère for respondent.

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CATTANACH J.:—These are appeals against assessments by the Minister under the *Income Tax Act* of the appellant for its 1961, 1962 and 1963 taxation years.

By agreement the evidence respecting these appeals was heard immediately following the evidence with respect to the appeals of Alpine Drywall Construction Limited, upon completion of which argument was heard on each set of appeals because the issues involved in each set of appeals were substantially the same, subject only to minor variations consequent upon minor differences in facts.

The appellant company was incorporated pursuant to the laws of Alberta in 1956, at the instigation of Bert Robbins and William Jager and as its corporate name indicates, engaged in that phase of the construction industry involving the moving of earth.

At all times material to these appeals 100 shares of the appellant's authorized capital stock, each of which entitles the holder thereof to one vote, were issued and outstanding of which 60 shares were issued to William Jager and 40 shares were issued to Bert Robbins.

In November 1958 William Jager transferred 59 of the shares held by him to Jager Holdings (Calgary) Ltd. which company had been incorporated at the behest of William Jager as a convenient vehicle in which to vest the shares formerly held by him in the various construction enterprises in which he was interested. The remaining share of the original 60 shares in the appellant held by William Jager was retained in his own name but was beneficially held for Jager Holdings (Calgary) Limited.

Again it was common ground that William Jager controlled Jager Holdings (Calgary) Limited in which he held 51 shares of its 100 shares of issued capital stock and his wife held the remaining 49 shares.

In December 1960 Bert Robbins purchased 10 shares of the appellant from Jager Holdings (Calgary) Limited so that from January 1, 1961 forward the shareholding in the appellant was as follows; Bert Robbins 50 shares, Jager Holdings (Calgary) Limited 49 shares and William Jager 1 share.

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Bert Robbins and William Jager were the only directors of the appellant company and William Jager was the duly appointed representative of Jager Holdings (Calgary) Limited to vote the 49 shares held by that company at all meetings of the appellant.

William Jager was elected President and Bert Robbins was elected Secretary-Treasurer at the inception of the appellant which offices they held throughout the taxation years in question.

The Articles of Association of the appellant herein and those of Alpine Drywall & Decorating, Ltd. were identical and by reason of which William Jager, as President and Chairman of all meetings, was vested with a casting vote in the event of an equality of votes upon any question arising for determination at any meeting of the Company.

Here, again, the actual business operations of the appellant were conducted by Bert Robbins without interference or direction from William Jager. Bert Robbins and William Jager were not related. Neither of them had read the Articles of Association and neither were aware that William Jager could cast a second vote and, of course, he did not do so at any time.

Again, as in Alpine Drywall, the work done by the appellant for the Jager companies was not the only work undertaken by it, but a lesser percentage and it obtained work from those companies only when its competitive bids were lowest.

In these appeals, as in the appeals of Alpine Drywall & Decorating Ltd., the sole question is whether the appellant is associated with Jager Holdings (Calgary) Limited within the meaning of the word "associated" as used in section 39 of the *Income Tax Act*.

The question of whether the appellant was associated with Jager Holdings (Calgary) Limited depends upon whether the appellant was controlled by William Jager, who controlled Jager Holdings (Calgary) Limited, in accordance with section 39(4)(*b*) which reads as follows:

> 39. (4) For the purpose of this section, one corporation is associated with another in a taxation year if, at any time in the year,
>
> ...

(*b*) both of the corporations were controlled by the same person ...

...

In view of the conclusion I reached in *Vineland Quarries & Crushed Stone Limited v. M.N.R.*[1] it is permissible to "look through" the share register of Jager Holdings (Calgary) Limited and to ascertain that William Jager controls that company.

The shares in the appellant were held in the following proportions, 50 by Bert Robbins, 49 by Jager Holdings (Calgary) Limited and 1 by William Jager in trust for Jager Holdings (Calgary) Limited. On the authority of the *Bibby case*[2] the share held by William Jager in trust is to be considered as being held by him and enquiry is not to be made as to the beneficial ownership thereof. On the authority of *British American Tobacco Co. Ltd. v. I.R.C.*[3], the 49 shares held by Jager Holdings (Calgary) Limited are to be taken as representing the will and voice of William Jager. Therefore, the 100 shares of the appellant are held, 50 by Bert Robbins and, to all intents and purposes, 50 by William Jager.

Therefore, the question resolves itself into whether the second or casting vote held by William Jager vests the control of the appellant company in him.

For the reasons expressed in the appeals of Alpine Drywall & Decorating Ltd., which are being filed concurrently herewith, I must conclude that it does not.

The appeals are, therefore, allowed with costs.

[1] [1966] C.T.C. 69.

[2] [1945] 1 All E.R. 667.

[3] [1943] 1 All E.R. 13.

Ottawa 1965

May 10-14, 17-21, 27-28, 31, June 1-4, 8-11, June 16

BETWEEN:

THE GENERAL TIRE & RUBBER COMPANY

PLAINTIFF;

AND

DOMINION RUBBER COMPANY LIMITED and PHILLIPS PETROLEUM COMPANY

DEFENDANTS.

(by original action)

AND BETWEEN:

The said PHILLIPS PETROLEUM COMPANY

PLAINTIFF;

AND

The said THE GENERAL TIRE & RUBBER COMPANY and The said DOMINION RUBBER COMPANY LIMITED .....DEFENDANTS.

(by counterclaim)

AND

BETWEEN:

PHILLIPS PETROLEUM COMPANY ....PLAINTIFF;

AND

DOMINION RUBBER COMPANY LIMITED and THE GENERAL TIRE & RUBBER COMPANY

DEFENDANTS.

(by original action)

AND BETWEEN:

The said THE GENERAL TIRE & RUBBER COMPANY .....PLAINTIFF;

AND

The said PHILLIPS PETROLEUM COMPANY and The said DOMINION RUBBER COMPANY LIMITED .....DEFENDANTS.

(by counterclaim)

Patents—Infringement—Priority of invention—Validity determining meaning of claims—Construing the claims of a patent—Verification of plaintiff's product as embodying the claims of the patent—Prior art to be compared with claims of the patent not with plaintiff's prod-

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GENERAL TIRE & RUBBER CO. v. DOMINION RUBBER CO. LTD. *et al.*

uct—Definition in claims of patent—Novelty—Anticipation—Obviousness—Lack of invention—Prima facie validity of the patent does not extend beyond application date—Burden of proving earlier date of invention—Unpatentable claim—Allowance made pursuant to s. 45(7), s. 45(1)(a), s. 45(3), s. 28(1)(a), Patent Act, R.S.C. 1952, c. 203, s. 45(8).

This is a conflict proceeding under subsection (8) of s. 45 of the *Patent Act*, R.S.C. 1952, c. 203, as amended, to determine the respective rights of the parties on their applications for a patent or patents containing claims which are numbered in these actions as C-4, C-5 and C-6.

The decision of the Commissioner of Patents in this matter was made on January 26, 1961, by which all of the subject conflict claims were awarded to Dominion.

In all of the claims it is provided that cold rubber be prepared by emulsion polymerization, so that the polymerization be completed before the latex resulting be co-coagulated with the latex of oil softener.

In other words, the alleged inventions in each of the claims call for the addition of the oil softener by a particular method, namely, by latex masterbatching.

The issues to be determined in this action are, firstly: "What was invented?" and secondly "Who was first in respect of each of the claims C-4, C-5 and C-6?".

The evidence showed that Dominion, through Howland the inventor, by the 12th of December 1947, had conceived and disclosed the idea of combining cold high Mooney rubber and oil by incorporating it through this method of co-coagulation; and that it would be obvious to Howland or to any other person skilled in the art that the scope of this invention would extend to any amount of oil loading by latex masterbatching to high Mooney rubber of anywhere from 75 to 200.

The evidence also disclosed that so-called cold rubber became generally available in the period 1946 and 1947; and that every other element of claims C-4, C-5 and C-6 in 1947 were part of the prior art.

Held:

A.

1. That it is clear on the evidence that Dominion was first in respect of each of the claims C-4, C-5 and C-6; and therefore is entitled as against General and Phillips to the issue of a patent including claims C-5 and C-6.

2. That there is nothing inventive in the selection of the precise amounts of either oil or Mooney measurements.

3. That claim C-4 is not inventively distinguishable from claim C-5 therefore it contains "substantially the same invention" and is "so nearly identical" with claim C-5 within the meaning respectively of s. 45(1)(*a*) and s. 45(3) of the *Patent Act*, and therefore claim C-4 is unpatentable.

4. That the proposed substitute claim C-9 submitted by General in the preliminary proceedings to this trial is also unpatentable because it is not inventively distinguishable from claim C-5.

B. That in respect to A-1178 the action of Phillips is therefore dismissed.

C. That the counterclaim of Dominion is allowed.

D. That the counterclaim of General is dismissed.

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ACTION for infringement of patent.

Christopher Robinson, Q.C. and *James D. Kokonis* for The General Tire & Rubber Company.

Gordon F. Henderson, Q.C. and *David Watson* for Dominion Rubber Company Limited.

Hon. C. H. Locke, Q.C. and *Ross G. Gray, Q.C.*, for Phillips Petroleum Company.

GIBSON J.:—This is a conflict proceeding under subsection (8) of section 45 of the *Patent Act*, R.S.C. 1952, chapter 203, as amended, to determine the respective rights of the parties on their applications for a patent or patents containing claims which are numbered in these actions C-4, C-5 and C-6.

The General Tire & Rubber Company (hereinafter referred to as "General") is a corporation having its principal place of business in the City of Akron in the State of Ohio, one of the United States of America.

Dominion Rubber Company Limited (hereinafter referred to as "Dominion") is a company incorporated under the laws of Canada having its head office in the City of Kitchener in the Province of Ontario.

Phillips Petroleum Company (hereinafter referred to as "Phillips") is a corporation incorporated under the laws of the State of Delaware, one of the United States of America, having its principal office in the City of Bartlesville in the State of Oklahoma.

General is the owner by assignment of an alleged invention made jointly by Emert S. Pfau, Gilbert H. Swart, and Kermit W. Weinstock which relates to the manufacture of pneumatic tires of the type suitable for use on various types of motor vehicles, airplanes and the like, particularly relating to pneumatic tires having extruded tread portions of an exceedingly tough synthetic rubber.

Dominion is the owner by assignement of an alleged invention made by Louis H. Howland relating to improvements in the compounding of synthetic rubber.

Phillips is the owner by assignment of an alleged invention made jointly by Walter A. Schulze and William B.

Reynolds relating to elastomer compounding; relating in another of its more specific aspects to an improved method for compounding synthetic elastomers for high raw Mooney polymers; and in another of its more specific aspects relating to a method for producing an increased volume of vulcanizable elastomers; and in another of its more specific aspects relating to improved vulcanizable synthetic elastomers.

The following is the relevant chronology in this case:

1. *Date of Invention*—Dominion, October 1947;
   Phillips, January 19, 1948;
   General, no earlier than April 1949.

2. *United States Filing Dates*

   Dominion—November 9, 1951; Serial #255,747
   General—November 20, 1950; Serial #196,584
   Phillips—April 6, 1951; Serial #219,766

3. *Canadian Filing Dates*

   Dominion—September 10, 1952; Serial #636,139
   Phillips—February 5, 1952; Serial #626,519
   General—February 14, 1951; Serial #611,684

There were entered as exhibits at the trial the relevant applications which were filed in Canada and in the United States and also the applications of each of the parties in the form or condition each was at the date of the conflict decision by the Commissioner of Patents, namely:

1. *Canadian Applications as Filed:*

   Exhibit G-31
   General—Serial #611,684
   Filed—February 14, 1951.
   Exhibit P-1
   Phillips—Serial #626,519
   Filed—February 5, 1952

   Exhibit D-32
   Dominion—Serial #636,139
   Filed—September 10, 1952

2. *United States Convention Applications:*

   Exhibit G-32
   General—Serial #196,584
   Filed—November 20, 1950
   Exhibit P-34
   Phillips—Serial #219,766
   Filed—April 6, 1951

   Exhibit D-31
   Dominion—Serial #255,747
   Filed—November 9, 1951

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3. *Applications as of Date of Conflict Decision*

Exhibit G-1	Exhibit G-2
General—Serial #611,681	Dominion—Serial #636,139
Exhibit G-3	
Phillips—Serial #626,519	

The decision of the Commissioner of Patents in this matter was made on January 26, 1961, by which all of the subject conflict claims were awarded to Dominion.

On July 27, 1961, General instituted against Dominion the action in this Court which is numbered A-169.

General did not join Phillips as a party.

In March of 1963 Phillips instituted its own action naming both General and Dominion as Defendants, which action in this Court is numbered A-1178.

Subsequent proceedings were taken whereby Phillips was made a party Defendant in the first action and the pleadings in each of the actions were amended so that in essence the same issues are raised in each and whereby it was ordered that these two actions be tried together. Both these actions, as a result, were tried together.

In my view the course of action adopted here was legally incorrect. By reason of section 45(8) of the *Patent Act*, it was incumbent upon General to have joined all persons who were parties to the conflict proceedings in the Commissioner of Patent's office at the time the Commissioner made his allowance pursuant to the provisions of section 45, subsection (7) of the *Patent Act*. As a result, in my view the first action commenced by General numbered A-169 is a nullity.

In the proceedings taken before this trial, General also sought to have certain substitute claims adjudicated upon at this trial, which substitute claims were not in the conflict proceedings before the Commissioner of Patents. The first of these two substitute claims numbered C-7 and C-8 were struck out of the pleadings of General on April 1, 1965; and on April 5, 1965 General sought to amend its counterclaim in action A-1178 by asserting substitute claim C-9 which the Court refused to permit. Appeals from the adjudication of this Court in respect to each of these matters taken by General to the Supreme Court of Canada were dismissed.

The proposed substitute claim, C-9, differs from claim C-4, which is in issue in this trial, in two respects only namely, in that the range of hydrocarbon softener is expressed as being from 20 to 50 parts instead of from 15 to 50 parts and the words "mineral oil" are inserted to qualify the words "hydrocarbon softener" as they appear in claim C-4.

Claim C-4 and the proposed substitute claim C-9 are set out hereunder from which it will be clear wherein the difference between them lies:

C4. The method of making a mass of polymeric material vulcanizable to a rubber-like state comprising forming an emulsion of monomeric material comprising at least one conjugated diolefin; polymerizing said monomeric material in said emulsion at a temperature below 15°C.; the resulting polymer having a raw Mooney value (ML-4) of at least 90; adding to a latex of said polymer a hydrocarbon softener as a dispersion in water, said softener being added in an amount of between 15 and 50 parts by weight per 100 parts by weight of rubber; and recovering resulting softened polymer

C9. The method of making a mass of polymeric material vulcanizable to a rubber-like state comprising forming an emulsion of monomeric material comprising at least one conjugated diolefin; polymerizing said monomeric material in said emulsion at a temperature below 15°C.; the resulting polymer having a raw Mooney value (ML-4) of at least 90; adding to a latex of said polymer a hydrocarbon mineral oil softener as a dispersion in water, said softener being added in an amount of between 20 and 50 parts by weight per 100 parts by weight of rubber; and recovering resulting softened polymer.

Note: Changes from claim C4 underlined.

Also set out hereunder are the other conflict claims C-5 and C-6.

C5. The process of making a mixture comprising a synthetic rubber and a processing oil which comprises coagulating and drying the coagulum of an aqueous mixture containing dispersed particles of a rubber processing oil and a synthetic rubber latex which has been emulsion polymerized at a temperature between —40°F. and +60°F. and the rubber content of which has an ML-4 Mooney viscosity in the range of 75 to 200.

C6. A mixture of a low temperature, viz, —40°F. to +60°F. aqueous emulsion polymerized synthetic rubber having an ML-4 Mooney viscosity in the range of 75 to 200, and a rubber processing oil, said processing oil having been co-coagulated with the synthetic rubber from a mixture comprising an aqueous dispersion of particles of the processing oil and synthetic rubber latex.

As is apparent, claims C-4 and C-5 and the proposed substitute claim C-9 are method or process claims and claim C-6 is a composition of matter claim in respect to the process claim set out in claim C-5.

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Claims C-4, C-5 and C-6 may be conveniently broken down in their constituent parts in this way:

CLAIM 4

METHOD CLAIM

—METHOD OF MAKING A MASS OF SOFTENED POLYMER CAPABLE OF VULCANIZATION

CO-COAGULATION

—POLYMERIZED MONOMENIC MATERIAL COMPRISING AT LEAST ONE CONJUGATED DIOLEFIN
—COLD RUBBER
—EMULSION POLYMERIZED
—MOONEY AT LEAST 90 ML 4
—A HYDROCARBON SOFTENER AS A DISPERSION IN WATER
—15-50 PTS SOFTENER TO 100 PTS RUBBER

CLAIM 5

PROCESS CLAIM

—FOR MAKING A MIXTURE OF A SYNTHETIC RUBBER AND A PROCESSING OIL
—CO-COAGULATION

1. RUBBER PROCESSING OIL IN THE FORM OF AQUEOUS DISPERSION
2. SYNTHETIC RUBBER LATEX
   A. COLD RUBBER
   B. EMULSION POLYMERIZATION
   C. MOONEY 75-200

DRY THE COAGULUM

CLAIM 6

COMPOSITION OF MATTER CLAIM

MIXTURE

—SYNTHETIC RUBBER
—COLD RUBBER
—EMULSION POLYMERIZATION
—MOONEY 75-200
—RUBBER PROCESSING OIL IN THE FORM OF AN AQUEOUS DISPERSION

CO-COAGULATION

In all these conflict claims the relevant synthetic rubber is what is known as cold rubber. This is a product that became generally available in the latter part of 1946 or early 1947.

Prior to that, the synthetic rubber that was generally used, was what is known as GRS rubber by which is meant Government Rubber Styrene, a synthetic product produced by a hot process.

In all the said conflict claims the cold rubber employed is the synthetic rubber produced as a result of an emulsion polymerization carried out at a temperature of 41°F or below, having a Mooney viscosity of 75 to 200.

In all the said conflict claims also, an aqueous dispersion of oil is employed, and the oil is a rubber processing oil which is called, among other synonyms, a softener.

In all the said conflict claims also it is provided that there be two emulsions which are co-coagulated so that the oil is incorporated into the coagulum when the co-coagulation has been completed, so that in the result a unitary product is obtained, the oil remaining within the rubber, having been dispersed within it.

In all of the said conflict claims also, after the co-coagulation, the final step provided for is to cause the co-coagulent to dry which is done by mechanical means in an oven at 180°F.

In process claim C-5 and in the composition of matter claim C-6, there is no limitation as to the quantity of the processing oil or softener that may be used in terms of the amount of rubber, whereas in claim C-4 there is prescribed precise amounts of oil and precise Mooney measurements. However, the main distinction between claims C-4 and C-5 is the reference to the amounts of softener.

In all the claims it is provided that the cold rubber be prepared by emulsion polymerization, and that the polymerization be completed before the latex resulting be co-coagulated with the latex of oil softener.

In other words, the alleged inventions in each of the claims calls for the addition of the oil softener by a particular method namely, by latex masterbatching.

This was a well known process at all material times as were the other three known methods of incorporating oil into synthetic rubbers namely, by milling incorporation, by Banbury incorporation, and by solution incorporation.

It was well known and a practice followed at all material times also to incorporate oil softeners in the synthetic rubber GRS but such incorporation was done mainly by milling incorporation and by Banbury incorporation and not by latex emulsion or masterbatching since there were certain disabilities resulting from incorporation of the oil softener by the latter.

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The submission of Dominion is that claims C-5 and C-6 are claims for a combination invention. It concedes that such describe the application of a known method namely, latex masterbatching to a known material namely, cold rubber. But it submits that this method had not been previously applied to this known material, and it was not obvious to combine at any material time.

The submission of both Phillips and General in essence is that the invention lies in the concept of incorporating large amounts of oil softener into cold high Mooney rubber, and that the method of incorporation namely, by way of latex masterbatching is not necessarily a part of the invention.

The background of these alleged inventions which gives rise to these conflict claims may be briefly stated.

In the period 1940 to 1941, as a result of the worldwide war activity, rubber raw material from its natural sources, for the United States and Canada became unavailable. To provide a substitute product for rubber became the concern of the governments of the United States and Canada.

As a result, both governments embarked on a programme of experiment and investigation with a view to developing synthetic rubber for use in motor vehicle and other vehicle tires, among other things. In these reasons, only the programme in the United States is relevant.

In the United States of America under the Reconstruction Finance Corporation, there was set up an agency known as the Rubber Reserve which carried on its activities until the end of 1954 or the beginning of 1955. Through this agency all of the major rubber companies by mutual agreement were detailed to carry out certain specified research and development programmes. These programmes were in many instances suggested by the individual rubber companies to Rubber Reserve, but once they were approved, then each of these programmes was financed and paid for by the United States Government through Rubber Reserve agency. In other words, every company which embarked on any of these programmes was reimbursed by Rubber Reserve through Reconstruction Finance Corporation for all its costs and expenses incurred in carrying out any approved project.

Phillips, General and U.S. Rubber Company (by whom Howland the assignor to Dominion was employed) engaged in this programme of research and development of synthetic rubber for tires.

It is admitted by Phillips and Dominion that it was in the course of carrying out this programme that the named employees who are the respective alleged inventors of Phillips and Dominion made the inventions which are the subject of the claims in this conflict action. In the case of General, however, it alleges that the named employees who had knowledge at the material times of what is alleged to have been invented, obtained such knowledge outside the work they were doing in the Rubber Reserve programme.

General, however, does not allege that in law it is the inventor of the subject matter of claims C-4, C-5 or C-6.

General submits that in respect of claims C-5 and C-6, that they are not patentable because of obviousness, and that in respect to C-4, it admits it is an invention namely, "a method as defined in the said claim in which the hydrocarbon softener is a mineral oil and is added in various amounts between 15 and 50 parts by weight per 100 parts by weight of rubber, which was known by inventors named in General's said application" before such invention was invented by the inventors of Phillips, but that in respect to the claim in so far as it relates to the hydrocarbon softener being added in an amount of between 15 and 20 parts by weight per 100 parts by weight of rubber, General is not entitled to a patent containing claim C-4, because General's application did not disclose this narrow range of softener between 15 and 20 parts.

Dominion submits that claims C-5 and C-6 are for a patentable process claim and composition of matter claim respectively as a combination invention.

Phillips submits that claim C-4 is in respect to a patentable process which is "substantially" different from claim C-5 within the meaning of section 45(1)(*a*) of the *Patent Act* and also that claim C-4 is not "so nearly identical" to C-5 to be unpatentable within the meaning of section 45(3) of the *Patent Act*.

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The issues to be determined in this action are, firstly, what was invented, and secondly, who was first in respect of each of the claims C-4, C-5 and C-6.

Section 28(1)(*a*) of the *Patent Act* prescribes that the invention must not be known or used by any other person before the alleged inventor invented it; and the jurisprudence in respect to the issues herein prescribe that the inventor must describe his invention either orally or in writing, so as to afford the means of making that which was invented, but that he need not necessarily state at that material time all the examples within the scope of his invention or all the effects and advantages of his invention.

The evidence discloses, as previously mentioned, that so-called cold rubber became generally available in the period 1946 and 1947.

The evidence also discloses that every other element of claims C-4, C-5 and C-6 in 1947 were part of the prior art.

The evidence as to what was done in 1947 by the parties is most conclusive.

Phillips, in the period 13 October to 17 November, 1947, in Tire Test 123 which was the last practical tire test made prior to the alleged invention of Dominion, employed all the elements set out in all the conflict claims, and the specific amounts of the alleged important elements of conflict claim C-4 (namely, high Mooney cold rubber mixed with amounts of oil softener in excess of 15 parts per 100 parts of rubber) and incorporated the same in a Banbury, but not by latex masterbatching. It probably did this, it may be inferred from the evidence, because incorporating softener into GRS rubber up to that material time had proved to have disadvantages. It is therefore a reasonable inference from this evidence alone that those skilled in the art employed by Phillips, which personnel had very considerable capacity, did not consider it obvious to incorporate the oil into this new rubber namely, cold rubber, by way of latex masterbatching.

Dominion's alleged inventor, Howland, however, at least as early as the 12th of December, 1947, had conceived and

disclosed the idea of combining cold high Mooney rubber and oil by incorporating it through this method of co-coagulation. He did this and he prepared a report which was sent to Rubber Reserve and circulated it among the participants in the Rubber Reserve programme. This report was filed as Exhibit D-42 at the trial of this action.

It is true that this report only discloses one example of how this alleged combination patent was carried out namely, a single 600 gram batch employing 125 Mooney rubber and 7 parts of paraflux resulting in a compound Mooney of 160. But, in my opinion, it would be obvious to Howland or to any other person skilled in the art that the scope of this invention would extend to any amount of oil loading by latex masterbatching to high Mooney rubber of anywhere from 75 to 200.

The example given produced the maximum advantages as the evidence discloses and it would be obvious to any person skilled in the art at that material time that the addition of more oil would cause all properties of this synthetic rubber to go down, and it would also be obvious to such persons that, because high Mooney cold rubber of 75 to 200 was employed, it could stand such diminution of properties and notwithstanding the resultant product would still be as good or better than the then available synthetic hot rubbers.

In my opinion, the concept of using high amounts of softener and incorporating the same in high Mooney cold rubber, was not inventive. Instead, as stated, what was inventive was the idea at the material time to combine the softener with the high Mooney cold rubber in a particular way, namely, by latex masterbatching.

In this, clearly on the evidence, Dominion, through Howland, was first.

In my opinion, therefore, Dominion is entitled as against General and Phillips to the issue of a patent including claims C-5 and C-6.

It was submitted that claim C-4 in any event was inventively distinguishable from claim C-5.

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To find that this is so, it must be determined that the reference to specific amounts of oil and precise Mooney measurements, but mainly the former, describes an inventive step.

In my opinion, there is nothing inventive in the selection of these precise amounts of either oil or Mooney measurements.

I am therefore of opinion that claim C-4 is not inventively distinguishable from claim C-5 and therefore it contains "substantially the same invention" and is "so nearly identical" with claim C-5 within the meaning respectively of section 45(1)(*a*) and section 45(3) of the *Patent Act*.

Claim C-4 is unpatentable therefore, in my opinion.

I am also of the opinion that the proposed substitute claim C-9 submitted by General in the preliminary proceedings to this trial is also unpatentable, because it also is not inventively distinguishable from claim C-5.

In respect to A-1178, the action of Phillips is therefore dismissed and the counterclaim of Dominion, in so far as these reasons extend, is allowed, and the counterclaim of General is dismissed.

Dominion, in respect to A-1178, is to have its costs against both Phillips and General.

In respect to action A-169, General is to pay to both Phillips and Dominion all costs which were necessitated by reason of General having brought that action.

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WORDS AND PHRASES

MOTS ET EXPRESSIONS